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1914 SESSION CASES.

CASES

DECIDED IN

THE COURT OF SESSION,

AND ALSO IN THE

COURT OF JUSTICIARY

AND

HOUSE OF LORDS,

FROM JULY 20, 1913, TO JULY 22, 1914.

REPORTED BY

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JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

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Lord JOHNSTON.
Lord MACKENZIE.
Lord SKERRINGTON.

SECOND DIVISION.

Lord Justice-Clerk, { The Right Hon. Sir JOHN H. A. MACDONALD, K.C.B.
Lord DUNDAS.
Lord SALVESEN.
Lord GUTHRIE.

PERMANENT LORDS ORDINARY.

Lord SKERRINGTON.
Lord CULLEN.
Lord DEWAR.
Lord ORMIDALE.
Lord HUNTER.
Lord ANDERSON.‡

---

* Lord Strathclyde took his seat, in succession to Lord Dunedin, on 17th October 1913.
† Lord Kinnear resigned on 21st October 1913.
‡ Lord Anderson took his seat on 4th November 1913.

HIGH COURT OF JUSTICIARY.

Lord Justice-General, The Lord STRATHCLYDE.

Lord Justice-Clerk, { The Right Hon. Sir JOHN H. A. MACDONALD, K.C.B.

LORDS COMMISSIONERS OF JUSTICIARY.

The other Judges of the Court of Session.

Lord Advocate, { The Right Hon. ALEXANDER URE, succeeded by the Right Hon. ROBERT MUNRO.

Dean of Faculty, { The Right Hon. CHARLES SCOTT DICKSON.

Solicitor-General, { ANDREW MACBETH ANDERSON, Esq., succeeded by THOMAS BRASH MORISON, Esq.

HOUSE OF LORDS.

PEERS

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, VISCOUNT HALDANE.

EARL LOREBURN, EARL OF HALSBURY, Lords KINNEAR, DUNEDIN, ATKINSON, SHAW OF DUNFERMLINE, PARKER OF WADDINGTON, SUMNER, and PARMOOR.

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ERRATA.

P. **126, line 1** of notes, *for* "Wilkins" *read* "Watkin."

P. **480, line 14** from top, *for* "March" *read* "February."

P. **(J.) 41, line 5** from foot, *for* "Pollock" *read* "Pont."

P. **(J.) 41, line 4** from foot, *for* "Port" *read* "Kirk."

P. **(J.) 60,** in "Carlo v. M'Intyre" *transpose* names of counsel for the respective parties.

P. **(J.) 165, line 9** from top, after "Respondent" add "—*Sol.-Gen. Morison.*"

CASES

DECIDED IN

THE HOUSE OF LORDS.

1913-1914.

No. 1.

Feb. 6, 1914.

Bank of Scotland v. Liquidators of Hutchison, Main, & Co., Limited.

THE GOVERNORS AND COMPANY OF THE BANK OF SCOTLAND, Appellants.—*Sol.-Gen. Morison—Clyde, K.C.*

JOHN MACKINTOSH MACLEOD AND ANOTHER (Liquidators of Hutchison, Main, & Company, Limited), Respondents.—*Horne, K.C.—Black.*

Bankruptcy—Effect—Company—Winding-up—Creditor's right to a security—Obligation to assign debenture in security for debt—Assignation not completed at date of liquidation—Trust—Constitution.

A company entered into an arrangement with a bank to which they were indebted, whereby it was agreed that, on the bank surrendering certain moveables belonging to the company which the bank held in security, the company should obtain from J, who was indebted to them, a debenture over his assets, and should assign the debenture to the bank in lieu of the surrendered security. The moveables were surrendered and the debenture was obtained from J; but before it had been assigned to the bank the company went into liquidation. The bank having claimed the debenture on the ground that the company held it merely for behoof of the bank as trustees or agents,—

Held (*aff.* judgment of the Second Division) that the company did not hold the debenture for the bank, but had, at most, come under a contractual obligation to assign it; that accordingly the company were the parties beneficially interested in the debenture at the date of the liquidation; and claim for the bank *rejected.*

Dictum of Lord Westbury in *Fleeming* v. *Howden*, (1868) 6 Macph. (H. L.) 113, at p. 121 (L. R., 1 H. L. Sc. 372, at p. 383), that "an obligation to do an act with respect to property creates a trust" *discussed*.

Heritable Reversionary Co., Limited, v. *Millar*, (1892) 19 R. (H. L.) 43, [1892] A. C. 598, *distinguished.*

(IN the Court of Session, 29th November 1912—1913 S. C. 255.)

The Bank of Scotland appealed to the House of Lords.

The appeal was heard on 17th and 19th November 1913.

Earl of Halsbury. Lord Kinnear. Ld. Atkinson. Lord Shaw of Dunfermline.

Argued for the appellants;—The appellants' case was founded on the law of *tantum et tale* to which effect was given by the House of Lords in *Heritable Reversionary Co., Limited*, v. *Millar*.[1] The Court below had read the letters passing between the appellants and the Company as containing a suspensive condition, namely, that the obligation of the Company should have no binding effect until a formal deed was signed. This was a misconstruction of the letters.

[1] (1892) 19 R. (H. L.) 43, [1892] A. C. 598.

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The letter of 3rd February 1910 showed that the obligation to assign the debenture was definite and completed; and thereafter the legal title of the Company was effectively subjected to an equitable obligation in favour of the appellants. It might be said that the appellants had been made the attorney of the Company for enforcing the agreement, the Company in fact holding the security under a personal contract with the appellants, under which they were just as accountable to the appellants as though they had expressly held the security only as trustees or agents, so that it would have been a fraud on their part to have used the property so as to prejudice the appellants' interest therein. The moment the Company got the debenture there arose a resulting trust; and a trustee in bankruptcy "takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy."[1] Accordingly the liquidators here were in the same fiduciary position as the Company. In *Heritable Reversionary Company, Limited*, v. *Millar*[2] the decision was that heritable property to which a bankrupt had an unqualified feudal title, but which did not belong to him, was not his property in the sense of the Bankruptcy Act, 1856, and did not vest in his trustee. The doctrine in that decision was not limited to the particular facts of that case, but was applicable wherever property was held by a person in a fiduciary capacity.[3]

Argued for the respondents;—An incorporeal right could only be transferred by an assignation duly intimated to the debtor. The argument that this general rule did not apply because Hutchison, Main, & Company were really only trustees for the Bank was not in accordance with the facts, because it was impossible to spell out of the averments or correspondence anything in the nature of a trust or mandate. The letter of 3rd February was indefinite as to amount and time, and it contemplated that there should be a transfer made in legal form. The beneficial interest in the debenture was in the Company until it was transferred out of their hands. It was something which they were procuring for their own benefit in the course of their relations with Johnson. In this respect the cases cited by the appellants were all distinguishable. Here the beneficial interest and the formal title were in the same *persona* at the date of bankruptcy, and the property accordingly perforce passed to the liquidators. The only thing which could have ousted the liquidators would have been an effective transfer granted outwith the prohibited period prior to bankruptcy.[4]

EARL OF HALSBURY.—We are all agreed that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs, but it will

[1] Fleeming v. Howden, 6 Macph. (H. L.) 113, at p. 121, L. R., 1 H. L., Sc. App. 372, at p. 383.

[2] 19 R. (H. L.) 43, [1892] A. C. 598.

[3] Union Bank of Scotland v. National Bank of Scotland, (1886) 14 R. (H. L.) 1, 12 App. Cas. 53; Forbes's Trustees v. Macleod, 1898, 25 R. 1012; Dunn v. Pratt, (1898) 25 R. 461; Gordon v. Cheyne, (1824) 2 S. 675; Dingwall v. M'Combie, (1822) 1 S. 463; Littlejohn v. Black, (1855) 18 D. 207; Macadam v. Martin's Trustee, (1872) 11 Macph. 33. Cranstoun v. Bontine, (1832) 6 W. & S. 79, and Taylor v. Farrie, (1855) 17 D. 639, were also cited.

[4] Reference was made to Stiven v. Scott & Simson, (1871) 9 Macph. 923; Gourlay v. Mackie, (1887) 14 R. 403.

be convenient that the reasons for our judgment should be given at a later date.

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On February 6th, 1914,—

LORD KINNEAR.—The question in this case is raised by a claim made by the appellants in the liquidation of a limited company, called Hutchison, Main, & Company. The claim is based on an alleged preferable right in a certain security which is said to have been constituted by a debenture created and issued in favour of Hutchison, Main, & Company by another limited company styled Frank A. Johnson, Limited. This debenture is now in the hands of the liquidators, and would seem *prima facie* to be held by them as an asset of the estate for distribution among the creditors *pari passu*. But the appellants claim right to a preference which will exclude the other creditors on two different and inconsistent but alternative grounds. They say, first, that at the date of the liquidation they had obtained a valid and effectual security over this debenture for payment of a debt of £14,000 due to them by the Company; and, secondly, that the debenture is not part of the distributable estate, but belongs to them, inasmuch as at the date of the liquidation it was held by the Company as trustees for them, and not as beneficial owners. Both grounds have been rejected as untenable by the Court below, and I think the judgment is right.

It is common ground between the parties that the rights of competing creditors in the liquidation are to be governed by the same rules as regulate the rights of creditors in a sequestrated estate under the Bankruptcy Acts. These are well established and familiar. The general object of the statutes, as Lord President M'Neill states it in *Littlejohn* v. *Black*,[1] "was to preserve as far as possible all rights and interests in the position in which they stood the moment before bankruptcy." From that moment no preference could be acquired by any creditor or created by the bankrupt. But the earlier Act, with which he was at the time concerned, as well as that now in force, "abstained from disturbing any securities or preferences honestly obtained and lawfully completed according to the nature of such securities or preferences." I do not understand it to be disputed that in this respect the Company in liquidation is exactly in the same position as an individual debtor under the Bankruptcy Acts. Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the Company and its liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy. This, indeed, is the necessary effect of the express provision of the Companies Act that the estate is to be distributed among the creditors *pari passu*. Every creditor is to have an equal share, unless any one has already a part of the estate in his hands by virtue of an effectual legal right. The question, therefore, is whether, at the date of the liquidation, the appel-

[1] 18 D. 207, at p. 215.

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lants had obtained a valid security legally completed over the debenture issued by F. A. Johnson.

In answering this question the Court did not require to consider whether a floating charge over the assets of a trading company would constitute a valid security according to the law of Scotland except in the cases where it may have been specially authorised by statute, because Frank A. Johnson is an English company, and its rights and liabilities must be governed by English law. Nor did they need to inquire, as in other circumstances might have been necessary, how far it was valid and effectual, or by what method it could be effectually transferred in security, according to the law of England, because, in fact, it has not been transferred to the appellants at all.

There can be no question that by the law of Scotland the *jus crediti* in debts may be made the subject of an effectual security, provided the debt be assigned and the assignation completed according to the method recognised as proper for the completion of such rights. But to make it effectual the assignee must have a right which he can enforce against the debtor in his own name, because it is indispensable for the efficacy of a security that the secured creditor should have *jus in re*. It is manifest on the face of their own statement, and of the document they produce in support of it, that the appellants have no such right. They say that the Company had financial dealings both with the appellants themselves and with the British Linen Bank, and that, at a time when the appellants were not satisfied with the state of the account, it was arranged that they should transfer to the British Linen Bank certain goods which they held in security, and in lieu thereof should take bills on F. A. Johnson to be held in security, and "as collateral security the company would give the appellants a debenture or floating charge over the assets of F. A. Johnson for the sum of £12,000." This last part of the statement lacks precision. But the nature of the proposed debenture is more clearly brought out in the contractual obligation.

This is expressed in a letter from the Company's agents to the appellants, dated February 3, 1910, in the following terms: "We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of the company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank." This is the only writing by way of security which the appellants ever obtained, and it seems to me quite idle to pretend that it is a valid and effectual security in itself. It is a promise to give the Bank the benefit of a security which the Company is to procure from its debtor in its own favour, and it is nothing more. It does not appear in what manner the Bank was to obtain this benefit, and in particular it is not stated whether the debenture is to be transferred or whether the Company is to account for the proceeds. But this is not material, because nothing was done to make the promise effectual. The appellants' counsel laid great stress on

the undertaking to "make the debenture available to the bank" as soon as it reached the hands of the agents. But that only shows that something remained to be done which the appellants could not do for themselves. If they have a complete and real security they require no help from the Company to make it good. If they have not, they have no preference of any kind. They are in no better position than that of unsecured creditors of the Company, and the estate must be divided equally among all such creditors.

But then it is said that the question as to the validity of the security arises only on the assumption that the debenture is part of the distributable estate, and that, although the appellants have stated a claim on that assumption, their substantial case is that it is held by the Company and its liquidators, not as part of the Company's estate, but as trustees for them. In aid of this contention it was argued that the Company procured the debenture as agents for the appellants. But agency is matter of fact, and no facts are proved or stated from which it could possibly be inferred. The case has been decided on the assumption that the appellants' averments on record are true, and in these averments no suggestion is to be found that they employed Hutchison, Main, & Company as their agents to procure the debenture. In the absence of averments relevant to be sent to proof the case must be decided on the documents. These consist of the letter already mentioned, the agreement between Hutchison, Main, & Company and Frank A. Johnson, and the debenture itself, and there is no trace of the supposed agency in any of them. If they are to be taken as expressing the transaction, they make it apparent that Hutchison, Main, & Company procured the debenture in their own name and acting on their own behalf, and not as agents for anybody else. The agreement between them and Frank A. Johnson was that the latter should execute and deliver to the Scotch company a debenture for a total sum of £17,000 to be "held as security for all amounts which may from time to time be owing to the Scotch company"; and the debenture actually issued is, accordingly, for £17,000, and is in favour of Hutchison, Main, & Company. I have no difficulty, therefore, in rejecting the argument founded on a supposed agency. But it is nevertheless true that Hutchison, Main, & Company were under an obligation to make the debenture available to the appellants, not to its full amount, but to the extent of £12,000, and it is said that this affects their right with a trust which excludes any beneficial interest in themselves or their creditors. The argument was founded on the decision of this House in *Heritable Reversionary Co.* v. *Millar*,[1] and on the doctrine which was there considered that a trustee in bankruptcy takes the estate *tantum et tale* as it stood in the bankrupt.

But the decision has only a remote bearing, if any, on the case before your Lordships, and the doctrine of *tantum et tale* is inapposite, because on the liquidation of a limited company there is no transference of property to which it can be applied. The effect of the Bankruptcy Act is to divest the bankrupt, and to invest the trustee in the entire estate; and it is not surprising that questions should have arisen as to the extent

[1] 19 R. (H. L.) 43, [1892] A. C. 598.

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to which this transference of the legal title might or might not involve a corresponding transference of all equitable qualifications which might have affected the estate in the hands of the bankrupt. But the liquidators of a limited company are not vested in the estate to the exclusion of the company. The estate remains vested in the company itself, and the liquidators are mere administrators of it for the purpose prescribed by the statute, and that is for equal distribution among creditors. It appears to me, therefore, that the argument on the doctrine of *tantum et tale* is beside the mark. But the question remains whether the debenture forms part of the distributable estate; and it is that which is said to be decided by the case of *Millar*.[1] I cannot agree. The only arguable question in that case belonged to a totally different chapter of law: to wit, What is the legal effect of the registration of an absolute title to land in the Register of Sasines? A bankrupt who had been manager of a trading company had purchased a certain heritable property, for behoof of the company and on the instructions of their directors, and the purchase-money was provided by them. He took the title in his own name, and he executed a declaration of trust which was perfectly explicit and effectual to qualify his right; but unfortunately he recorded the title, *ex facie* absolute, in the Register of Sasines, and he did not record the declaration of trust. It was, therefore, a latent trust, however effectual as between the agent himself and his employers. It was held in the Court of Session[2] that the Register of Sasines was conclusive, because the bankrupt was infeft on an absolute title, and everyone, whether creditor or purchaser, dealing with a proprietor infeft was entitled to rely on the public records, and was not affected by any qualification or burden on the real right which did not appear there. The main ground of judgment was that the bankrupt could have sold the subject and given an unimpeachable title to a purchaser, and that the trustee in bankruptcy is vested in all heritable estate held by the bankrupt under such an absolute title, to the same effect as if he had obtained a decree of adjudication in implement of a sale to himself.

That construction of the vesting clause was corrected in this House[1] and the judgment was reversed on the ground that, as between the bankrupt and his employers, the former was a bare trustee, and the latter were the true and beneficial owners of the property, which, therefore, did not belong to the bankrupt in the sense of the Act, and was not vested in the trustee. It was not disputed that third persons dealing with the bankrupt with specific reference to the property were entitled to rely on the title as it stood on the Register of Sasines, and, thus, that an onerous purchaser from him would have obtained an unimpeachable title. But it was held that this would not be because the property was his, but because the true owners had permitted him to appear on the Register of Sasines as the owner, and thus entitled anyone dealing with him for value to regard him as such. The noble and learned Lords held that the rule of

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[1] 19 R. (H. L.) 43, [1892] A. C. 598.

[2] Heritable Reversionary Co., Limited, v. M'Kay's Trustees, (1891) 18 R. 1166.

personal bar which thus protects transactions of the trustee from challenge only applies to such as have specific reference to the trust estate, and is not pleadable by personal creditors who do not stipulate for, or obtain, any conveyance to that estate. This appears to me to be the full force of the decision; and I am unable to see that it has any bearing on the matter in hand. Of course it assumes, what, indeed, was never disputed, that property admittedly held under a bare trust, without any beneficial interest in the trustee, would not pass to his creditors on his bankruptcy. But the bankrupt's title of property was qualified only by a latent trust. The question was whether this latent declaration of trust could be looked at; and when that was once settled by the decision of this House the rest followed as a matter of course.

It is further to be observed that the trust so established was declared in express terms, and directly affected the constitution of the real right. It is a very different thing to say that a personal obligation to give the benefit of a specific fund to a particular creditor creates a trust which attaches to the fund and excludes it from the estate for distribution. That the judgment in the case of *Millar*[1] was not intended to cover such a case as this is obvious, because Lord Herschell states the distinction between the duty imposed by a trust and the liability created by a personal contract in perfectly clear terms. But the appellants rely upon a dictum of Lord Westbury in *Fleeming* v. *Howden*,[2] where he is reported to have said that "an obligation to do an act with respect to property creates a trust." This proposition is expressed in general terms, but in relation to property only, and not to personal obligations; and it must be interpreted with reference to the particular case which the noble and learned Lord was discussing. The effect intended to be given to it in that case does not seem to me to be doubtful. Mr Fleeming, afterwards Lord Elphinstone, held the estate of Duntiblae under a deed of entail which required him to denude on succeeding to a peerage. He was duly infeft in terms of an instrument of sasine which was recorded in the Register of Sasines, but the deed under which he held was not recorded in the Register of Tailzies. It followed that, although the entail was distinctly set forth on the face of the deed in which he was infeft, the fetters of the entail were ineffectual to exclude the diligence of creditors. He succeeded to a peerage in 1860 and died in 1861 without having denuded, and leaving large debts. It was held that the estate did not pass to a trustee in bankruptcy because from the moment the clause of devolution became operative it was not to be regarded as the property of the deceased bankrupt but was held by him in trust for the benefit of the heir to whom it had devolved. But it was so held, as is shortly but very clearly explained in the judgment of Lord Colonsay, because the duty to devolve was a quality of the right on the face of the title under which Mr Fleeming possessed. It was thus a trust which every one becoming his creditor on the faith of his having a feudal investiture was bound to

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[1] 19 R. (H. L.) 43, [1892] A. C. 598.

[2] 6 Macph. (H. L.) 113, at p. 121, L. R., 1 H. L. Sc. 372, at p. 383.

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know, for there it stood open and patent. An obligation of this kind, which in express terms qualified the title to land, imposed a duty which might well be held to involve a trust.

But to extend Lord Westbury's phrase so as to make it cover personal obligations which do not affect the real right of the obligor seems to me altogether extravagant. It was maintained in argument that every obligation with reference to any property or fund which involves a liability to account fell within the principle. If that were so, every imperfect security, however invalid as a real right, would be effectual as a trust. But then in the same sense a bankrupt holds his whole estate as trustee for all his creditors. The fallacy consists in using legal terms in a popular or metaphorical sense and yet affixing to them all the legal consequences which would attach to their use in a strictly technical sense. It is impossible to suppose that Lord Westbury employed the word "trust" in any such inaccurate sense, and, indeed, the danger of so using it is nowhere more clearly exposed than it is by that eminent person himself in *Knox* v. *Gye*.[1] In discussing the liabilities of a surviving partner to the representatives of a deceased partner, his Lordship says, "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately." He is not a trustee: if he is by an improper use of words to be called so the trust is limited to the discharge of his obligation. He goes on to say, "It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." That Mr Fleeming was a complete trustee in the sense thus explained, holding the property as trustee by express declaration, and holding it exclusively for the benefit of the *cestui que trust*, is beyond question, because it was so decided by this House. I think it equally clear that Hutchison, Main, & Company, who held a debenture under no express declaration of trust, and who certainly did not hold it exclusively for the benefit of the appellants, cannot be styled trustees of that debenture except by such an inaccurate use of language as Lord Westbury condemns. They were under an obligation to give the benefit of it to the appellants, but only to a limited extent; and that obligation they are disabled from performing in terms, because their hands are tied by the liquidation.

On the whole matter, therefore, I am of opinion that the appellants are in the position of mere personal creditors who hold no complete security for their debt, and that the debenture which they might have obtained in security had their contract been carried out is not held exclusively in trust for them, but forms a part of the estate for equal distribution among the creditors of the Company.

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[1] (1872) L. R., 5 H. L. 656, at p. 675.

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LORD ATKINSON.—This is an appeal against an interlocutor, dated 29th November 1912, of the Lords of the Second Division of the Court of Session in Scotland, whereby they adhered to an interlocutor of the Lord Ordinary dated 20th June 1912.

By this latter interlocutor the deliverance of the liquidators of a certain limited liability company named Hutchison, Main, & Company—on the claim of the Governor and Company of the Bank of Scotland that they were entitled, to the extent of £14,000, to a security constituted by a certain debenture in the total nominal amount of £17,000 on the entire assets of a certain English limited company, styled Frank A. Johnson, Limited, in accordance with the provisions of an agreement dated 4th March 1910, made between Frank Alexander Johnson, of the first part; Frank A. Johnson, Limited, of the second part; and Hutchison, Main, & Company, of the third part—was upheld.

The liquidators by their deliverance rejected this claim. The Bank of Scotland filed objections to this deliverance, and the Lord Ordinary found that the averments made by the Bank in support of this objection were irrelevant. It is admitted that for the purpose of this appeal the averments in the answers of the Bank must be taken to be true.

The facts have been fully and clearly stated in the judgment of the Lord Ordinary. It is unnecessary to restate any but the very few upon which, in my view, the question for decision turns. Hutchison, Main, & Company were a Scotch company, carrying on in Glasgow the business of manufacturers of golf balls and other gutta-percha and indiarubber goods. These goods they were in the habit of selling to Frank Alexander Johnson, and afterwards to Frank A. Johnson, Limited, the company into which Frank Alexander Johnson converted his business. As against these purchases the former company drew bills on Johnson, and subsequently on his firm, which they respectively accepted. Many of these bills were discounted by Hutchison, Main, & Company in the Bank of Scotland, and many others in the British Linen Bank; all or nearly all of each lot being renewed from time to time. Some other bills remained in the hands of the drawers undiscounted. In February 1910 Hutchison, Main, & Company stood indebted to both banks in respect of these bills to considerable amounts. The precise amounts are immaterial. Securities had been lodged with both banks by them to secure their indebtedness. The British Linen Bank, thinking the security inadequate, refused or threatened to refuse to discount any more of these bills, or to renew any of them, unless they were further secured.

Thereupon an arrangement was entered into between the Bank of Scotland through their local manager, Mr Bisset, whereby it was agreed that securities to the value of £2000 held by the Bank as against the overdraft of Hutchison, Main, & Company should be released and transferred to the British Linen Bank, who in consideration therefor would continue to renew Johnson's bills. A further term was added, of which the written evidence is contained in a letter dated 3rd February 1910, written by W. Baird & Company, the solicitors of Hutchison, Main, & Company, to Mr Bisset. The passage of this letter dealing with the matter runs thus: "We further write to say that we are authorised by the directors, and

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our London correspondents have instructions forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of this company for the amount required to secure the debt due by Mr Johnson to our clients. So soon as that debenture reaches our hands we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the Bank, and it is understood, in respect of the arrangements made, that the Bank will give to those interested in the Company the benefit of the arrangements referred to in past correspondence."

It would appear to me to be perfectly clear on the construction of this letter, if it embodies the agreement of the parties, that Hutchison, Main, & Company, in procuring this debenture, were acting on their own behalf, and not as agents for the Bank of Scotland. I do not think there is any ground whatever for the contention that they were instructed to act as such agents, or did, in fact, so act. And it is, I think, equally clear that the only obligation they put themselves under was, at the most, a contractual obligation to make the debenture available to the Bank of Scotland "as a further and additional security" when they procured it. How that was to be done is not stated, but from the letter of Mr Bisset to W. Baird & Company of the following day it is plain that the mode in which he contemplated that Hutchison, Main, & Company should discharge this obligation, and make the debenture available as a security, was by assignation of it, followed presumably by notice to the debtor, Frank A. Johnson, Limited. He wrote: "With regard to the debenture or floating charge over Mr Johnson's assets, we shall rely on your having this completed as soon as possible, and sent to us for assignation to the bank as a security for the company's indebtedness."

This was not done. Discussion arose as to the best mode of making the debenture available, but nothing was done to perfect the security. The debenture was delivered on 4th March 1910, by Frank A. Johnson, Limited, to Hutchison, Main, & Company, in pursuance of an agreement of the same date entered into between them. By that agreement Frank A. Johnson, Limited, contracted to execute forthwith and deliver to Hutchison, Main, & Company a debenture or series of debentures in the form to the agreement annexed in the total sum of £17,000, to be held by the latter company as security for such sums as might, from time to time, be due to them by the former company, either on the bills in the schedule mentioned, or "in respect of advances or generally on trade account." There is no mention whatever in this agreement of the arrangement made between Hutchison, Main, & Company and the Bank of Scotland touching the debenture or debentures to be delivered under it.

Hutchison, Main, & Company went into liquidation on 1st July 1913. At that time they were *ex facie* the absolute beneficial owners of this debenture, and according to the case of *Heritable Reversionary Company* v. *Millar*,[1] any beneficial property they had in it would, under the Bankruptcy (Scotland) Act, 1856, on liquidation pass to, and become vested in, the liquidators.

[1] 19 R. (H. L.) 43, [1892] A. C. 598.

The interest which would so pass would be the absolute and entire beneficial interest (unless some lesser beneficial interest had been carved out of this whole, and had, before liquidation, become vested in another). It would not, I think, on the authorities, be at all sufficient that Hutchison, Main, & Company should have merely entered into a contract to carve out of their property in the debenture this partial interest. Something in addition should be done which would, in contemplation of equity and good conscience at all events, separate the part from the whole, and prevent that part from being available to satisfy *pro tanto* the creditors of the insolvent owner. The ingenious arguments of Mr Clyde and the Solicitor-General for Scotland appear to me to amount to a contention that in the circumstances of this case this carving out took place, in contemplation of equity, the moment the debenture was delivered to Hutchison, Main, & Company. They did not contend that any specific charge on the debenture was thereby created, but they did contend that, by reason of the contractual obligation of Hutchison, Main, & Company to make the debenture available as a security to the Bank of Scotland, a trust in favour of that bank attached upon it immediately upon its delivery; that Hutchison, Main, & Company thenceforth held it, as to the £12,000 portion of the sum secured, as trustees for the Bank, and not as beneficial owners, and that the liquidators are now bound, as it is contended this Company would itself have been bound before liquidation, to transfer to the Bank of Scotland the benefit of the debenture up to that sum. That contention is, in my opinion, ingenious but unsound.

I do not think that the averments contained in the appellants' answers carry their case any further than the documents. The contract they rely upon was no doubt a contract for good consideration. Whether after a delay of so many months it was enforceable, and if so, what was the nature of the relief which would be obtained, are matters beside the real question for decision, which is this: Were Hutchison, Main, & Company, at the time of their sequestration owners of the entire beneficial interest in this debenture or not? In my opinion they were such owners. Whether or not they had bound themselves by contract to denude themselves of a portion of their interest does not alter their position as owners while and as long as that contract remained to be carried out. The Lord Justice-Clerk has, I think, put the case in a nutshell in the following passage of his judgment (1913 S. C., at p. 264): "To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the Company, and that the Bank had no right to it, but had only a right to enforce a contract by which the Company was bound to assign the debenture to the Bank." In my opinion, nothing has been shown, either in the documents given in evidence, or in the averments contained in the appellants' answers, to establish, on any principle of equity, that at the time of the liquidation this insolvent Company had, either in the form of a charge, or of a trust, denuded itself of any portion of the entire beneficial interest in the debenture. If so, the entirety of that interest must go to satisfy *pro tanto* the debts of all their creditors, not the debt of one alone.

The decision appealed from was therefore, in my opinion, perfectly right, and this appeal should be dismissed with costs.

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Lord Halsbury has requested me to say that he concurs in the judgment which has just been delivered by my noble and learned friend Lord Kinnear.

Lord Shaw of Dunfermline.—I concur. The facts are important, but they are not complex. They are as follows: In the beginning of the year 1910 a limited firm named Hutchison, Main & Company, carrying on business in Scotland, were indebted to two Scottish banks—one, the appellants, the Bank of Scotland, and the other, the British Linen Bank. For some time the English agent of Hutchison, Main, & Company had been a Mr F. A. Johnson. By an arrangement amongst all these parties the Bank of Scotland transferred to the British Linen Bank certain goods and merchandise of the value of about £2000 which they held in security. On the other hand, they received bills by Johnson for £3000.

Johnson, who was, as stated, Hutchison, Main, & Company's agent in England, was also indebted to that company. He was anxious to form his own business into a limited liability concern and to obtain for this concern the agency of Hutchison, Main, & Company which he himself held. It was necessary in these circumstances that some arrangement should be made by which Johnson, Limited, should come under obligation to pay the bills due by Johnson himself. This was accordingly done, and the the terms of that arrangement are contained in an agreement of 4th March 1910.

By the fifth article of that agreement Johnson, Limited, undertook to execute and deliver to Hutchison, Main, & Company debentures for £17,000. The terms under which the debentures were to be held were these: "Such debentures shall be held by the Scotch company (that is, Hutchison, Main, & Company) as security for all amounts which may from time to time be owing to the Scotch company either in respect of such bills set forth in the schedule hereto or of any other sum that may from time to time be due to the Scotch company by the English company either in respect of advances or generally on trade account." It thus appears that if there was any trust with regard to the debenture or debentures granted by Johnson, Limited, in favour of Hutchison, Main, & Company, the trust was as now stated. And there can be no doubt that if Johnson, Limited, had paid the sums due by them to Hutchison, Main, & Company that firm would have been bound to hand back the debenture which had come into their hands under that simple arrangement. This transaction took place, as mentioned, on 4th March.

The debenture was granted on the same day. It is by Johnson, Limited, and it covenants with Hutchison, Main, & Company "its successors and assigns, to pay to the said Hutchison, Main, & Company, Limited, its successors and assigns, on the 4th day of March 1915, or on such earlier date as the principal moneys hereby secured shall become payable under the conditions of this debenture, at the registered office of the company the sum of £17,000 on presentation of this debenture."

In these circumstances it would require competent and very cogent and clear evidence to convince the mind that this debenture, once granted, was

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not the property of Messrs Hutchison, Main, & Company until that firm should have parted with it by voluntary assignation or until its liquidator or its trustee in bankruptcy should have succeeded to it as a consequence of the statutory assignment which vested in him everything which was *in bonis* of the firm.

The whole question in this case appears, therefore, to be: Has there been any deed produced, formal or informal, or is there indeed any relevant averment that the property in this debenture thus duly vested in Hutchison, Main, & Company was not in reality the property of that firm, but was so only in appearance,—that the debenture was only their apparent title, but that the real title to its contents was in somebody else, namely, the appellants? In short, I will venture to put the proposition which, as it appears to me, is at the bottom of this case in these words: What proof is tendered that the contents of this debenture were not at the date of liquidation *in bonis* of its holder, Hutchison, Main, & Company, but were *in bonis* of the Bank of Scotland? For unless the latter proposition be relevantly averred and legally proved, the claim of the Bank to that debenture must fail.

This being the statement of the proposition, it is now important to see how the Bank addresses itself to it on the record. In particular, does the Bank really claim that this property throughout belonged to it and not to Hutchison, Main, & Company?

It founds upon the correspondence. From that it appears that in the preceding month of February Messrs Hutchison, Main, & Company, whose own affairs were manifestly embarrassed, did make an important promise to the Bank. It is in these terms: "We are authorised by the directors, and our London correspondents have instructions forthwith to procure from Mr Johnson a debenture or floating charge over the whole of his assets in the name of this company for the amount required to secure the debt due by Mr Johnson to our clients." (The letter is written by Messrs Hutchison, Main, & Company's solicitors, and it proceeds as follows:) "So soon as that debenture reaches our hands, we have instructions to make it available to the Bank of Scotland as further and additional security for the repayment by our clients of their indebtedness to the bank, and it is understood, in respect of the arrangements made, that the bank will give to those interested in the company the benefit of the arrangements referred to in past correspondence." The Bank is, therefore, undoubtedly right in so far as it maintains that a just expectation was held out to it that the debenture was to be made available to it by Hutchison, Main, & Company.

The form, however, of making it available was certainly not that they should take the debenture as trustee or agent for the Bank and hold the debenture for it. On the contrary, the firm took the debenture exactly in terms of the agreement made with Johnson, Limited, namely, as its own; and the arrangement with the Bank was that after this had been done then the next step would be taken, namely, to grant a title to it to the Bank by way of assignation. This is clear from the bank manager's letter of 4th February, which says: "With regard to the debenture or floating charge over Mr Johnson's assets, we shall rely on your having this

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completed as soon as possible and sent to us for assignation to the Bank as a security for the Company's indebtedness."

The debenture was thereafter granted on 4th March, but no assignation was made. Correspondence is produced which shows that in April a solicitor in London had been consulted on the point of assignment and that counsel had been instructed to prepare a mortgage. On 6th April the bank manager stated that he would "be glad to receive the mortgage referred to when it is ready for delivery." Nothing further was done; the months slipped away; and neither assignment nor mortgage had been received by the Bank when, on 1st July 1910, Hutchison, Main, & Company went into liquidation.

The learned Judges in the Courts below, not unnaturally, treat the case as one of an "uncompleted security." And so treated their judgment upon it would humbly appear to me to be correct. But, in truth, this puts the facts too favourably for the appellants, unless indeed the words "uncompleted security" are meant to include the case of a security not merely inchoate but never to any extent having any existence. A promise had been made to bring it into existence, by way first of assignation and then of mortgage, but beyond the giving of that promise nothing had been done. The learned Lord Justice-Clerk expresses most clearly and concisely, if I may say so, the essential facts of this case in one sentence when he says (1913 S. C., at p. 264): "To me it appears to be clear that at the date of the liquidation the debenture in question was still held by the Company and that the Bank had no right to it, but had only a right to enforce a contract by which the Company was bound to assign the debenture to the Bank."

It is from this point of view that the citation of much of the authority quoted seemed to me to be inapplicable. For the right of the Bank in the circumstances which I have mentioned was a right resting upon nothing more than this, namely, an unfulfilled promise. And, when one analyses the idea, that is the simple category under which we may presume that 99 per cent of every bankrupt's obligations could be ranged. All his creditors, down to the humblest tradesmen, relied on his promise, expressed or implied, that he would pay for accommodation given, services rendered, or goods received. Upon what principle is one of these creditors to be preferred to another? The whole law of equitable distribution would be destroyed, and the whole security for mercantile dealings would be much impaired, if it were open to an individual creditor to say: "I got no assignment of my debtor's goods either by delivery or by deed, but he promised to me that he would not part with certain of them except in my favour." After bankruptcy or liquidation, things still standing on that footing, all these *nuda pacta* disappear, and the one question which remains is: Was the property—whatever promises were made with regard to it before—was the property at the time of bankruptcy or liquidation *in bonis* of the debtor or not?

It is only fair to the appellants to say that the shape of their pleadings in this case is in accord with the correspondence, their eleventh answer containing the gist of their claim at law in these terms: "As part of the arrangements aforesaid concluded between the Company and the respon-

dents (the Bank), the Company were under obligation to transfer the benefit of such debenture to the extent aforesaid, and that such obligation is therefore binding on the liquidators." This is a plain admission that at the date of liquidation the debenture was not the property of the Bank, but still remained the property of the Company. At the conclusion of a strenuous argument for the appellants, I ventured to put the Bank's contention in the following propositions, to the accuracy of which their learned counsel assented: "When the debtor acquires and holds property in his own name, but under a personal obligation to account to a particular creditor therefor, then, in the event of bankruptcy the existence of the personal obligation prevents the property being treated as *in bonis* of the debtor. On the contrary, the debtor must denude in favour of the particular creditor for whom he is truly a trustee." I am of opinion for the reasons stated that these propositions are not in accordance with the law of Scotland. A preference created in this manner is repugnant to the sound and familiar principles of equitable distribution; and the doctrine of converting a promise to assign or transfer into something which effects a transmutation of real ownership by the debtor into merely apparent ownership by him is legally indefensible.

The only support to be obtained for this operation is by mis-applying the well-known doctrine of apparent and real ownership. When an agent obtains money for the specific purpose of purchasing a property for his client and takes the title in his own name, and becomes bankrupt, it is clear that in such a case the law will get behind the apparent title to the beneficial and the real title, and that—always granted that the interests of third parties who have bought upon the faith of the records have not arisen—the property will, in the event of bankruptcy, be correctly treated as never having been *in bonis* of the debtor, but always of the client. Lord M'Laren explains this with clearness in *Forbes's Trustees* v. *Macleod*.[1] Or when a property is acquired by a company with the company's money and put for convenience sake in the name of the company's manager, then upon the occasion of the manager's bankruptcy the same result happens. The apparent title and the beneficial and real title are in conflict, not on account of the existence of any promise on the part of the manager to transfer it to the company, but on account of the fact that the property all along never was the manager's but was the company's. It would be, therefore, contrary to the truth of the case to permit that property to enter the assets of the manager, to whom it never in truth belonged. The company stands accordingly preferred to the property in the distribution of his assets.

Heritable Reversionary Company v. *Millar*[2] is the outstanding instance of this. In the language of Lord Watson, "An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title. That which, in legal as well as in conventional language, is described as a man's property is

[1] 25 R. 1012, at p. 1015.
[2] 19 R. (H. L.) 43, at p. 49, [1892] A. C. 598, at p. 614.

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estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud." And the distinction between a case of real and beneficial interest as against apparent title on the one hand, and a case of real and beneficial interest or *dominium* with a contractual obligation to convey or transfer, is well brought out in the judgment of Lord Herschell, where he distinguishes the case of *Wylie* v. *Duncan*[1] in this way[2]: "It appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare trustee, and that of heritable property as to which the owner has come under some contractual obligation. The latter was the case in *Wylie* v. *Duncan*.[1] Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to re-dispone to Wylie, from whom he took the subjects. But this was a mere personal contract. If he had sold the property and disposed of the proceeds, he might have rendered himself liable to legal proceedings, on the ground that he had put it out of his power to fulfil his obligation; but he would not have been guilty of a breach of trust, or brought himself within the reach of the criminal law."

The familiar case—sanctioned in all the law books and acknowledged in many decisions—for the application of this law is that which was commented on in this House in *Union Bank of Scotland* v. *National Bank of Scotland*.[3] It is the case of a disposition of heritable property entering the record, but granted concurrently with a back bond which acknowledges that the transaction, although giving the title to the disponee, was truly a security transaction. Nor do I question that the same result could be achieved in a less formal manner. But what is necessary in all such cases is that the question of property itself in what I have ventured to call a real and beneficial sense is settled adversely to the debtor—settled, that is to say, in this way, that the property does not belong to him, but belongs to someone else.

The decisions and dicta in many cases were cited at the discussion, and it would be possible to deal with these in detail. But there are two further considerations which I bear in mind. In the first place, I think that nothing can shake the authority of the case of *Heritable Reversionary Company* v. *Millar*,[4] in which substantially the entire case law relevant to this subject was analysed and focussed in the judgments of Lord Herschell and Lord Watson.

And, in the second place, I feel constrained to add that the only judicial dictum of weight which seems to me to give any favour to the argument presented for the Bank is that of Lord Westbury in *Fleeming* v. *Howden*.[5] "An obligation," said the distinguished Judge, "to do an act with respect

[1] (1803) M. 10,269.
[2] 19 R. (H. L.) at p. 44, [1892] A. C. at p. 605.
[3] 14 R. (H. L.) 1, 12 App. Cas. 53.
[4] 19 R. (H. L.) 43, [1892] A. C. 598.
[5] 6 Macph. (H. L.) 113, at p. 121, L. R., 1 H. L. Sc. 372, at p. 383.

to property creates a trust; and if a fiar, bound to fulfil an obligation acquires or retains, by means of his neglect of that duty, a greater estate than he would otherwise have had, he is a trustee of such excess of interest for the benefit of the persons who would have been entitled to it if the obligation had been duly fulfilled." It seems somewhat late in the day to cite the dictum of this eminent Judge as creating an invasion into the well-settled principle that a contractual obligation with regard to property, which has not effectually and actually brought about either a security upon it or a conveyance of it, is not *per se* the foundation of a trust or of a declarator of trust. As Lord Watson said in *Millar's* case,[1] "I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleeming* v. *Howden*[2] with reference to the nature of the interest which a trustee in sequestration takes in the heritable estate of the bankrupt require considerable modification." Perhaps one ought now to venture distinctly further and to say that it is difficult to reconcile the dictum of Lord Westbury with the decision in *Millar's* case,[1] or to see how the former can now be stated to represent with accuracy the principle of the law of Scotland.

These circumstances make it clear to me that nothing urged by the Bank in the present case comes up to what the law requires. For, as I have said, it requires nothing less than this, that the property in the debenture referred to was in the Bank of Scotland. The averments, squaring with the correspondence, are, however, that there was a personal contract with Hutchison, Main, & Company to transfer it to the Bank, and that matters stood upon that contract at the time of liquidation. At that time, accordingly, the debenture was part of the property of the bankrupt. It required, in the view of parties, an assignment to divest him of it, and this assignment was not obtained. The case accordingly is the familiar one of an unfulfilled promise to give property or security for goods or benefit which have been received. It is no part of Scotch law to admit a claim of that character to preference in the distribution of bankrupt or liquidation assets.

I am humbly of opinion that the judgment of the Court below is upon that ground correct and should be affirmed.

INTERLOCUTOR appealed from affirmed, and appeal dismissed with costs.

ASHURST, MORRIS, CRISP, & CO.—TODS, MURRAY, & JAMIESON, W.S.—FAITHFUL & OWEN—DAVIDSON & SYME, W.S.

[1] 19 R. (H. L.), at p. 49, [1892] A. C., at p. 613.
[2] 6 Macph. (H. L.) 113, at p. 121, L. R., 1 H. L. Sc. 372, at p. 383.

No. 2.
Feb. 6, 1914.
Watson, Laidlaw, & Co., Limited, v. Pott, Cassels, & Williamson.

WATSON, LAIDLAW, & COMPANY, LIMITED, (Pursuers) Respondents. —*Clyde, K.C.—Sandeman, K.C.—M. A. Robertson.*
POTT, CASSELS, & WILLIAMSON, AND OTHERS, (Defenders) Appellants.—*Walter, K.C.—Macmillan, K.C.—Sinclair.*

Patent—Infringement—Measure of damages—Appeal to House of Lords.

In an action by patentees for damages in respect of the sale of articles infringing their patent it was proved that the defenders, the infringers, had sold such a number of the articles as would have yielded to the pursuers, had they effected the sales, a profit of approximately £5000. The Second Division of the Court of Session (recalling an award by the Lord Ordinary of £1500) awarded the pursuers £3000, which represented the profits on the proportion of the articles sold by the defenders which, in the opinion of the Court, the pursuers would themselves have succeeded in selling had there been no infringement.

The defenders appealed to the House of Lords and craved their Lordships to restore the award of the Lord Ordinary, which they contended was well founded on the facts, and in any event was, like the verdict of a jury, only open to challenge if wholly unsupported by, or contrary to, the evidence. The pursuers acquiesced in the figure arrived at by the Second Division.

The House of Lords, holding that they were entitled to consider the question of damages on its merits, on a review of the whole evidence *affirmed* the judgment of the Second Division, (*diss.* Lord Halsbury, who was of opinion that there were not sufficient materials in the case for assessing the damages).

Opinion (*per* Lord Shaw of Dunfermline) that legally the pursuers were entitled to damages in respect of all the articles sold by the defenders, irrespectively of whether they themselves could have sold them or not, and that in cases where they themselves could not have effected the sales, damages fell to be assessed by way of a royalty on the articles sold.

(IN the Court of Session, 14th March 1913—1913 S. C. 762.)
The defenders appealed to the House of Lords.
The appeal was heard on 20th and 21st November 1913.

Earl of Halsbury.
Lord Kinnear.
Ld. Atkinson.
Lord Shaw of Dunfermline.

At delivering judgment on 6th February 1914,—

EARL OF HALSBURY.—I regret to say I am unable to concur in the judgment about to be delivered. The question here is simply one of the amount of damages which the pursuers prove they are entitled to recover. The burden of proof lies upon them, and, apart from evidence which of course may shift it, that burden lies upon them to the end, no matter in what stage of the litigation the question arises. The exact nature of the invention does not appear to me to be very material to consider. It is not disputed that the appellants manufactured and sold 252 machines, each of which contained the patented article, and in respect of each of which the pursuers are entitled to recover such damage as was thereby occasioned to them; but in this last question arises the difficulty of proof that, but for the unlawful interference by the defenders, the pursuers would have made the profits of each such sale. The Lord Ordinary came to the conclusion that £1500 was the amount proved before him. The

Judges of the Second Division doubled that amount. I understand that Lord Dundas considered that, in arriving at the amount of £1500, the learned Judge was influenced by what I agree would be a totally irrelevant topic; but I cannot find the smallest ground for attributing to the Lord Ordinary so grave an error, namely, the question of a previous offer. The question is no doubt a very difficult one, and, with all respect to Lord Moulton, I do not think it is rendered easier by suggesting a different form of calculation, namely, what would be a reasonable sum made as a charge for the licence to use a patented article. It is, as I have said, a difficult question, but it is purely a question of fact, and that question appears to me to have been vigorously contested before the Lord Ordinary. That learned Judge has in terms expressed his confidence in the witnesses, and two of the learned Judges who have overruled him in no doubtful manner expressed their opinion to be that they do not acquiesce in his finding.

I do not think that we have the materials to assess the damages ourselves. There is no principle here in debate. I cannot think that in any sense £1500 represents nominal damages, neither can I acquiesce in the proposition that the size of the machine can by any ingenuity be made a relevant topic in calculating the damages. I should feel great difficulty in affirming either judgment; but, while I agree with my noble friend, Lord Kinnear, that the judgment of fact is open to review, yet in this case I should not be able to say what I was affirming, what I was overruling, or upon what principle any sum whatever was reached. Fortunately for the parties your Lordships have been able to surmount my difficulties, and so avoid throwing upon them the enormous expense of a new assessment of damages, which is the only judgment with which I could agree.

I ought to add that I entirely agree with Lord Dundas as to the omission of any reasons for the judgment of the Lord Ordinary.

Lord Kinnear.—The appellants in this case complain of a judgment of the Second Division of the Court of Session, by which they are ordained to pay to the respondents £3000 as damages for the infringement of a patent. There is no question as to the validity of the patent, nor as to the infringement; but the appellants maintain that the sum awarded is excessive, and that it ought to be reduced by one-half, or £1500, which is the sum awarded by the Lord Ordinary. The onus is, of course, upon them to satisfy your Lordships that the judgment is wrong, and I think they have failed to discharge it.

The controversy depends upon disputed matter of fact; and I shall state shortly what I think the right view of it. But it is necessary in the first place to consider an argument which was maintained with some insistence by the appellants, that the Lord Ordinary's award of £1500 ought to have been accepted by the Court below as conclusive. It is said that his decision, on matters of fact, must be considered on the same footing as the verdict of a jury, which can only be set aside if it is given without evidence, or proceeds upon a misdirection in point of law. But this rests upon an entire misapprehension of the law and practice of

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Scotland. The procedure in the Court of Session is regulated by Acts of Parliament, which give to the party who may be aggrieved by the judgment of a Lord Ordinary a right to appeal to the Inner House on matter of fact as well as on matter of law. It is of the essence of a right of appeal so unlimited that the aggrieved party should be entitled to demand a review of the judgment, of which he complains, on all the grounds on which it was, or ought to have been, considered by the Judge of first instance.

The inveterate practice of the Court of Session is in accordance with this view of the statutes, and the learned Judges of the Second Division were therefore acting in performance of a duty which the law imposes upon them when they reviewed the Lord Ordinary's judgment on the matter of fact, and undertook to determine, not whether there was evidence before him on which his judgment might be based, but whether on a balance of evidence his conclusion was right or wrong. This is fully explained in *Kinnell* v. *Peebles*,[1] and the law is laid down to the same effect by Lord Blackburn in this House in the case of *Mann* v. *Brodie*.[2] It is true that in both these cases it is clearly indicated that the nature of the evidence may be such as to give the Lord Ordinary, who heard the witnesses, better means of judging than the Inner House or your Lordships, who only read the notes. In such a case the Lord President says that he should not only attach the greatest weight to the opinion of the Judge who saw the witnesses and heard their evidence, but that he should have been slow to disturb his conclusion; and Lord Shand said that on a question of credibility he had not known a case where the decision of the Lord Ordinary was not affirmed. But that is a consideration which creates no difficulty in the case before your Lordships. The question does not depend on the credibility of conflicting witnesses, but on the true import and bearing of facts the existence of which is hardly controverted. The Lord Ordinary says nothing to suggest that the witnesses on one side were more worthy of belief than those on the other. On the contrary, he says that on both sides they "gave their evidence frankly and fairly," and on the weight to be given to the evidence, irrespective of credibility, he expresses no opinion whatever. The learned Judges of the Inner House had thus no alternative but to consider the evidence for themselves, and give their own judgment on the facts just as if they were judging in the first instance.

The Lord Ordinary, however, makes one observation which suggests a somewhat different question. He says that, because the question is entirely a jury one, he did not think it necessary or desirable to give reasons for fixing the amount. This might be very right if the only question were one of amount, depending on considerations that could not be precisely formulated. There may be circumstances in which damages cannot be governed by any settled rule; and in such cases a discretion may well be left to a Judge, as it commonly is to a jury, not, indeed, without limits, but within limits that are not very strictly defined. But, nevertheless, the estimate of amount must be based on solid grounds, both

[1] (1890) 17 R. 416. [2] (1885) 12 R. (H. L.) 52, 10 App. Cas. 378.

of fact and law. The patentee must prove the loss that he has sustained by unlawful sales as the natural and direct consequence of the wrong done to him; and the Judge has to determine whether such loss has been proved. Whatever his reasons may have been, it cannot be supposed that the Lord Ordinary awarded a random sum; and yet his award could be presented in no other light to the Judges of the Second Division, since his reasons for it were unexplained. It follows that they were required to examine the evidence in the same way as in any other question of disputed fact, and determine for themselves the amount to which damage had been proved.

I think the case of the *United Horse Shoe and Nail Company* v. *Stewart & Company*[1] in this House, which was relied upon by the appellants, is a very valuable authority on the question of the weight that may properly be given to the award of the Judge of first instance. But it gives no countenance to the notion that his award, just because it is his, is to be accepted without examination by a Court of appeal. The main question before the House was between substantial and nominal damages. The Lord Ordinary had held that substantial damage had been proved; the First Division reversed his judgment and awarded a certain sum by way of nominal damages; and it was held in this House that in principle the Lord Ordinary's judgment was right. The award of the First Division was thus completely displaced, and it became necessary to consider whether the Lord Ordinary's judgment should be restored even as to amount. It is evident from the judgment that, for this purpose, the noble and learned Lords who advised the House examined the evidence, and determined for themselves what was proved and what was not proved, and what part of the proof was relevant to the issue and what was not. As a result of this examination their Lordships held it to be proved that the patentee had suffered damage by reason of sales in infringement of his patents, and also that, but for the intervention of the infringers, a large part of these sales, though not the whole, would have been effected by the patentee himself. So far, the patentee's case was capable of direct proof or disproof, and their Lordships decided it according to their own view of the evidence. But when it came to an estimate of the actual amount of injury done to the patentee's trade, it was thought that this was matter for a probable estimate only, and not for exact calculation, because, as Lord Watson puts it (at p. 49), "it is impossible to ascertain with arithmetical precision what in the ordinary course of business would have been the amount of the patentees' sales and profits." It was on this problematical question alone that the House accepted the Lord Ordinary's amount without being altogether satisfied of its accuracy. But they did so only because they were satisfied on the one hand that it did substantial justice, and on the other, that it could not be said with certainty that any different figures would be exactly right. The Lord Chancellor puts the ground of judgment in a sentence when he says (at p. 46):—"The judgment of the Lord Ordinary, with which I concur, . . . hardly appears to me adequately to represent the amount of damages which the learned Judge held to be proved

[1] (1888) 15 R. (H. L.) 45, 13 App. Cas. 401.

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. . . But I so far agree with the Lord Ordinary that, in arriving at the exact figure, it is extremely difficult, without further materials, to arrive with any confidence at a different sum to that which the Lord Ordinary has assessed." And Lord Macnaghten says (at p. 51):—"The amount of damages is not a matter of exact calculation, and your Lordships have not got before you all the materials which would be required to arrive at the most accurate estimate that could be formed. . . . But it appears to me that substantial justice will be done if your Lordships confirm the amount that the Lord Ordinary has awarded." I am of opinion that the course followed by the Second Division in the present case is entirely consistent with that approved by the House in the case cited. They could not accept the Lord Ordinary's award, not only because they knew nothing of its grounds, but because on their own examination of the evidence they were satisfied that it did not do substantial justice.

I think their own judgment rests upon a perfectly sound basis. They considered rightly that every sale of a patented article in violation of a patent is a damage to the patentee. They found it admitted that the appellants had sold 252 machines in infringement of the patent, and they came to the conclusion, on the evidence, that the profits of the respondents on similar sales came to a sum little short of £5000, or on a different calculation of over £6000. This brought the Court to the question as to the amount of loss, which has been found to be incapable of an exact solution. But the main point in controversy, on this part of the case, is nevertheless susceptible of argumentative proof, and on this I agree with the learned Judges below that the appellants have failed.

They maintain that if they had not interfered the respondents could not have effected the sales in question, first, because they were really due to the exceptional efficiency and popularity of their selling agents, Messrs Hellendoorn & Akkerman; and secondly, because their customers were attracted, not by the patented arrangement, but by a different arrangement of ball-bearings not covered by the patent. In so far as this is urged to show that the whole of these sales, or the great bulk of them, would have been made if the machines sold had not included the respondents' patent buffer, it appears to me a conclusive answer that Mr Hellendoorn himself took pains to advertise the merits of the patented machine by issuing illustrated circulars to the classes of persons likely to buy, and that, in dealing with possible customers, he put forward as a special inducement to buy from him, that he was able to supply the same centrifugal machines as the respondents. On the whole evidence, I think it proved that the greater number of the machines sold by the appellants, during the period of infringement, were avowedly sold and purchased on the merits of the respondents' invention, and that a considerable proportion, although not all, of the purchasers would have bought from the respondents if they had not obtained these machines from the appellants' agents. This left for consideration what is no doubt a very troublesome question as to the allowance which ought to be made for other causes which might reasonably be thought to have promoted the appellants' sales. This is not a matter which in the nature of things can be ascertained with any certainty. But the judgments

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show that it was very carefuly considered by the learned Judges. I am not prepared to substitute any estimate of my own for that which they have made, and I do not examine in detail the grounds on which they have reduced the £5000 above mentioned to £3000, because the only question before your Lordships is whether the latter sum is excessive. I think the appellants have failed to prove the alleged excess. The respondents, without admitting that it is in fact adequate, are content to accept it as sufficient, and I am of opinion that substantial justice will be done by affirming the interlocutor. I only add that this conclusion is, to my mind, entirely in accordance with the course taken by your Lordships' House in the case of the *United Horse Shoe and Nail Company* v. *Stewart*.[1]

Lord Atkinson.—In this case the Lord Ordinary, by an interlocutor dated the 30th March 1912, assessed the damages payable by the appellants to the respondents—in respect of the infringement by the former of certain letters-patent dated the 4th of May 1903 (No. 10,034 of 1903), granted in favour of James Wright Macfarlane, of the firm of Watson, Laidlaw, & Company, of 99 Dundas Street, Kingston, in the county of Glasgow, for the improvements in certain centrifugal machines therein described—at £1500. On a reclaiming note, lodged by the present respondents, the Second Division, by its interlocutor dated the 4th of March 1913, increased that amount to £3000. From this latter interlocutor the present appeal has been taken by the appellants.

It is admitted that the appellants manufactured and sold 252 machines, each of which so resembled the patented machines as to involve the infringement of the patent of the respondents. And to the extent, therefore, that the manufacture and sale of these pirated machines interfered with the sale by the respondents of their patented machines, the latter are entitled to be compensated in damages for the loss they have sustained. The difficulty in deciding the matter in controversy in this case, as in most cases of its kind, lies in the necessity of forming an estimate of the extent to which the sale of the patented machines has been interfered with by the sale of the pirated machines, so as to enable one to measure the amount of the loss sustained by the patentees.

Had this case been tried before a Judge and jury, the jury would have solved the question in a rough-and-ready way by the application of such common sense and commercial knowledge as commonly enables them to decide satisfactorily questions not susceptible of mathematical calculation; and their verdict could not have been disturbed by a Court of review, however that Court might disagree with their conclusion, unless it was of opinion that, having regard to the evidence, no reasonable men could come to the conclusion at which the jury had arrived. This is, however, because the jury are, in such a case, the sole judges of fact.

If, however, a case be tried—as this case, like the case of *The United Horse Shoe and Nail Company* v. *Stewart & Company*,[1] was tried—before a Judge sitting alone, who thus becomes the Judge of both law and fact, then on appeal from his decision the conclusions of fact at which he arrived

[1] 15 R. (H. L.) 45, 13 App. Cas. 401.

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must, of necessity, be subject to review, and the evidence from which his conclusions were drawn must of necessity be re-examined. This course was followed in the Court of Session and your Lordships' House in the *Horse Shoe* case,[1] and is daily followed by the Court of Appeal in this country, and by this House in appeals, for instance, from the Judges of the Chancery and Admiralty Divisions when they decide without the assistance of a jury. Of course, the Judge who has had the great advantage of seeing and hearing the witnesses who are examined before him is in a far better position to judge of their credibility than anyone can be who has not had that advantage, a consideration never to be lost sight of on appeal from the decision of a Judge so placed; but, credibility apart, it by no means follows that he is in a better position to draw the correct inference from the evidence given than are the Judges of the Court which has only the notes of that evidence before it.

In *Mann* v. *Brodie*[2] the question at issue was the existence of a public right of way over certain lands therein mentioned. The Lord Ordinary found against the existence of this right of way. The First Division of the Court of Session found in favour of it, but the difference between the conclusions arrived at by these two tribunals arose from the divergence of their respective views as to the effect of the evidence given on the two points mentioned by Lord Blackburn at page 388 of the Appeal Cases Report, rather than upon the question of the credibility of the witnesses. At page 384 Lord Blackburn, in the opening sentences of his judgment, laid down the law thus:—"The First Division differed from the Lord Ordinary, not as to any question of law but as to the effect of the evidence. There was not anything in the nature of the evidence to give the Lord Ordinary, though he heard the witnesses, better means of judging than the Judges of the First Division or your Lordships who only read the notes; and the Judges, I think, owed it to the respondent to form their own opinion and to act upon it if it was different from that of the Lord Ordinary. I think now that your Lordships owe it to the appellant to form your own opinion and to act upon it though it is different from that of the Inner House. I need not say I should not lightly differ from them, even though in doing so I agreed with the Lord Ordinary."

In the *Horse Shoe and Nail Company* case[1] the sole question in controversy was the amount of damages. There, as here, the main claim was that the damages were to be assessed on the assumption that if the infringers had not interfered with the patentees' trade the latter would themselves have sold, during the period of interference, a quantity of nails, in addition to what they had actually sold, equal to the quantity sold by the infringers. The consideration of the matter of competition, its keenness and amount, was involved in the decision of the claim. The Lord Ordinary had awarded the sum of £530 as damages. The Inner House had, on appeal, reduced that sum to £50. The noble and learned Lords who took part in the decision examined the evidence for themselves. They held that the sum of £50 was insufficient, that the Lord Ordinary had to some

[1] 15 R. (H. L.) 45, 13 App. Cas. 401.
[2] 12 R. (H. L.) 52, 10 App. Cas. 378.

extent proceeded upon an erroneous principle, but that as the amount of damages, which their own examination of the evidence led them to conclude had been sustained, approximated nearly to the sum the Lord Ordinary had awarded, substantial justice would be done by confirming his award. The principle of that decision applies, I think, to the present case.

Here the Lord Ordinary does not in his judgment indicate in any way on what principle he proceeded, or by what method, or on what basis he arrived at the figure of £1500. The respondents are content with the decision of the Inner House. They accept it, and have not appealed against it. The appellants do not suggest that the sum of £3000 is too little. On the contrary, they contend it is twice too much. The burden of showing it is too much rests upon them. They do not, in my view, discharge that burden by merely showing that the amount awarded by the Lord Ordinary is only half that awarded by the Inner House. If on examining the evidence one comes to the conclusion that it has not been clearly shown that this sum of £3000 is too large, then, in my opinion, the award of the Inner House should be allowed to stand and this appeal should be dismissed with costs.

The first and most important point to determine is how many more of the patented machines it is reasonably probable the respondents would have sold if the appellants had not sold these 252 infringing or pirated machines. This is obviously a matter which cannot be determined by mathematical calculation or with absolute accuracy. At best the result can only be an approximation.

Mr Walter, on behalf of the appellants, reduced the number of extra sales the respondents would have made if his clients never had infringed to about 105. He arrived, however, at that figure by assuming that the sales by the appellants of 119 pirated machines in the island of Java did not prejudice in any way the sale of the respondents' machines in that market, and also assumed that the same assumption applies to 28 similar machines sold by the appellants under certain conditions which he specified. He contended that the persons who purchased these 147 machines for use were induced to do so, not from any appreciation of their superiority due to the particular improvements which the respondents had patented, or from any desire to purchase machines possessing those features, but solely because of the push and popularity of one Akkerman, through whom the sales were effected, aided by another person named Hellendoorn.

This Akkerman is a most important witness. He was examined and cross-examined on interrogatories. The Lord Ordinary neither saw nor heard him, and was in no better position to judge of his credibility than were the Judges of the Inner House, or than are your Lordships. I have read through all this evidence, and examined with special care that given by the important witnesses following, namely, Pieter Gallas, R. Williamson, I. F. R. Hellendoorn and Akkerman himself, together with the letters and other documents given in evidence in the case, and am utterly unable to come to the conclusion for which Mr Walter contends.

Hellendoorn acted as sole agent in Java for the sale of the appellants' machines. He himself bought these machines and resold them to the

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owners and managers of sugar estates. The respondents' machines were sold in Java through the instrumentality of Pieter Gallas, manager of a company or firm named the Constructive Winkel de Bromo, which carried on the business of supplying the respondents' centrifugal machines—the patented machines—to the managers of sugar estates in this island. This company, like Hellendoorn, purchased these machines from the respondents, and made their profit on the resale of them. This witness, whose veracity is not impeached, states at p. 46 that Hellendoorn was his chief competitor in the sale of centrifugal machines in Java; that very few centrifugal machines but those of the respondents and those sold by Hellendoorn were sold in the Java market; that after he, Gallas, started to supply the patented buffer, the new feature of special merit in the patented machine designed to check oscillation, Hellendoorn put a similar buffer on the market, advertised it, and distributed circulars containing drawings and descriptions of it. The admissions made by Akkerman in answer to cross interrogatories 68, 69, and 70, page 106, are of the utmost importance. They run thus:—"Cross Int. 68. Was the attitude adopted by Mr Hellendoorn and you as his agent in dealing with owners and administrators of sugar estates in Java that he was able to supply machines of the same type as those supplied by Watson, Laidlaw, & Company? (A.) Yes. Cross Int. 69. Did he also make it public in Java that he could supply all necessary parts for their machines? (A.) Yes. Cross Int. 70. In fact, was not the position adopted by Mr Hellendoorn as defenders' agent in Java, in dealing with owners and administrators of sugar estates there that he was able to supply exactly the same centrifugal machine as Watson, Laidlaw, & Company, Limited, at a lower price? (A.) Mr Hellendoorn's attitude was that he was able to supply exactly the same centrifugal machines as the pursuers, but nothing was said about a lower price."

The special feature of the invention of the respondents was a spindle supporting a revolving shaft. This spindle rested on a conical rubber buffer, and was so constructed as to admit of ball-bearings being so placed in its substance as to work. It is plain, from the manner in which the circulars distributed by Hellendoorn were got up, that they were designed for the very purpose of inducing intending purchasers to believe that the machines he supplied were in all respects the same as those supplied by the respondents.

Moreover, the correspondence given in evidence clearly proved that both Hellendoorn and Akkerman were most anxious to procure, and did procure, the infringing machines of the appellants for the very purpose of disposing of them to purchasers by the means set forth in the above-mentioned interrogatories. They say they thought they had the right to do this. It is, in my view, impossible to suppose that two keen business men like Hellendoorn and Akkerman would have purchased the appellants' machines if they did not believe they could resell them, and equally impossible to suppose that they would have distributed these circulars and drawings, and made the statements above mentioned, if they were not confident that the sale of the machines they so purchased would be stimulated by pointing out their resemblance to the respondents'

machines. It may well be that the sales of the appellants' machines in Java were increased owing to the push and popularity of Akkerman. Due allowance should be made for that; but bearing in mind that the respondents' machines were extensively sold in Java, and were well known there and elsewhere, it is only reasonable to conclude that, if the appellants had not infringed, a considerable percentage of the persons who purchased the appellants' machines would have purchased those of the respondents.

Applying, then, the principle adopted in the cases to which your Lordships have been referred to the evidence in this case, it would appear to me reasonably probable that at least 60 per cent. of those purchasers would have supplied themselves with the machines they required from the vendors of the respondents' machines. Sixty per cent of 150 machines would be 90 machines, which, added to the 105 the sale of which Mr. Walter admits the respondents have lost, would mean that the respondents have lost the profits they would have realised upon the sale of about 195 machines. Mr Walter admits that a fair test of this loss would be the amount the appellants would have had to pay to acquire legally the power which they usurped. That is a royalty calculated at 10s. per inch of the machine. This would, owing to the large dimensions of some of the machines, average considerably more than £15 per machine, but taking it at that average the royalties would amount to £2915. In addition to this the loss the respondents have sustained under the other heads of their claim by the sale by the defenders of such things as accessories, and by extensions, repairs, &c., has to be considered. I have some difficulty in forming any estimate as to what sum this latter loss approximates. But the loss I have already mentioned as probable on the sale of the machines alone approaches so near to the sum awarded by the Inner House, that I fail to see that the latter is too large; and, following the precedent of the *Horse Shoe and Nail Company* case,[1] I think substantial justice would be done by upholding the decision of the Inner House and dismissing the appeal with costs.

Lord Shaw of Dunfermline.—This is an action brought by the respondents against the appellants for damages in respect of the infringement of a patent granted in the year 1903 for improvements in the manufacture of centrifugal machines. The merits of the patent have been the subject of previous litigation, when the validity of the patent was affirmed and the appellants were interdicted from infringement. The principle of the patent, if I may quote what was formerly said judicially upon the subject, is that[2] "material, partly solid and partly fluid, put into a basket which is made to rotate, may be dried by the effect of the centrifugal action which occurs with the rotary motion and which separates the fluid matter from the solid. By the perforation of the basket the fluid matter, thus driven centrifugally, flies off and the solid matter remains in the receptacle. The basket or receptacle is

[1] 15 R. (H. L.) 45, 13 App. Cas. 401.
[2] 28 R. P. C. 565, at p. 578.

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swivelled upon the foot of the central bar or spindle. . . . It happens that the basket thus swung on the central bar, when it rotates with a certain velocity, begins to oscillate and the oscillation communicates itself also to the spindle. This oscillation, thus accompanying the rotation, may cause breakage and loss." The invention of the respondents was one for the avoidance of this oscillation. The patent consisted of "the construction of a hollow indiarubber cone suitably supported, into which fits a counterpart cone formed upon the spindle of the machine. By this construction the inventor takes advantage of the wedging action of the spindle cone upon the encasing rubber, and obtains, along with the necessary flexibility, the control previously unknown."

I am convinced, upon the evidence in this case, that the merits of the respondents' patent, which have already been judicially affirmed, have been proved to be of considerable commercial interest and value. I think it to be established, first, that it was in the hope and prospect that it would be so that it was copied by the appellants, the infringers; secondly, that they thought it right to apprise consumers in general of their ability to supply by the infringing machines exact replicas of those made by the respondents, and accordingly to issue the circulars and drawings to which reference will be made; thirdly, that consumers, being thus commercially apprised by the appellants of their power to supply machinery containing a novel and useful merit, purchased such machines. Upon this last head I include under the term "consumers" those agents (and especially one agent in Java, with a large connection in that island) who were able to continue their commercial connections and secure fresh orders, not only on account of their talents for business, but because it was in their own interests as well as the interests of the consumers, that they should be in a position to offer machinery containing the merits of the patented invention.

I have made these observations because in the present case I am also convinced on the evidence that, from the point of commercial effectiveness and output, there can be no doubt of the value of the patented part to the machine as a whole. And I may add that I see no reason to suppose that it ever entered into any consumer's mind to attempt the transaction (the attempt would probably have failed) of purchasing the novel and meritorious patented portion of the machine from the patentee, and the remainder of it from the appellants or any other firm. I further apply this observation to the machines and frames, which were generally treated as one item of order.

The damages were fixed by the Lord Ordinary at £1500—given as a jury estimate and without a statement of reasons or of the lines of calculation. In the Second Division of the Inner House this award was raised to £3000. The respondents are content with this sum, and defend the judgment. Subject to this position of the respondents, your Lordships, under the principle of *Mann* v. *Brodie*,[1] must consider the whole case, both in fact and in law. Nor is the balance swayed by any consideration of the advantage to the Judge of first instance in having seen

[1] 12 R. (H. L.) 52, 10 App. Cas. 378.

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the witnesses, for the Lord Ordinary was satisfied that the evidence had been fairly and frankly given on both sides. In result accordingly the issue for this House is whether, upon a review of the whole case, the one sum or the other—£1500 or £3000—comes nearest to the mark which your Lordships would fix.

The learned counsel for the appellants, in defending the lesser figure of £1500, proceeded by the method of a wide deduction from the number of machines, infringing the patent, which were sold. That number was 252. The sale of each of these was a legal wrong. But it is said that with regard to the major number of these the sales should not sound in damages. And fortunately the argument on this subject can be focussed by the consideration that of these machines, over 130 in number, which were sold in the island of Java, it is said: This Java trade would never have gone to the patentee; the machines sold there were disposed of by our, the infringers', agent; they contained the patented part, but, patented part or none, they would have been supplied as well and as good by us; and in any event this Java market you, the patentee, would not have touched. The figure of 252 must, therefore, be reduced in this simple and plain way by more than one half, and it is only with regard to the balance—the true dimension of the case—that damages can be measured. If this argument be good, the Lord Ordinary's figure can be justified. If bad, the Inner House figure of £3000 must at least stand, and the appeal fails.

There are many other details and items of the claim and case which were dealt with, but for the purpose of the broad comparison between the £1500 and the £3000 the Java trade covers the ground both in argument and in fact. In my opinion, the case does raise sharply an important question as to the assessment of damages in patent cases, and with that question I proceed to deal.

It is probably a mistake in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles. They are the practical working rules which have seemed helpful to Judges in arriving at a true estimate of the compensation which ought to be awarded to a patentee against an infringer.

In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures. In a second class of cases, restoration being in point of fact difficult—as in the case of loss of reputation—or impossible—as in the case of loss of life, faculty, or limb—the task of restoration under the name of compensation calls into play inference, conjecture, and the like. And this is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound

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imagination and the practice of the broad axe. It is in such cases, whether the result has been attained by the verdict of a jury or the finding of a single Judge, that the greatest weight attaches to the decision of the Court of first instance. The reasons for this are not far to seek—such as the value of testimony at first hand, even down to the nuances of its expression, and they include, of course, the attitude and demeanour of the witnesses themselves. In all these cases, however, the attempt which justice makes is to get back to the *status quo ante* in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed.

In patent cases the question of damages is in all instances to some extent, and in many instances to the entire extent, dependent upon the same principle of restoration. The patentee may show that the trade done by the infringer would have been his (the patentee's) trade, and he is entitled in such cases to be restored against the action of the infringer; and he may adopt, in liquidating that principle in money, an alternative course. He may say, "I shall accept the profits which have been made by the infringer in this trade which ought to have been my trade"; or he may take the other head of the alternative and say, "The illicit opposition to and interference with my own trade caused me damage. I lost profit which I would have otherwise made in it; I lost business connection; the development of my business on its natural lines was interrupted by my being driven by these acts of piracy out of sections of my own trade." These and other things may be heads of damage. And it is well settled that a patentee may choose his course of measuring his loss either by the profits which the infringer made, or by items of damages such as those referred to, but that in respect of the same matter he cannot have both his own damages and the infringer's profits.

In the course, however, of deciding cases, certain expressions have been used by learned Judges, which, according to the contention, are to the effect, or truly mean, that if the patentee chooses the latter course, namely, to reckon up his claim under heads of damage, he is limited, so to speak, by the principle of restoration. Phrases, for instance, have been used, which it is said imply that the entire measure of his damage is the loss which he has incurred of the trade in the pirated articles. And then comes in an astute argument, that in all cases where the infringer can establish that the trade in the machines which happen to contain the patented article or part would under no circumstances have ever reached the patentee himself, no claim can be admitted. To take an instance such as the present case affords, the patentee was not in a position to carry on business in a certain part of the world exclusively possessed for commercial purposes by the energies of the infringer and his agents. It is said in such a case: Where is the damage which the patentee has incurred? On the other heads of the case he has obtained his damages; but on this part, which covers a section of trade which in no circumstances he could have touched, he can have sustained no damage, because he would never have sold his patented articles within that section. The duty of an infringer is covered by the principle of restoration, and the patentee has surely been restored to as good a position as he was in before the infringe-

ment, or would have been in but for it, if he has been put into the same financial position as he would have occupied in that region of trade where alone he would have been operating.

It is at this stage of the case, however, that a second principle comes into play. It is not exactly the principle of restoration, either directly or expressed through compensation, but it is the principle underlying price or hire. It plainly extends—and I am inclined to think not infrequently extends—to patent cases. But, indeed, it is not confined to them. For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire. If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise." I confess that this seems to me to be precisely in principle the kind of question and retort which underlay the argument of the learned counsel for the appellants about the Java trade. I explain that thus. In the island of Java machines of the kind in question in this case are largely used in the process of manufacturing sugar, in which the separation of the fluid from the solid matter by a system which is swift and avoids danger and loss is of great value. Much evidence was led to the effect that in that island, however, the agent for the infringer was an able business man, and that the value of his influence and connection was such that in substance it would not have mattered whether the machines sold by him contained the novel merit of the respondents' patent or did not. He would have sold machines which he and others think as good; and in any case the respondents (the patentees) would not have sold their machines as against him. The evidence to this effect is not conclusive, but it is strong, and I desire, as the matter in that way tests the principle I am applying, to accept it in its entirety. I exclude from view all that rather condemnatory evidence which shows that consumers, and notably foreign consumers, did think most highly of the patented invention. I will exclude all the evidence which shows that the appellants, the infringers, actually copied the drawings of the patented machine, and circularised their customers in various parts of the world to the effect that they could supply that identical article, or rather, the rotary machine with that identical merit. And I will go further and assume that the respondents would not have done the Java trade in the 130 machines sold in that island by the infringers, and containing the patented part. The argument is—for indeed this instance covers sufficiently the whole ground—the argument is: Here it is demonstrated that the patentees have lost no trade which they could have obtained. And under the cover of certain judicial dicta the infringers are entitled to say that the entire measure of the patentees' damage is exhausted when restoration of the *status quo ante* has been obtained.

Now, in the first place, it is clear to my mind that, suppose the patentees had chosen to ask an account of the profits made by the in-

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fringers upon the infringing machines, they would have been entitled to obtain it, and a decree for the amount, and it would have been no answer to say, The account shall be given, but there shall be excluded from it places which we shall establish your trade would never have reached.

In the second place it appears to me that, although it be true that a patentee cannot have both remedies at the same time, namely, the damages to his own business and the profits of the infringer's business, still this is true simply because it is in that way that overlapping is prevented. But in the instance of which the present is an excellent type there is no overlapping whatsoever. If with regard to the general trade which was done, or would have been done by the respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the respondents would not have done: and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorised sale or use of every one of the infringing machines in a market which the patentee if left to himself, might not have reached. Otherwise that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstracter to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters, Limited*.[1] Each of the infringements was an actionable wrong, and although they may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorised use of his property. Otherwise the remedy might fall unjustly short of the wrong.

In various cases—of which the present is a good example—it is only by this combination of actual damage on the principle of restoration with, in another section of these operations, the principle of royalty that a full and adequate response can be made to the cardinal question which remains always to be answered in these infringement suits, the question put by Vice-Chancellor Page Wood in *Penn* v. *Jack*,[2] viz.: "What would have been the condition of the plaintiff if the defendants had acted properly instead of acting improperly. That condition if it can be ascertained, will, I apprehend, be the proper measure of the plaintiff's loss." To apply the principle: The appellants did this Java trade improperly. Had they done it properly they would have done it under royalty. That royalty the respondents would have obtained.

Fortunately the figures—on these principles being settled—leave no doubt on the mind that the award of £3000 made by the learned Judges of the Second Division is much within the mark, and that their figure—it not being complained of as too low—must stand. To Mr Hellendoorn alone, the Java agent, over 130 infringing machines were sent. It is an admitted fact that the royalty of 10s. per inch of diameter is a fair

[1] (1911) 28 R. P. C. 163.

[2] (1867) L. R., 5 Eq. 81, at p. 84.

charge, and this works out at about £17, which upon 130 machines reaches a slump amount of £2210. Thus for the Java trade alone a sum of over £2000 is due. To this sum falls to be added the loss and damage in respect of all the other branches of the trade. And much over the sum of £3000 is thus on admission, or moderate computation, reached.

Feb. 6, 1914.

Watson, Laidlaw, & Co., Limited, v. Pott, Cassels, & Williamson.

I do not doubt that the conclusion reached by the Court below ought not to be disturbed.

Lord Shaw of Dunfermline.

ORDERED that the interlocutor appealed from be affirmed, and that the appeal be dismissed, with costs.

GRAHAMES, CURREY, & SPENS—WEBSTER, WILL, & Co., W.S.—NICHOLLS, HERBERT, & Co.—J. & J. ROSS, W.S.

STEPHEN SHIELDS, (Pursuer) Respondent.—*Christie, K.C.—Scanlan.*
JAMES SHEARER AND ANOTHER, (Defenders) Appellants.—*Sol.-Gen. Morison—Macquisten—H. M'Kinnon Wood.*

No. 3.

April 3, 1914.

Shields v. Shearer.

Reparation—Illegal apprehension—Arrest by constables without warrant of person "reasonably suspected of" crime—Privilege—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *sec.* 88.

Issue—Form of issue—Illegal apprehension—Apprehension "without reasonable grounds of suspicion"—Malice.

The Glasgow Police Act, 1866, sec. 88, empowers constables within the city to take into custody, without any other authority than the Act, any person "who is either accused or reasonably suspected of having committed" a penal offence.

In an action of damages for wrongous arrest brought against two Glasgow constables, who had apprehended the pursuer without a warrant, the defenders maintained that, as they had *bona fide* suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by section 88 of the Glasgow Police Act and the action should be dismissed; or otherwise that, if a trial were allowed, malice must be put in issue, in respect that the pursuer was bound to prove that the defenders had been actuated by ill will towards him.

Held (*aff.* judgment of Second Division) (1) that it was a question for a jury whether the grounds of the defenders' suspicion were or were not reasonable; (2) that the pursuer was not bound to prove ill will on the part of the defenders, and accordingly that malice need not be put in issue; and an issue whether the defenders "wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer" *approved.*

(IN the Court of Session 4th July 1913—1913 S. C. 1012.)
The defenders appealed to the House of Lords.
The appeal was heard on 3rd April 1914.*
At the conclusion of the appellants' argument,—

Ld. Chancellor (Haldane).
Ld. Kinnear.
Ld. Dunedin.
Ld. Atkinson.
Lord Shaw of Dunfermline.

LORD CHANCELLOR.—It would be with reluctance that I should criticise a decision come to in the Court of Session on a question of procedure, but

* The following case, which was not referred to in the argument in the Court of Session, was cited in the House of Lords:—Buchanan v. Corporation of Glasgow, (1905) 7 F. 1001.

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Lord Chancellor.

on the present occasion I find myself, for reasons I will presently state, entirely in accordance with the views of the learned judges who have decided this case in the Court below; and I am strengthened in my sense of concurrence by the fact that three of your Lordships, who have large experience in connection with Scottish procedure, are of the same opinion. Of the issue as framed I only propose to say that it seems to me, if it is justifiable, a convenient course to have adopted for the bringing to justice of the case before us.

The real question seemed to me at a very early stage of the opening of the Solicitor-General for Scotland a question of substance—the question whether it is necessary for the pursuer to prove that malice in fact was in the minds of the police when they took steps which resulted in what he alleges was his false imprisonment.

Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act, and it may be, in proceedings based on wrongs independent of contract, a very material ingredient in the question of whether a valid cause of action can be stated.

What has happened in the present case is this: that an issue has been framed under a statute which governs these matters in Glasgow, and an issue which substantially follows the words of that statute. The issue proposed is: "Whether on or about 14th October 1912 the defenders wrongfully and illegally, and without reasonable grounds for suspicion, apprehended the pursuer in or about Glebe Street, Townhead, and conveyed him to the St Rollox police office in Glasgow, to his loss, injury, and damage"; and the damage is laid at £100. In order to succeed on what is the real question of substance underlying this case the learned Solicitor-General frankly admitted that he would have to say that if the defenders, the police, wrongfully and illegally without reasonable grounds of suspicion apprehended the pursuer, still the pursuer could not succeed without proving that malice in fact which I have distinguished from malice in law.

I asked the learned Solicitor-General, than whom no one is more competent to answer the question, whether he could produce any train of authorities in the Court of Session, or any decision of this House, which introduced what would be a most startling demarcation between the law as it exists in Scotland and the law as it exists here, and he replied with candour that he could not. There was one case, the case of *Young* v. *Magistrates of Glasgow*,[1] which we were all agreed was a case which related to a different state of matters. That being so, it appears to me that the

[1] (1891) 18 R. 823.

issue which has been framed in this case is an issue which really is more favourable to the defenders than the issue which they would normally have were the case treated as one merely at common law; they have got such protection as the statute which prevails in Glasgow gives them. If they can succeed in bringing themselves within the words of justification which that statute enacts, then they will succeed.

The conclusion I have come to is that the Court of Session have taken a very convenient course in this case, a course in which, there being no challenge on the part of the pursuer as to the form of issue, I entirely agree; and I therefore move your Lordships that this appeal be dismissed; and dismissed with costs.

Lord Kinnear.—I entirely agree with my noble and learned friend on the woolsack, and I have nothing to add to what he has said.

Lord Dunedin.—I also agree with what has just been said by my noble and learned friend on the woolsack. I think, perhaps, I had better add to what he has said that I think my noble and learned friend has used terms which are not perfectly familiar terms in Scotland; I mean "malice in law" and "malice in fact"; but which are exactly represented, in the cases which have turned upon these matters, by the distinction between cases where malice may properly be inferred from the mere wrongful act that is done, and cases where it is necessary in the Scotch phraseology to aver facts and circumstances out of which malice may be inferred; such a case, for instance, as the case of *Beaton* v. *Ivory*.[1] In other words, to use the words of my noble and learned friend, in *Beaton* v. *Ivory*[1] there could not be a relevant case against the sheriff unless the Court were able to infer malice in fact, which they were not able to do.

The common law upon the question that we have been here dealing with seems to me plain beyond all question. The first point is that in a case of this sort you are bound to take the averments of the pursuer alone, and not the defence which is made by the defender. That was laid down in this House by Lord Chelmsford, L.C., in the case of *Pringle* v. *Bremner & Stirling*.[2] Taking that, in this case we find that there are no circumstances according to the pursuer which justify the arrest at all; and, when that is so, I think it is absolutely clear upon the authorities that all that was necessary for the pursuer to put in issue were the words "wrongfully and illegally" without anything more, leaving any question of privileged situation to be dealt with by the learned judge at the trial. The only case that has been quoted against that is the case of *Young*,[3] and I am perfectly satisfied that in *Young's*[3] case the admission of the words "maliciously and without probable cause" in that issue was due to the concession of the counsel concerned, and not consequent upon the matter being argued. There have been countless cases since, not only cases in the books but cases in which one may invoke one's own personal knowledge of pro-

[1] (1887) 14 R. 1057.
[2] (1867) 5 Macph. (H. L.) 55.
[3] 18 R. 823.

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cedure, where the pursuer has made averments as here, and the issue was "wrongfully and illegally," and that alone.

Then we come to the question, Does the Glasgow Police Act, which says that constables are to be allowed to arrest if they have reasonable grounds of suspicion, make any difference? Upon that clause the appellants here argued that it meant that a constable was allowed to arrest if he said he suspected, and that the mere fact that he said he suspected absolutely closed the question. I should be sorry indeed to suppose that the liberties of the subject in Glasgow have been so interfered with as they would have been if an Act of Parliament had been passed with the meaning the appellants put upon it. Upon that point I will only say that I entirely agree with that portion of Lord Salvesen's judgment which deals with that matter.

That being so, the only question that remains is whether it was advisable in this case to alter the old form of issue, and to put in the particular words of the statute. I agree with my noble and learned friend on the woolsack in thinking that the course adopted has been quite convenient. I would like to say this, that upon the question of the mere form of the issue—which is merely what is a convenient way of trying the case—I should think your Lordships' House would be slow indeed to interfere with the learned judges of the Court of Session, unless you were thoroughly convinced that what they had done would, in some way or other, lead to a result which would not be in accordance with justice in the interests of either the pursuer or the defender.

I agree in the motion that has been made.

Lord Atkinson.—I concur. I have some hesitation in expressing any opinion on a matter of Scotch pleading and practice, but it certainly would appear to me that the issue as framed is more favourable to the defenders than they are entitled to. I think human liberty is such a valuable thing in this country—as in Scotland—that a person who invades it by arresting an individual must justify his action in that respect. The Solicitor-General for Scotland was extremely candid in stating that his quarrel with this issue was that it was not so framed as to place upon the pursuer the burden of proving affirmatively that the act of the constable was done with ill will. I do not think there is any principle of law which would throw that burden upon the pursuer, and I am very happy to say that it is so. I do not think any case was cited before your Lordships which would justify your coming to any such conclusion. I think that the issue as framed practically enables the parties to raise the defence based upon the Glasgow statute, and that there is no sound objection to it.

Lord Shaw of Dunfermline.—I agree. In determining as to an issue the rule is elementary that the allegations of the pursuer must be taken as they stand. The case made is very simple. It is, as alleged, this—that the pursuer, being the lawful owner of a watch, was arrested for having it in his possession.

The power of arrest of a citizen in Glasgow does not appear to me to

be in any way different from what it is in other places in Scotland. Very frequently no warrant is required. And of course there are certain protections afforded. In addition to the ordinary rules of the common law, the Glasgow police statute bears upon the subject. I desire, since the case has reached this House, to say that I adopt entirely what I consider, if I may say so, to be the excellent summary of the position given by the learned sheriff-substitute. He says: "By virtue of section 88 of the Glasgow Police Act, 1866, a police constable has power to arrest without a warrant any person whom he may reasonably suspect of having committed a crime. But it rests upon the constable to prove that his suspicion was reasonable, and his act therefore justifiable. It may quite well be that the defenders here will be able to establish at the proof that the pursuer brought his arrest upon himself by his own furtive and suspicious behaviour, by his giving confused and contradictory accounts of how the watch came into his possession, and the like. If that be so the defenders were doing no more than their duty in arresting him."

I had great difficulty in understanding what it really was that the appellants desired. After a brief argument it was admitted that the pursuer's averments did contain issuable matter. It turned out ultimately that the appellants wished to put into this issue the word "maliciously." The form of the issue is this: "Whether on or about 14th October 1912 the defenders wrongfully and illegally, and without reasonable ground of suspicion, apprehended the pursuer." To this hour I do not understand what "maliciously" would add to that. For if a constable has arrested a citizen without reasonable grounds even of suspicion against him, the law would demand no further proof of malice. With regard to actions of slander it has long been established that malice is implied by the reckless use of words without any consideration whether they were true or not. And with regard to false or improper apprehension or imprisonment the law is also elementary that malice is implied from recklessness whether the citizen arrested is innocent or not. Accordingly, when the statute in Glasgow says that it is no defence unless there is reasonable ground for suspicion, it appears to me that the Act simply lays down in so many terms—in broad and popular terms—what might have been put in the old legal form by the words "maliciously and without probable cause."

The difficulty in this case is said to have arisen from one sentence in Lord Salvesen's opinion. I think it right to call attention to that because it ought to be said, in justice to the learned judge, that that sentence has been misconstrued. No doubt he did say (1913 S. C., at p. 1017) that "the constable who arrests a person without a warrant takes the risk of justifying the apprehension." The learned Solicitor-General for Scotland argued that that must mean that the onus was upon the constable; but the learned judge in the succeeding sentence shows that that is not so. For he cites the statute and he says: "The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut the presumption"; and he concludes his judgment by saying this, in which I entirely agree: "It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged; and it is desirable that officers of the law should as far

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as possible be protected in the discharge of their duty by the grounds of liability being pointedly brought under the notice of the jury." It humbly appears to me that those sentences of Lord Salvesen make clear where the onus lies, namely, that it rests upon the pursuer.

A word with regard to the form of issue. My noble and learned friend has referred to the practice. I am aware that the general or at least frequent practice is that the insertion of the words "wrongfully and illegally" in the issue as presented to the jury is enough. When the pursuer's averments do not show that the defender was in any position of privilege, this is necessarily so. When thereafter, and in the course of the trial, privilege is disclosed and determined by the judge, the judge then charges the jury that they must further be satisfied that the action was done maliciously and without probable cause. In these cases, therefore, before the jury come to determine their verdict their duty is to consider the black type with "wrongfully and illegally" and to remember (if they can) the judge's charge that they must also find further that the act was done maliciously or maliciously and without probable cause. This course is *ex necessitate* inexact and might conceivably produce mishap if the jury omitted to recall the judge's charge. But what the learned judges of the Second Division have done in this case seems to me to be eminently fair to both parties,—a good reason for preserving this issue, which is not the subject of any cross-appeal. They have in point of fact taken this statute, which it is admitted covers the position of the defenders, and put in the forefront of the issue, and before the faces of the jury, the actual and complete thing which must be affirmatively established. I think that nothing could more clearly direct the minds of the jury to the true point. I accordingly approve of the issue as it has been put. I think it a model form.

ORDERED that the interlocutor appealed from be affirmed and that the appeal be dismissed, with costs.

HERBERT Z. DEANE—J. FERGUSON REEKIE, S.S.C.—MARTIN & CO.—CAMPBELL & SMITH, S.S.C.

No. 4.

April 22, 1914.

Marquis of Linlithgow v. North British Railway Co.

THE MARQUIS OF LINLITHGOW AND YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED, (Pursuers) Appellants.—*Clyde, K.C.—Hon. Wm. Watson, K.C.*

THE NORTH BRITISH RAILWAY COMPANY, (Defenders) Respondents.—*Sir Robert B. Finlay, K.C.—Macmillan, K.C.—A. T. Lawrence.*

Compulsory powers—Canal—Right of support—Mines and minerals—Oil shale—Mineral owner empowered to work minerals provided canal not injured—Canal company empowered to stop dangerous working on payment of compensation—Constitution of notice to "stop working."

Section 112 of a private Act of 1817, under which a company acquired lands for the construction of a canal, reserved to the vendors the mines and minerals lying within or under such lands, and permitted them to work the minerals subject to an obligation not to injure the canal. Section 113 empowered the company, in case they should find it necessary for the safety of the canal, "to stop the working" of the minerals on making satisfaction for their value to the owners.

The company having informed the representative of the vendor of

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certain lands through which the canal had been constructed that they would hold him responsible for any damage caused by his working a seam of oil shale, subjacent and adjacent to the canal within the lands in question, the representative of the vendor brought an action against the company in which he claimed the value of this shale on the grounds that it was a "mineral" reserved to him under section 112, and that the company's intimation was an intimation "to stop the working" within the meaning of section 113.

The First Division of the Court of Session assoilzied the defenders, the ground of judgment being that the pursuer was not the owner of the seam in question, in respect that shale was not, at the date when the company acquired the land, regarded as a mineral, and consequently was not reserved to the vendor.

On an appeal to the House of Lords their Lordships—without expressing any opinion upon the question whether shale was a mineral and so was reserved to the vendor—*affirmed* the decision of the First Division assoilzieing the defenders, the ground of their Lordships' judgment being that sections 112 and 113 were independent sections, and that the company had not exercised the right of "stopping the working" of the shale conferred on them by section 113, but had merely intimated that they held the pursuer bound by the obligation not to injure the canal imposed on him by section 112.

(In the Court of Session, 11th June 1912—1912 S. C. 1327.)

The pursuers appealed to the House of Lords, and a cross-appeal was also taken by the defenders against a portion of the interlocutor of the First Division.

The case was heard on 9th, 10th, 12th, 23rd, and 24th March 1914.

Ld. Chancellor (Haldane). Ld. Kinnear. Ld. Atkinson. Lord Shaw of Dunfermline. Ld. Parker of Waddington.

On 22nd April 1914 their Lordships pronounced judgment, when opinions were delivered by the Lord Chancellor (Haldane), Lord Kinnear, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Parker of Waddington. In their opinions their Lordships examined at length the provisions of the Union Canal Act, 1817 (57 Geo. III. cap lvi.)—which governed the disposition under which the Canal Company acquired the lands for the canal—and in particular the provisions of sections 112 and 113 thereof. They also considered the communications and correspondence which had passed between the pursuers and the defenders in relation to the seam of oil shale in question. The conclusions at which their Lordships arrived were that sections 112 and 113 were independent sections, section 112 reserving to the vendors of lands the minerals under the lands disponed with a right to work them, but imposing an obligation to do no injury to the canal; section 113 conferring on the Canal Company an independent option to stop at their discretion any workings under or near to the canal which in their opinion might threaten damage, but imposing an obligation to pay for the value of minerals the working of which was so stopped. Their Lordships were of opinion that, in the communications which had passed between the parties, the defenders had not exercised the option conferred by section 113, but had merely indicated that they held the pursuers to the obligation not to injure the canal imposed on them by section 112, and that accordingly the pursuers' claim for compensation failed. Their Lordships expressly declined to pronounce any judgment upon the question with which the opinions of the Judges of the First Division had been chiefly concerned, viz., whether oil shale was a "mineral" within the meaning of the Act of 1817.

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ORDERED that the interlocutors complained of in the original appeal be affirmed except so far as they assoilzie the defenders from the first conclusion of the summons and so far as they refer to expenses: Ordered that the said first conclusion do stand dismissed as unnecessary, no judgment being pronounced in this House on the subject of whether the seams of shale or oil shale were embraced within the term "mines and minerals," as used in the Act 57 Geo. III. cap. lvi.: Ordered further that the said cross-appeal be dismissed, and that the appellants in the original appeal do pay to the respondents in the original appeal their costs in the Court of Session and also the costs in the House of Lords in respect of the original and cross-appeals.

GRAHAMES, CURREY, & SPENS—HOPE, SIMSON, & LENNOX, W.S.—JOHN KENNEDY, W.S.—JAMES WATSON, S.S.C.

No. 5.

April 28, 1914.

Smith v. Fife Coal Co., Limited.

JAMES SMITH, (Pursuer) Appellant.—*Lord-Adv. Munro—Hon. A. Shaw.*

THE FIFE COAL COMPANY, LIMITED, (Defenders) Respondents.—*Sol.-Gen. Morison—H. W. Beveridge.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Breach of rule—Miner doing shot-firer's work contrary to rule.*

The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the charge with the cable, and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter.

A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was seriously and permanently disabled by the explosion.

Held (*rev.* judgment of the Second Division) that the accident arose out of and in the course of the miner's employment, in respect that the accident was really due to the premature firing of the charge by the shot-firer, and could not be attributed to the miner having arrogated to himself a duty which he was neither engaged nor entitled to perform.

Kerr v. *William Baird & Co.*, 1911 S. C. 701, *distinguished.*

Ld. Kinnear. Ld. Dunedin. Ld. Atkinson. Lord Shaw of Dunfermline. Lord Parmoor.

(IN the Court of Session, 21st February, 1913—1913 S. C. 662.)

The pursuer appealed to the House of Lords.

The case was heard on 30th March, 1914.*

* The following cases, which were not referred to in the argument in the Court of Session, were cited in the House of Lords:—Plumb v. Cobden Flour Mills Co., [1914] A. C. 62; Whitehead v. Reader, [1901] 2 K. B. 48.

At delivering judgment on 28th April 1914,— April 28, 1914.

LORD DUNEDIN.—The facts as found by the arbitrator out of which this case arises are as follows. The appellant was a miner in the employment of the respondents. He worked at a working-face where from time to time blasting by means of a shot was necessary. On these occasions the proper procedure is as follows: The miner bores a hole, puts into it a detonator which is handed to him by the shot-firer—a duly appointed official—and stems or packs the detonator in the hole. The shot-firer then connects a cable with the detonator wire, which has been left protruding from the stemmed hole. Then proceeding to the other end of the cable, which is at least twenty yards in length, he couples the cable to an electric battery, and then, after seeing that all persons in the vicinity have taken proper shelter, he fires the shot by turning the handle of the electric apparatus.

What actually happened was this. The shot-firer, a man named Howard, in contravention of the regulations permitted the appellant to connect the detonator wire with the cable. Thereafter, while the appellant was in the act of retiring from the face, Howard, deceived by a voice calling out "Right; fire away," which voice was the voice of another man and not of the appellant, and without ocularly satisfying himself that the appellant was in safety, fired the shot. The result was that the appellant, who had not yet reached a place of safety, was severely injured.

In the circumstances the arbitrator found that the appellant had been injured by an accident arising out of and in the course of his employment. An appeal was taken, and the learned judges of the Second Division recalled the finding of the arbitrator.

I do not think it necessary to make any remarks of a general character upon the phrase in the statute "arising out of the employment," because I did so, with the approval of other members of your Lordships' House, in the very recent case of *Plumb*,[1] and I do not wish to repeat what I then said. Nor do I think that there was any divergence of opinion in the judgments of the learned judges in this case from the law as then laid down. Taking the phrase as a test and not as a definition, it may, I think, be conceded that, if the accident was due to the man arrogating to himself duties which he was not called on to perform and which he had no right to perform, then he was acting out of the sphere of his employment, and the injury by accident did not arise out of his employment. The sole question is, Was this so in this case? or, in other words, What is the true view of the facts?

I regret that I cannot come to the same conclusion as that come to by the learned judges.

I think I can best make my view clear by taking the case of *Kerr* v. *William Baird & Co.*,[2] and contrasting it with this. In that case the miner arranged a shot and fired it entirely by himself—I mean without the presence or help of the shot-firer at any stage of the proceeding. It

[1] [1914] A. C. 62. [2] 1911 S. C. 701.

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Ld. Dunedin.

was held rightly that the accident was due to the action of the man, and that such action consisted in taking upon himself duties which he had no right to perform. Here, on the contrary, the miner did not arrange and fire the shot. One part of the composite action was his duty—to insert and stem the detonator—and that he did. The next step—the connecting of the detonator wire with the cable—he had no business to do, and in doing it he did something which was not in the sphere of his employment. But two more stages are necessary before we arrive at the explosion which causes the injury and forms the accident, namely, the connecting of the cable to the battery and the putting the battery into efficient action by the turning of the handle, and both these stages are done by the shot-firer. In the circumstances I cannot bring myself to see that the efficient cause of the accident was connected with the arrogation of unauthorized duty by the miner.

It is true that no explosion could have taken place unless the cable had been connected with the detonator. But that is only a remote cause *sine qua non*, and one in which the relation of the appellant to the act as distinguished from any other person is immaterial.

It seems to me that the question of fact which has to be answered is this: Did the injury to the appellant arise out of the illicit and unauthorized action of the appellant? The answer to that, it seems to me, so far as the action of the appellant consisted in coupling the wire, is No. The injury arose from the premature explosion, and that premature explosion was caused by the action of the shot-firer.

The learned counsel for the respondents felt this difficulty, and urged strenuously that the injury by the explosion to the appellant was really due to his, so to speak, lingering in the place of danger, and that this lingering was due to the fact that he had taken upon himself the duty of connecting the wire to the cable. If he were right on the facts I think his argument would be sound. But the facts as found by the arbitrator are, in my judgment, against him. The workman was, I think, under the regulation, quite entitled to stay in the vicinity of his working place till he was cleared out by the action of the shot-firer. As it was, he was in the act of leaving—an act which could only have been protracted for a few seconds by the connecting of the cable—and the whole mischief was caused by the premature action of the shot-firer.

I am, therefore, of opinion that the view of the facts taken by the arbitrator was correct, and that his finding should be restored.

LORD ATKINSON.—I agree.

LORD SHAW OF DUNFERMLINE.—I concur. I have had the satisfaction of perusing the judgment which has just been read by my noble and learned friend Lord Dunedin and it exactly expresses my own view.

LORD PARMOOR.—In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator has found that the appellant is entitled to compensation in respect of injury resulting from an accident arising out of and in course of his employment with the respondents. The Second Division of the Court of Session, upon a stated case, has negatived the

appellant's right to hold the award of the arbitrator. The question of law for decision is whether there was evidence before the arbitrator upon which it could be competently found that the appellant sustained an accident arising out of and in the course of his employment. In answering this question it is necessary, in the first place, to ascertain what are the facts as stated or found by the arbitrator; and, in the second place, to determine whether to the facts so stated or so found the arbitrator has rightly applied the provisions of the Workmen's Compensation Act.

The appellant was a miner in the employment of the respondents who suffered serious and permanent injury from the firing of a shot in the mine. When it was intended to fire a shot in the mine, the appellant as part of his ordinary employment would bore, charge, and stem the hole. In the present case he further attached the cable to the charge. In so doing he clearly acted outside the sphere of his employment, and in direct contravention of an Order of February 22, 1910, made by the Secretary of State for the Home Department, under section 6 of the Coal Mines Regulation Act, 1896. Under this Order a shot-firer had been properly appointed, whose duty it was to attach the cable to the charge, and to do so before coupling the cable to the firing apparatus. The shot-firer did not attach the cable to the charge and, before the cable was attached to the charge, it had been coupled to the firing apparatus. There is a further provision in the Order that the shot-firer before firing a shot shall see that all persons in the vicinity have taken proper shelter. In this instance the shot-firer heard a shout, "Right; fire away," which he thought came from the appellant, but which was in fact from a neighbouring miner and addressed to that miner's drawer who had informed him that a shot was to be fired in the vicinity. The shot was then fired. The appellant had not taken proper shelter and was seriously injured.

The arbitrator has found, on the evidence before him, that the cause of the accident was the connecting of the cable to the battery by the shot-firer before the cable was connected to the charge, and before seeing that all persons in the vicinity had taken proper shelter, and firing the shot without ascertaining that all persons in the vicinity had taken proper shelter, and that at the time when the shot was fired the appellant was entitled to be at his working place, and was proceeding to go to a place of safety.

The further consideration is, whether on this conclusion of fact it was competent for the arbitrator to award compensation under the Workmen's Compensation Act, 1906; or, in other words, whether it was competent for the arbitrator to find that when the appellant suffered the injury on which he based his claim to compensation he was doing some act arising out of or in the course of his employment. It is not seriously denied that the accident happened in the course of the employment of the appellant as a miner by the respondents. The real argument urged on behalf of the respondents is that the accident did not arise out of the employment of the appellant as a miner. If, however, the finding of the arbitrator is accepted, that the appellant was injured from the firing of a shot while proceeding to a place of safety, it appears to be impossible to maintain that the accident which caused the injury did not arise out of

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the course of his employment as a miner, and no such argument was directly advanced.

The argument for the respondents, when closely considered, is in reality, based on a criticism of the finding of the arbitrator. It is said that the appellant in attaching the cable to the charge was doing something which he was never employed to do and which he was prohibited from doing at all. No doubt this is so, and if the accident had happened while the appellant was engaged in work outside the sphere of his employment, and which he was prohibited from doing at all, it would not have been competent for the arbitrator to award compensation either on principle or without contravening the authority of decided cases. The answer is that the arbitrator has negatived any such conclusion on the evidence before him, and that this finding was within his competence.

In my opinion the question of law should be answered in the affirmative and the appeal allowed.

LORD DUNEDIN.—My noble and learned friend Lord Kinnear desires me to say that he concurs in the judgment about to be pronounced.

INTERLOCUTOR appealed from reversed, and the award of the arbitrator restored, with costs.

WALKER, SON, & FIELD—D. R. TULLO, S.S.C.—BEVERIDGE, GREIG, & CO.—WALLACE & BEGG, W.S.

No. 6.

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MRS MARGARET COYLE OR BROWN, (Pursuer) Appellant.—*Moncrieff, K.C.—Keith.*
JOHN WATSON, LIMITED, (Defenders) Respondents.—*Lord-Adv. Munro—H. W. Beveridge.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Injury by "accident"—Pneumonia following upon chill—Wreck in mine involving withdrawal of workmen—Chill due to standing in a draught while waiting to be raised to the surface.*

During the working time in a coal mine the miners in No. 2 pit, owing to a wreck in the shaft, were ordered to ascend to the surface by the shaft of No. 1 pit, which was the downcast shaft for the air current which ventilated the mine. The miners, who had been sweating at their work, were compelled to wait at a mid-landing for an hour and a half, exposed to the down draught of cold air, until the men from the lower levels, who usually ascended by this shaft, had been raised. On reaching the surface one of the miners, who had been exposed to the draught, complained of chill. On this chill pneumonia supervened, and resulted in the death of the miner.

In an application by his dependants for compensation under the Workmen's Compensation Act, the arbitrator awarded compensation.

Held (*rev.* judgment of the Second Division) that there was evidence on which it could competently be found that the deceased's death was due to an "injury by accident"; and award of the arbitrator *affirmed*

Drylie v. *Alloa Coal Company, Limited*, 1913 S. C. 549, *approved.*

(In the Court of Session, 30th January 1913—1913 S. C. 593.)

The pursuer appealed to the House of Lords.

The case was heard on 30th and 31st March 1914.[1]

At delivering judgment on 28th April 1914,—

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Lord Dunedin.—On the assumption that the case of *Drylie*[2] was well decided I am of opinion that this case is ruled by that. I cannot help thinking, on perusing the opinion of Lord Salvesen, that that learned judge really took the same view, although he did not wish to express a formal dissent from the views of the other members of the Second Division. It seems to me that here, as there, you have an accident interfering with the normal working of the mine; a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident; and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance, depending on some cause other than the accident, which occurs to break that chain of causation. I would illustrate what I mean by this by referring to the case of *M'Luckie* v. *John Watson, Limited*,[3] where the wetting which brought on the chill was not a necessary result of the accident, but was due to the workman's determination not to wait his turn for the cage, but to stand in water in order to get in front of his fellows.

As regards the case of *Drylie*,[2] I was a party to that judgment and I have seen no reason to alter the opinion I then formed. I have the satisfaction of knowing that those of your Lordships who have considered that case for the first time on this occasion have seen no reason to doubt that it was rightly decided.

Therefore I think that the present appeal should be allowed and the award of the arbitrator restored, and I move accordingly.

My noble and learned friend Lord Kinnear has asked me to state that he concurs in this opinion.

Lord Atkinson.—This case has been very ably argued. The difficulties raised by the contention put forward by the learned Lord Advocate on behalf of the respondents arise, I think, from his effort, upon one point at all events, to disintegrate, as it were, the compound but injurious

[1] In addition to the cases cited in the Court of Session reference was made to Dunham v. Clare, [1902] 2 K. B. 292; Brintons v. Turvey, [1905] A. C. 230; Ystradowen Colliery Co. v. Griffiths, [1909] 2 K. B. 533; Clover, Clayton, & Co. v. Hughes, [1910] A. C. 242; Warner v. Couchman, [1912] A. C. 35; Blakey v. Robson, Eckford, & Co., 1912 S. C. 334; Pugh v. London, Brighton, and South Coast Railway Co., [1896] 2 Q. B. 248; Victorian Railways Commissioners v. Coultas, (1888) 13 App. Cas. 222; Dulieu v. White, [1901] 2 K. B. 669; Cooper v. Caledonian Railway Co., [1902] 4 F. 880; Bell v. Great Northern Railway Co., (1890) 26 L. R. Ir. 428; Yates v. South Kirby Collieries, [1910] 2 K. B. 538; M'Luckie v. John Watson, Limited, 1913 S. C. 975; Eke v. Hart-Dyke, [1910] 2 K. B. 677; Fenton v. Thorley & Co., [1903] A. C. 443; Wicks v. Dowell & Co., [1905] 2 K. B. 225; Rodger v. Paisley School Board, 1912 S. C. 584; Manson v. Forth and Clyde Steamship Co., 1913 S. C. 921.

[2] 1913 S. C. 549.

[3] 1913 S. C. 975.

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effect upon a workman of the forces or agents into contact with which he may by an accident be brought, separating the immediate and primary effect from the ultimate effect and endeavouring to establish a sequence of causation between them. He contended that the accident, under the Workmen's Compensation Act of 1906, must, to entitle the injured workman or his dependants to compensation, be the proximate cause of the personal injury, and insisted that in the present case the chill sustained by John Brown, the deceased workman, was the proximate cause of his death by pneumonia, and that the accidental breakdown or wreckage of the machinery of the mine in No. 2 shaft, so far from being the proximate cause of this chill, was either a mere historical event unconnected with it, or, at least, if a cause of it at all, a very remote cause.

By way of illustration I put to him during the progress of his argument the following question: Suppose an employer is, during very cold weather in mid-winter, driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, the car skids and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, but rescued so tardily as to be thoroughly chilled, and that an attack of pneumonia is thereby induced of which disease he dies, would the dependants of the first man be entitled to compensation under section 1 of the Act of 1906? The learned Lord Advocate answered in the affirmative, that they would be so entitled. I then asked him, Would the dependants of the second servant be similarly entitled? and as I understood him, he answered, as indeed the necessities of the case obliged him to answer, in the negative. But can there be any real distinction between these two supposititious cases in relation to this statute?

The accident, or the chapter of accidents—the primary accident, the bursting of the tyre, the consequential accidents, the skidding of the car, the collision with the battlement of the bridge, and the precipitation into the river—are common to both cases. The element into contact with which the deceased servants were brought, the cold water, is the same. The injurious effect of this element upon them is different. It smothered the one. That was the injury in his case. It chilled the other so badly that disease supervened. That was the injury in his case. According to the contention of the Lord Advocate, as I understood it, the bursting of the tyre, though it was the primary accident which, through the agency of other accidents consequent upon it, brought about the prolonged exposure of the deceased to the action of the cold water, was not the proximate cause of death.

The principle upon which cases should be dealt with under the statute where death or incapacity is caused to a workman by a disease induced by an "injury by accident" is clearly laid down in the well-known anthrax case, *Brintons* v. *Turvey*.[1] Lord Halsbury is reported to have expressed himself thus[2]: "When some affection of our physical frame is

[1] [1905] A. C. 230.

[2] *Ibid.*, at p. 233.

in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury' because the injury inflicted by accident sets up a condition of things which medical men describe as disease. . . . It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted." Lord Macnaghten said[1]: "Speaking for myself, I cannot doubt that the man's death was attributable to personal injury by accident arising out of and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it sets up a well-known disease which was immediately the cause of death, and would, no doubt, be certified as such in the usual death certificate." Lord Lindley said[2]: "In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

In the present case there were two shafts to the respondents' mine, the downcast shaft No. 1 and the upcast shaft No. 2. The current of air which ventilated the mine passed down the former shaft.

The deceased workman, John Brown, started to work in the mine at 7 A.M. on the morning of 26th June 1911, at a place which was dry, with a good current of air passing through it. Brown and his mates were sweating as they worked, their clothes were somewhat wet from this, not from any other cause. Some breakdown of the machinery connected with shaft No. 2 took place. Brown and his companions were ordered, owing to this, to ascend to the surface, and while proceeding to No. 2 shaft to ascend in the ordinary and accustomed way, they were directed to ascend by No. 1 shaft instead. They attempted to do so, but were checked at the mid-landing for the very prolonged and entirely abnormal period of one and a half hours during which the down current of cold air was playing upon them. Brown, the deceased, was badly chilled by this prolonged and abnormal exposure. Pneumonia was thereby induced, and from this disease he died. The immediate cause of the delay was this, that the men from the lower workings who were usually raised to the surface by shaft No. 1 had not been raised, and Brown and his companions were detained till these lower workers were raised. Thus Brown and his companions were, owing to the accidental breakdown of the machinery in No. 2 shaft, placed by the orders of their master in a position where they were, through the accident of the prolonged and abnormal delay, exposed to the action of the current of air while they waited. That exposure was not expected, intended, or designed apparently either by the employer or workmen. It was one of the consequential accidents arising from the primary accident, the breakdown of the machinery, just as the prolonged immersion in the river of the servant who was rescued was, in the supposititious case I have mentioned, one of the consequential accidents of the bursting of the tyre of the motor car. This

[1] [1905] A. C., at p. 234.

[2] *Ibid.*, at p. 238.

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accidental but prolonged exposure was the cause of the "injury," the chill. The pneumonia was only the disease brought on by that injury.

I do not think this case can be distinguished on any solid ground from the case of *Drylie* v. *The Alloa Coal Company*.[1] There, owing to the breakdown of a pump, the water in a mine accumulated so that the workmen had to stop work. They went to the shaft to ascend and were kept waiting there for twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure caused to the deceased a chill from which disease has set up. It would appear to me that the abnormal exposure to the action of the cold air and cold water in that case was on all fours with the abnormal exposure to the current of cold air in this case, and that the exposure in the latter case was quite as much an accident as in the former, and the chill quite as much an injury by accident in that case as in the former.

In my opinion therefore this appeal should be allowed with costs, and the question of law stated by the learned sheriff-substitute for the opinion of the Court should be answered in the affirmative.

Lord Shaw of Dunfermline.—This appeal arises out of an arbitration under the Workmen's Compensation Act, 1906. Sheriff-substitute Shennan, an experienced arbitrator, sets forth the facts in a stated case and says: "In these circumstances I found that the deceased, John Brown, died from the effects of injuries by accident received by him on 26th June, while in the course of his employment with the appellants, and awarded compensation."

In my opinion there is no ground for holding that the learned sheriff had in any respect misdirected himself in law; and the view that his finding was contrary to, or in no reasonable sense in accordance with, the facts proved appears to me to be equally unfounded.

One pit shaft in this mine was blocked by an admitted accident; a dislocation of the working arrangements ensued; the men had to be sent up by another shaft under circumstances which exposed them to severe chill; this chill in one unfortunate workman's case brought on pneumonia; and of that the workman died. It appears to me both legally and philosophically incorrect to say that this should not be treated as a chain of causation—with the accident at the one end as cause, and death at the other end as effect. Wherever a chain of causation is alleged to exist it is possible to say that it is broken at a certain point, and to attribute the effect to a fresh and intervening factor. The sheriff, as the judge of the facts, did not find that the chain of causation was broken in this way, and I see no ground for saying that he erred.

I am accordingly of opinion that the judgment of the Second Division which recalled the arbitrator's finding and award should be reversed.

It would be unnecessary to say more but for certain considerations, to which, out of respect for the learned judges of the Second Division, it appears to me proper to allude. In the first place, the judgments distinguish the present case from a decision by seven judges of the Court of

[1] 1913 S. C. 549.

Session in Scotland (Lord Salvesen dissenting) in the case of *Drylie* v. *Alloa Coal Company*.[1] In that case by an accumulation of water in a mine (caused by a breakdown in the pumps) the workmen were forced to stand knee deep in water; one of the men was in consequence seized with pneumonia; and he died. The Act was held to apply and an award of compensation was made. I think that this was right and that the judgment was sound.

Had it been necessary, I should for myself have said that the principle of the present case was concluded by that applied in *Drylie*.[1] The cold element in the one case was water and in the other air. But, as Lord Salvesen indicates very clearly, there does not appear to be any other real ground of distinction between the two cases. In this I respectfully agree. Indeed, I do not entirely understand why that learned judge, accepting the *Drylie*[1] decision and not distinguishing the two cases, did not tender his dissent from the present judgment. But the learned counsel for the respondents were within their rights in maintaining that the present judgment is unanimous.

Before passing from *Drylie*[1] I desire to remark upon a passage in the judgment of Lord Dundas. That learned judge is reported to have said, "The circumstance of Drylie finding himself immersed to the knees in icy cold water was abnormal; it, in its turn, was, as matter of fact, due to an abnormal cause—the stoppage of the pump while men were at work in the pit; and if the pneumonia of which he died was, in fact, caused by his immersion, I think the elements of an 'accident' are here present." I am aware that, in the present case, the views of Lord Dundas do not exactly equate with those just cited from that report. But these sentences do appear to me to give, if I may say so, such a clear statement of a chain of causation, connecting the whole with the statutory provision, that I should humbly have adopted them if *Drylie*[1] had directly reached this House.

For the reasons given, I think that the present case was ruled by the judgment in *Drylie*,[1] and the departure in the present case from its principles—for I am humbly of opinion that the two cases cannot stand together—makes the present appeal of importance, and that particularly in regard to one point.

The point appears most clearly from the opinion of Lord Salvesen, and it is this: that countenance appears to be given to the view that the compensatory provisions of the statute cannot be invoked unless injury be caused by "physical impact." This is, at this time of day, a most serious and, in my humble opinion, a most disturbing and erroneous proposition. I think Mr Moncrieff in his able address and citation of authority was right so to treat it.

Lord Salvesen elaborately argues and illustrates the point in *Drylie*.[1] It is fair to the learned judge to say that he indicates that in his view the pneumonia which supervened to the workman may have been causally attributable, not to the accidental exposure, but merely to neglect. But while this is so, the learned judge does appear to give some countenance to the idea that physical impact, or indeed direct lesion, is required

[1] 1913 S. C. 549.

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in order to enable compensation to be given. He observes, for instance: "The only case decided in the House of Lords, so far as I am aware, where a death from a disease not preceded by some direct lesion was held to be a death resulting from injury by accident, is the well-known anthrax case.[1]" And in another passage he says: "In all such cases, if we are to affirm the judgment of the Sheriff-substitute, it will be open for the arbitrator to find, if he were bold enough to attribute the disease to a particular exposure resulting from some accidental occurrence, that it was the result of an injury by accident within the meaning of the Act."

I pass by the form of the expression, "if he were bold enough to attribute," and take the learned judge to mean "if he found as a fact that" the disease arose from exposure, &c.

It must be observed that the statute itself in no way limits the causal connection between accident and disease to cases of physical impact, nor does it treat the connection itself as anything extraordinary. In the section dealing with industrial diseases (sec. 8 (9)) it provides that "nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident within the meaning of this Act."

In the second place, such a restriction, excluding all cases, however serious,—say of shock and the like—unless physical impact or lesion had occurred, has, in my opinion, no justification in the state of the authorities. The one case cited in its favour is *Victorian Railways Commissioners* v. *Coultas*.[2] The case was decided by the Privy Council, and it is observable that the judgment of the Board was in form merely on the point of remoteness of damage. "Their Lordships . . . are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that impact is necessary, that the judgment should have been for the defendants." But there undoubtedly are observations by Sir Richard Couch of a more definite character. For instance, the learned judge, deprecating the extension of liability, does say, "In every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury," and he observes on the chance of a wide field for imaginary claims. In the present case and in *Drylie*[3] one may discern traces of similar views.

But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Commissioners* v. *Coultas*[2] has been questioned, and, to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority.

The subject was, if I may say so, examined with much erudition and care by the Lords Justices in *Dulieu* v. *White*,[4] and the *Victorian* case[2] was held not binding. I may be permitted respectfully to agree with the observations thereon of Kennedy, L.J., in his judgment. It may be added that these were in line with certain dicta of Lord Esher on the same topic in *Pugh* v. *London, Brighton, and South Coast Railway Company*.[5]

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[1] Brintons, Limited, v. Turvey, [1905] A. C. 230
[2] 13 App. Cas. 222.
[3] 1913 S. C. 549.
[4] [1901] 2 K. B. 669.
[5] [1896] 2 Q. B. 248.

In Scotland that very learned Judge, Lord Stormonth-Darling, in *Cooper* v. *Caledonian Railway Company*,[1] stated broadly and emphatically that the *Victorian Railway* case[2] was no part of the law of Scotland. Probably, however, no better analysis of it has been made than by Palles, C.B., in the Irish case of *Bell* v. *Great Northern Railway Company of Ireland*,[3] and I desire to tender my respectful adhesion to and approval of that judgment. I should add that other cases were cited showing it to be fully established by authority—recent and strong authority—that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort.

On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour—always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice, or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction. Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge.

The other case, of which the present is an example, is much narrower—a case of injury to the body, a physical injury, but a physical injury not caused by physical impact. On the point of the principle of liability, what is there to distinguish the case of a man who is drowned in a scuttled boat from that of another who is immersed and sustains a chill resulting in his death? Make the difference still narrower—as narrow, for instance, as between this case and *Drylie*.[4] The fatal pneumonia of one man is produced by his standing in cold water, and of a second by his standing in cold air. How the particular element which was the medium through which the producing cause operated towards the fatal result should have any legal effect in altering either the range or the canon of liability does not appear to my mind.

The truth is that the difference between all such cases is not one of principle. It is one of the things which becomes more notable as a point of difficulty in the practice of the law on the matter of proof. But whether the causal connection between occurrence and result be established, the principle to be applied is, as it ought to be, the same. The difficulty of establishing the causal connection may be, of course, much greater in the one case than in the other, and Courts of law are justified in demanding in all cases, and especially where external signs are wanting, that the relation of cause and effect be sufficiently established.

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[1] (1902) 4 F. 880.
[2] 13 App. Cas. 222.
[3] 26 L. R. Ir. 428.
[4] 1913 S. C. 549.

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If, however, it be established, then the liability in my humble judgment follows.

I am of opinion that the appeal should be allowed with costs.

LORD PARMOOR.—This is an appeal against the decision of the Second Division of the Court of Session in Scotland upon a case stated in an arbitration under the Workmen's Compensation Act, 1906. The arbitrator found that John Brown died from the effects of injuries by accident received by him on 26th June 1911 while in the employment of the respondents, and awarded compensation to the appellant.

The material facts are that between 8 and 9 o'clock on the morning of 26th June 1911, all the men in the pit where Brown was working were ordered to ascend to the surface in consequence of a wreck in the shaft. On their way they were met by an official, who told them to proceed by the communication road to the shaft of No. 1 pit. They had to wait at a mid-landing for about an hour and a half, until the men from the lower seam, who usually ascended by this shaft, had been raised. At the mid-landing, during the period of waiting, a strong current of air blew in on Brown and his fellow miners. When the men reached the surface Brown complained of feeling cold, and died from pneumonia due to the chill incurred while waiting at the mid-landing. Under these circumstances the arbitrator awarded compensation to the appellant; but the judges in the Second Division of the Court of Session in Scotland found that such award was not within the competency of the arbitrator.

It was not denied by counsel for the appellant that in order successfully to maintain a claim for compensation under the Workmen's Compensation Act, 1906, there must be an accident in the ordinary popular meaning of that term, and an injury attributable to such accident. The accident relied upon is the wreckage in the shaft, and the injury the chill from which Brown took pneumonia and died. The answer of the respondents is that the wreckage in the shaft should be considered merely as an historical incident in the narrative of the case, and as too remote a factor to which to attribute the injury, and that in any case the injury cannot fairly be attributed to the wreckage in the shaft.

I cannot assent to this argument on behalf of the respondents. The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage in the shaft, and but for such wreckage it would not have occurred. The incidents are closely connected and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draught did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim, a definite accident and injury fairly attributable thereto. It is not material that the wreckage in the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing, and the subsequent chill, as a probable or natural result of the wreckage in the shaft. Such considerations do not arise in a claim under the Workmen's Compensation Act. The workman under the Act is as much entitled to compensation if death results from exposure consequent on

and attributable to an accident as he would be if death had resulted from immediate physical injury.

A number of authorities were quoted by the counsel for the appellant. It is only necessary to refer to two of them. The case of *Victorian Railways Commissioners* v. *Coultas*[1] was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention, nor do I think that any such contention could be supported. The following passage occurs in the judgment: "Their Lordships . . . are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that impact is necessary, that the judgment should have been for the defendants."

The second case is *Drylie* v. *Alloa Coal Company*.[2] I am unable to distinguish that case from the present case. It cannot be material, for the purpose of a claim under the Workmen's Compensation Act, whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident and has caused the injury on which the claim to compensation is founded.

In my opinion the appeal should be allowed, and the question of law stated by the arbitrator for the opinion of the Court should be answered in the affirmative.

INTERLOCUTOR appealed against reversed and award of the arbitrator restored, with costs.

DEACON & CO.—SIMPSON & MARWICK, W.S.—BEVERIDGE, GREIG, & CO.—W. & J. BURNESS, W.S.

PETER WISHART, (Pursuer) Respondent.
GEORGE GIBSON & COMPANY, (Defenders) Appellants.—*Macmillan, K.C.—Alex. Neilson.*

No. 7.

May 14, 1914.

Wishart v. Gibson & Co.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Sched.* (16)—*Review of weekly payments—Date from which weekly payments may be ended or altered—Remedy of employer where workman charges for payment.*

The employers of an injured workman, in terms of an award of an arbitrator, paid him compensation for total incapacity up to 24th September, at which date they ceased the payments, contending that his incapacity had ceased. On 4th November they presented an application for review of the compensation, asking that the payments should be terminated as at 24th September. The arbitrator found in fact that the workman had completely recovered his capacity at 24th September.

Held (*rev.* judgment of Second Division) that the compensation fell to be terminated as at the date when the incapacity ceased, and not merely at the date of the application for review.

Donaldson Brothers v. *Cowan*, 1909 S. C. 1292, *overruled.*

Opinion (*per* Lord Atkinson) that the same principles would apply to an application to diminish or increase the weekly payments.

[1] 13 App. Cas. 222.

[2] 1913 S. C. 549.

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Opinions reserved upon the question whether, if payments have *de facto* been made by an employer after the date of recovery, he can obtain repayment.

Observations, per Lord Shaw (concurred in by the Lord Chancellor), on the procedure to be adopted by an employer, who maintains that the workman has recovered and ceases the weekly payments, if the workman charges for payment.

Ld. Chancellor (Haldane).
Ld. Atkinson.
Lord Shaw of Dunfermline.
Ld. Parker of Waddington.
Lord Sumner.
Lord Parmoor.

(IN the Court of Session, 28th June 1913.)

George Gibson & Company, shipowners, Leith, applied to the arbitrator (Sheriff-substitute Guy) for review of the weekly payments of compensation payable by them in terms of an award of the arbitrator to Peter Wishart under the Workmen's Compensation Act, 1906, and, being dissatisfied with his award on the application, obtained a stated case for appeal.

The case set forth, *inter alia*:—

". . . The respondent on 11th May 1912 applied for an award of compensation against the appellants under the said Act at the rate of 14s. per week as from 23rd April 1912, in respect of injuries sustained by him on said last-mentioned date by accident to his right hand, arising out of and in the course of his employment with the appellants as a dock labourer. On 5th August 1912 I issued my award, in which I found that the respondent was then totally incapacitated, and found him entitled to compensation at the rate of 14s. per week from and after 23rd April 1912. The appellants paid the respondent compensation in terms of said award up to 24th September 1912. On 4th November 1912 the appellants presented an application for review of the compensation payable to the respondent, and craved me to end the compensation as at 24th September 1912, or diminish the same, or to do otherwise in the premises as might seem proper. They, *inter alia*, averred that the respondent had, since 24th September 1912, completely recovered from his said accident, and was working in England, and earning the ordinary rate of wages there. The respondent averred in his defences that he was at the date of his defences (18th November 1912) still incapacitated as the result of said accident, and was only earning 23s. per week, which was all that he was able to earn in consequence of his injuries. At the diet of proof on 24th December 1912 the respondent's counsel stated at the bar that he consented to the compensation being ended as at 4th November 1912. The appellants thereafter led evidence. The respondent led no evidence, did not cross-examine the appellants' witnesses, and took no part in the proof. . . .

"I found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work.

"In these circumstances I ended the compensation payable by the appellants to the respondent under the award dated 5th August 1912, as at said 4th November 1912, the date of the presentation of this application for review, and I found the respondent liable to the appellants in expenses. I would have ended the compensation as at said 24th September 1912 had it been competent for me in this application to do so; but I held that it was not competent for me to do so, in respect that by doing so I would be disturbing a decree of Court as at a date when there was no proper application to enable this to be done."

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The questions of law were—"(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation at that date?"

On 28th June 1913 their Lordships of the Second Division (Lord Dundas, Lord Salvesen, and Lord Guthrie) answered the first question of law in the negative, stating in their opinions that they considered that the case was ruled by the decision of a Court of seven Judges in *Donaldson Brothers* v. *Cowan*, 1909 S. C. 1292, which they were bound to follow.

George Gibson & Company appealed to the House of Lords.

The case was heard on 21st April 1914.

Argued for the appellants;—The appeal was in effect an appeal from *Donaldson Brothers* v. *Cowan*[1] by which the Second Division were bound. It was there decided that the earliest date at which the arbitrator could terminate the compensation was the date of the application for review. That decision was both inequitable and illogical. It was inequitable because in an application such as the present it would necessarily often result in the employer having to pay compensation in respect of a period during which the workman had recovered his capacity, or, where the application was at the instance of a workman seeking an increase, in preventing his obtaining increased compensation for a period in respect of which he might be justly entitled to an increase. It was illogical, because, if review could not act retrospectively, the logical date must be the date of the award,[2] while, if it could act retrospectively, the logical date must be the alteration in the workman's condition. The date of the application for review was a purely arbitrary and meaningless date to select. Further, the decision in *Donaldson*[1] was inconsistent with the scheme and language of the Act,[3] which provided for payment of compensation only during incapacity, a provision which clearly involved the result that the date at which an arbitrator was to terminate compensation was the date of the workman's recovery, and the date from which he was to increase compensation was the date at which the workman's incapacity became increased. There was nothing in the language of paragraph 16 of the First Schedule inconsistent with this view. The words "on such review" did not mean at the date of the review, but in the course of the proceedings for review. Paragraph 9 of the Second Schedule, which provided for the recording of a memorandum of the award or agreement fixing the compensation, provided (with regard to proceedings in England) that "thereupon the memorandum shall for all purposes be enforceable as a county court judgment," but it did not provide that it should for all purposes be equivalent to such a judgment, and it was upon a misapprehension of this provision that the Scottish decisions had proceeded. Further it was not necessary that there should be a formulated dispute as to the workman's incapacity in order to entitle the employer to apply for a review, and in any case the cesser of the weekly payment was sufficient evidence of a disupte.[4] Although the precise point had

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[1] 1909 S. C. 1292.

[2] Steel v. Oakbank Oil Co., (1902) 5 F. 244.

[3] *E.g.*, First Schedule, (1) (*b*).

[4] Tyne Tees Shipping Co. v. Whitlock, (1913) 6 Butterworth's W. C. C. 559.

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never actually arisen for decision in England opinions favourable to the appellants' contention had been expressed by the judges in several cases.[1]

There was no appearance for the respondent.

At delivering judgment on 14th May 1914,—

LORD CHANCELLOR.—[In the Lord Chancellor's absence his opinion was read by Lord Atkinson]—The main facts out of which the question to be decided in this appeal arises may be stated briefly.

On 23rd April 1912 the respondent, who was a dock labourer in the employment of the appellants, sustained an injury by accident arising out of and in the course of his employment. On 5th August the Sheriff-substitute made an award under the Workmen's Compensation Act, 1906, under which he decided that the respondent was totally incapacitated, and was entitled to compensation at the rate of 14s. a week from and after the date of the injury. The appellants paid this compensation up to 24th September 1912, but after that date they paid nothing. On 4th November they applied under the First Schedule to the statute for review of this compensation, and asked that it might be ended as from 24th September, on the ground that the respondent had then completely recovered, and had since been earning wages at the ordinary rate. The Sheriff-substitute found that this was so, and ordered the compensation to end as from 4th November, the date of the application for review. He stated that he would have ordered it to end as from 24th September had it been competent for him to do so, but that he considered that the law did not enable him to disturb a decree of the Court as at a date when there was no application to enable this to be done. The question is whether this decision was right.

The answer to this question must depend on the proper interpretation of the terms in which the Act of Parliament has set up the jurisdiction, a jurisdiction which is new and is the creature of the statute.

The learned judges of the Second Division were of opinion that the Sheriff-substitute, who stated the question of law for their decision, had no power to end the compensation as from a date antecedent to the application for review. They agreed with the Sheriff-substitute in thinking that the point had been disposed of by a case which bound them, *Donaldson Brothers* v. *Cowan*.[2] In that case the First Division, with three consulted judges of the Second Division, construed the statute as meaning that it was not competent to end compensation at a date antecedent to that of the application for review notwithstanding that it was proved that incapacity had ceased at an earlier date. They held that the proper date of ending was that of the presentation of the application to review. The basis of their decision was, in the words (at p. 1298) of the Lord President (Lord Dunedin), that "when compensation is once fixed, the only way to alter

[1] Morton & Co. v. Woodward, [1902] 2 K. B. 276; Upper Forest and Western Steel and Tinplate Co. v. Thomas, [1909] 2 K. B. 631; Charing Cross, Euston, and Hampstead Railway Co. v. Boots, [1909] 2 K. B. 640; Hosegood & Sons v. Wilson, [1911] 1 K. B. 30.

[2] 1909 S. C. 1292.

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it is that provided by the statute, an application to vary." Lord Dunedin went on to indicate that he differed from the view which had been suggested in certain decisions of the Court of Appeal in England. The Master of the Rolls (Lord Collins) said in *Morton & Company* v. *Woodward*[1] that "the scheme of the Act is that compensation is to be given during the period of incapacity—that is, incapacity of the workman to earn his wages. Therefore, when a dispute arose as to the man's incapacity for work, the essential question was his condition, not when the Court was able to give its attention to the matter, but when the dispute was formulated as to whether the man's incapacity had ceased or not." This view received varying degrees of countenance from the Judges of the Court of Appeal in *Upper Forest and Western Steel and Tinplate Company* v. *Thomas*,[2] *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots*,[3] and *Hosegood & Sons* v. *Wilson*.[4]

The language of the statute on which depends the solution of this conflict between these judicial opinions leaves a good deal to be desired in point of precision. But after some hesitation I have come to the conclusion that the interpretation placed on it by the appellants is the true one. Paragraph 1 of the First Schedule provides that the amount of compensation, where total or partial incapacity for work results from the injury, is to be a weekly payment *during the incapacity*. The jurisdiction to award the weekly compensation is thus limited to the period of the incapacity. The arbitrator is to decide that there is incapacity, but he cannot make an award which will carry the compensation beyond that period. By paragraph 14 the workman receiving weekly payments is to submit himself, if so required, from time to time to examination by a doctor provided by the employer. By paragraph 15, if as the result an agreement is not reached as to the workman's condition, the question may be referred by the officer of the Court to a medical referee, whose certificate is to be conclusive. Paragraph 16 contains words which, taken by themselves, are ambiguous. It provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased." At first sight these words suggest that the right to payment up to the date of the review being a right arising from the previous finding, that finding and the title arising under it can only be got rid of by a second finding, that effecting the review, and only as from the date of the second finding and not retrospectively. But I do not, on consideration, think that this construction is consistent with the provision to which I have already referred, limiting the compensation to the period of incapacity. If on the review it is decided that payment of compensation ought to cease, on the ground that the workman, in fact, ceased to be incapable at a date previous to the application, I do not see how, this being a judicial review of the state of health subsequent to the previous decision, and the result of that decision having been limited to the period of incapacity, the workman can claim that payments should be made to him after he must be taken to have

[1] [1902] 2 K. B. 276, at p. 280.
[2] [1909] 2 K. B. 631.
[3] [1909] 2 K. B. 640.
[4] [1911] 1 K. B. 30.

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ceased to be incapable. What is brought under review is the continuance and duration of the incapacity.

In the case before us no question arises as to repayment to the appellants of money obtained from them after the incapacity ceased. In point of fact they paid nothing after 24th September. Had they paid, and were they now seeking to recover the money, another question would arise upon which I express no opinon. The weekly payments would have been made under a decree which was on the face of it valid, and which was not reviewed in any proceeding in the nature of an appeal, but stood until its effect was terminated by the exercise of a subsequent and original jurisdiction. It may be that what had been paid under the first decree could not have been recovered. As to this I say nothing, for no such point arises. The only question is whether the words in the schedule to which I have referred enabled the Sheriff-substitute to pronounce that the incapacity had ended before the application to review, in this case on 24th September. I think that they did. The alternative construction would allow the workman to claim payment notwithstanding that incapacity had ceased. I think the intention of the Act is to give compensation only during incapacity. If it has ceased, and the employer has not availed himself of his right to apply for review, it may be, as I have already said, that he cannot recover what he has paid while the first decree remained uninterrupted in its operation. But that would not involve the further conclusion that the judicial authority was precluded from subsequently determining the real date when the incapacity, during which alone the first decree could properly continue to operate undisturbed, had come to an end. It appears to me that the words "on such review may be ended, diminished, or increased" must, having regard to the provisions of paragraph 1 of the Schedule, be read as enabling a review to be made retrospectively. No doubt such a review is not in the nature of an appeal or a rehearing. Its character is, as I have already said, rather that of an original application. But I see no reason why the words should be read without reference to their context in the earlier provisions of the Schedule, and I think that so read they import the construction I have indicated.

I am, therefore, of opinion that the appeal must be allowed.

There is one further observation which I wish to make. There are differences between the procedure in Scotland and the procedure in this country which the statute recognises and provides for. I have had the advantage of reading the judgment of my noble and learned friend Lord Shaw, and I concur in the suggestion made at the end of that judgment as to the practical method of conforming to the requirements of Scottish procedure. It is important that on a point like this we should not introduce confusion about well-settled principles.

Lord Atkinson.—This case came before the Court of Session on a case stated by the Sheriff-substitute. The respondent was, by an award of the arbitrator dated 5th August 1912, awarded compensation, fixed at 14s. per week, from the date of the injury he had sustained, under the Workmen's Compensation Act of 1906, in respect of his total incapacity

due to an injury by accident arising out of and in the course of his employment. This award has not been printed in the case, but it is clear from the provisions of the 1st section of the statute, coupled with those of paragraph 1, head (*b*), of the First Schedule annexed to the Act, that the arbitrator, the Sheriff-substitute in this case, had only jurisdiction to direct the weekly payments to be made during the respondent's incapacity. It must therefore be assumed, at least in the absence of the order, that it was in conformity with these enactments, and was expressly or impliedly qualified so as not to be *ultra vires*.

On 4th November 1912, the appellants presented an application for the review of those weekly payments under the provisions of the 16th paragraph of the First Schedule. In that application they averred, as a fact, that the respondent had by 24th September 1912 completely recovered from the effect of the accident, and had since that date been working in England and earning the ordinary rate of wages there. They, accordingly, claimed that the weekly payment should for these reasons be ended as from that date. The appellants had refused to make, and did not make, any weekly payments to the respondent after 24th September 1912. So that the question of the right of an employer to recover back from a workman weekly payments made after incapacity had in fact ended, but before review, does not arise in this case at all. Whenever it does arise much may turn on the special facts of the case in which it arises, and I therefore advisedly abstain from expressing any opinion upon a point which is not raised, and could not be raised in this case, and has necessarily not been argued. The Sheriff-substitute has found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work. He states that he ended the compensation as at 4th November 1912, the date at which the appellants presented their application for review, but that he would have ended it on 24th September 1912 had he considered it was competent for him to do so. And the questions of law which he submitted for the opinion of the Court of Session are the following:—"(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation on that date?" These are the only questions before your Lordships' House for decision, and the answers which should be given to them must, in my view, depend entirely on the proper construction of the statute and the schedules attached to it, and on that alone.

Now, the 1st section of the Act runs thus: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." On referring to the First Schedule, paragraph 1 (*b*), coupled with paragraph 3, it is clear that what was aimed at was, by the payment of weekly sums during incapacity, total or partial, to compensate the workman for the loss of the power to earn wages. But as this incapacity, whether total or partial, might diminish or cease altogether, and as partial incapacity might develop into total incapacity, it was necessary to provide machinery for the adjustment, in the interest of employer and workman alike, of the weekly payments according to the

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changing condition of the workman subsequent to the first award. Accordingly it is provided that any workman receiving weekly payments under the Act must, if required by the employer, from time to time submit himself for examination by a medical man, and elaborate provisions are made for the reference of the question of the workman's fitness for employment to a medical referee.

Paragraph 16 deals with the review of these weekly payments, not a review in the nature of an appeal from the award made in the first instance by the arbitrator, who decides on the existence of incapacity when he makes his award, but a review directed to the question whether, owing to changed conditions, these weekly payments should be increased, diminished, or made to cease. It is a review, moreover, which may be effected under paragraph 16 by the agreement of the parties, and would more properly be styled a re-estimation or revision of the amount of compensation awarded rather than a review of the award itself. It is only when the parties fail to review by agreement that the matter is to be settled by arbitration. It was suggested in argument that the award of an arbitrator, whether original or made on a review under paragraph 16, is in the nature of a judgment of a county court. That this is an error is, in my view, clear from the provisions of paragraph 9 of the Second Schedule. By that paragraph the same effect is given to a memorandum embodying the terms of the agreement of the parties as is given to a memorandum embodying the decision of an arbitrator. The memorandum, when recorded, is, in either case, no doubt enforceable as a judgment of the county court, but that is a very different thing from saying that on registration it, in England, becomes a judgment of a county court. The judge of the county court is not *functus officio* when he makes his award in the first instance. Should the parties fail to agree to review the weekly payment, he is brought into touch with the matter again, and can himself do that for them, increasing or diminishing or making the payments to cease as to him shall seem necessary to meet the justice of the case. For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that, when proceedings for review have been properly instituted, the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended, at all events where, as in the present case, the employer has by his application given the date when he alleges incapacity has ended in fact, and claims to have the payments ended from that date.

According to the rules to which your Lordships' attention has been called, the practice prescribed in England, when an employer raises a defence against the enforcing of the payment of a weekly sum on the ground that incapacity has ceased, is apparently to make the order for payment but to stay the execution of it until the employer has had an opportunity of making a proper application for review, on the terms, however, that the amount awarded should be paid into Court. This would appear to me to be a most convenient and proper course. My noble friend Lord Shaw has dealt with the Scotch practice. I am clearly

of opinion that both the questions submitted by the Sheriff-substitute for the opinion of the Court should be answered in the affirmative. With all respect to the learned and distinguished judges who decided the case of *Donaldson Brothers* v. *Cowan*,[1] I am not quite sure that the peculiar nature of the awards of compensation under this statute was steadily kept in view.

It may well be that as a general rule judgments of Courts of law stand until they are reversed, and that when the right is claimed to modify them, the relief, when given, should only operate either from the time it is claimed, or from the time it is granted, according to the circumstances of the case; but where, as in this case, something is by an award directed or ordered to be done during the continuance of a certain state of circumstances or until the happening of a certain event, then that judgment or order by its very terms directs that this thing need not be done when those circumstances have altered in the way contemplated, or that event has occurred. And, all questions of laches or acquiescence apart, I can see no reason why, where it is proved in a proper proceeding that the particular state of circumstances has ceased, or that the particular event has occurred when the thing directed should cease to be done, the arbitrator should not be entitled to make an order, in truth only carrying into effect the first order, and direct that this thing need not be further done.

Though it is not necessary for the decision of this case to determine whether any different rule or principle should apply where it is merely claimed that the weekly payments should be diminished or increased, still I may say for myself that the inclination of my present opinion is that the same general principle should apply to the one case as to the other, and that the weekly payments should be varied from the time the circumstances justifying the change are shown to have occurred. I think the judgment appealed from was erroneous and should be reversed, and this appeal allowed, but without costs.

Lord Shaw of Dunfermline.—This appeal arises out of an arbitration under the Workmen's Compensation Act. The arbitration was in a process of review of a weekly payment made under a previous award. The facts must be taken as they are set forth in the stated case. They have been already fully adverted to.

From that case it appears that the respondent was on 5th August 1912 found by the Sheriff to be totally incapacitated for work. It is also "found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work." Not only so, but since that date, or rather since 25th September, it is found that the respondent has been fully employed and earning wages. In these circumstances the respondent claims that the weekly payments awarded to him during incapacity should be continued to him after his incapacity has ceased and he has been earning wages elsewhere. I think that this claim cannot be defended on any principle of common honesty. Nor do I think that it can

[1] 1909 S. C. 1292.

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be justified on any principle of law. For this reason I humbly agree that the judgments appealed from should be reversed.

The proceedings for review of the weekly compensation began on 4th November. It is clear that the learned arbitrator felt that to say that the cessation of incapacity then began was erroneous. The incapacity had ceased two months before. Quite correctly, however, interpreting the decision in *Donaldson Brothers*,[1] he felt himself prevented from getting back to the true date, or nearer thereto than the date of the petition for review. The judgment of the Court below in the present case also followed that of *Donaldson*.[1]

The case is not complicated by any payments having been made since the incapacity ceased. Where payments are in fact made, and repetition is demanded, there may be various considerations for and against such repetition: and pleas of bar, closed account, laches, and the like might come to be discussed. I humbly agree with the views on that subject expressed in the opinion of the noble and learned Lord Chancellor. These may be exceptional cases. But it may in general be said that, when both parties to an award do act in terms thereof, they will be presumed to do so on the footing of admitting that the conditions of the award were fulfilled and applied. It appears to me that so far as procedings under the Act are concerned—for I exclude other remedies grounded upon allegations of concealment, fraud, or the like—they ought not to be utilised so as to rip up concluded transactions.

In Scotland the effect of the recording of the award—an effect making it by the Act "enforceable" as a decree-arbitral—appears to some extent to have been emphasised at the expense of the consideration that the weekly payment was to be made during the continuance of the incapacity. I humbly look upon all the provisions as to procedure for review of the award to be provisions to enable Courts and arbitrators to get back to that cardinal point, to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity as to square with the facts.

An instance of what I mean is the judgment in the two cases of *Steel* [2] and *Pumpherston Oil Company* v. *Cavaney*.[3] A process of review may be lengthy, and judgment in it for many reasons may be much delayed. But these cases held that, until final judgment in the review was given, the old award (although proved to have been long out of accord with the facts) stood. This was never law in England, and is, of course, not now law in Scotland.

A great advance in Scotland was made by *Donaldson*.[1] This carried the change in liability a long step nearer to the change in the facts, and dated the former, not from the judgment in the application for review, but from the application itself. And I confess that, while I entirely agree that the case of *Donaldson* [1] was erroneous in not going further, I feel some of the difficulties alluded to in the Court of Session by Lord Dunedin. It is, of course, not of real assistance, however, that the award, or even the recorded agreement of parties, "shall be enforceable"

[1] 1909 S. C. 1292. [2] 5 F. 244. [3] (1903) 5 F. 963.

as a decree of Court. For the enforceability cannot affect the liability for or the existence or the *quantum* of the debt. Assume, however, an award made and recorded, the practical question is how is it to be treated after a dispute arises? By this I mean, not in the sense of a legally formulated dispute, but in the sense of an actual difference between the parties as to whether the condition of incapacity continues. The parties differ. In one case the workman alleges that his partial incapacity has now become total incapacity, and that the award should be increased. In another case the employer alleges that the incapacity ceased as at a certain date, and that the compensation should cease then, and he, in fact, has stopped on that account all further payments. The latter instance is the present case. But assume that in such an instance the workman denies any change of circumstances, and that accordingly a charge for payment in execution of the award is made. In my opinion the duty of the employer in such circumstances is instantly to institute proceedings for review by the arbitrator under the statute. He cannot bring a suspension of the charge in the ordinary sense so as to review the disputed circumstances in that process; but if the charge is persisted in he may *pro forma* bring a suspension [1] and table his application to the arbitrator for review, and the Court would at once suspend *in hoc statu* and sist all procedure in the suspension to enable the proper and statutory review to proceed. This, in my opinion, is the sensible course. It is a course which is suitable in Scotland, and it is in substance analogous to the procedure in England.

I agree with your Lordships that the appeal should be allowed, and that the questions stated by the learned arbitrator should both be answered in the affirmative.

Lord Parker of Waddington.—[In his Lordship's absence his opinion was read by Lord Shaw]—I agree. The liability imposed on the employer by section 1, subsection 1, of the Act of 1906 is a liability to pay compensation in accordance with the First Schedule to the Act; that is, in the case of total or partial incapacity resulting from the injury, to pay a weekly sum during the incapacity. By section 1, subsection 3, any question as to the amount or duration of the compensation is, in default of agreement, to be settled by arbitration. Any question as to the duration of the compensation must therefore in reality be a question whether the incapacity during which it is payable did or did not exist at the particular *punctum temporis* at which it is alleged that the compensation ceased to be payable.

In the present case the accident resulted in the total incapacity of the workman, and by the award of the Sheriff-substitute, dated 5th August 1912, the compensation payable was fixed at 14s. a week. The precise terms of this award are not in evidence, nor indeed do they appear to be material, for the duty of the Sheriff-substitute was merely to fix the amount of the weekly sum payable. He had no jurisdiction to determine prospectively—indeed it would be impossible to determine prospectively

[1] Note: *cf.* cases referred to by Lord Sumner, *infra*, p. 67, notes 1-4.

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—the duration of the weekly payment, which depended on the duration of the incapacity. The weekly sum payable under the award was paid until 24th September 1912. As from that date the employer refused to pay it, on the ground that the incapacity had then determined. There thus arose a dispute as to the duration of the compensation, and, the parties having failed to come to an agreement, this dispute was referred, as provided by the Act. The Sheriff-substitute found that the incapacity had ceased on 24th September 1912. Logically, therefore, it followed that the weekly sum ceased to be payable on and after that date. The Sheriff-substitute, however, felt himself constrained to hold, on the authority of *Donaldson Brothers* v. *Cowan*,[1] that the weekly sum did not cease to be payable until 4th November 1912, being the date upon which the arbitration proceedings in which his award was given were initiated. In this he was upheld by the order of the Second Division, now appealed from.

The decision in *Donaldson Brothers* v. *Cowan*[1] turned on the true meaning and effect of the provisions of paragraph 9 of the Second Schedule and paragraph 16 of the First Schedule to the Act. By the first of those paragraphs it is provided that any agreement or award determining the amount of the compensation is to be recorded as therein mentioned, and when recorded may be enforced as a county court judgment in England and as a recorded decree-arbitral in Scotland. This provision may be somewhat inaccurately worded, but its meaning is clear. The agreement or award determining the amount of compensation is not in any sense a judgment or decree, nor does it create any liability. The liability is imposed by the Act, and the agreement or award determines its amount. When, however, the agreement or award is recorded, the liability may be enforced as though it were a liability under a judgment or decree. Now, where the liability is to pay a weekly sum, not for any definite period but during incapacity, it could not, even if embodied in a judgment of the county courts in England, be enforced without some further proceeding, in which the Court could be satisfied as to the amount actually due. If in this further proceeding it were alleged by the employer that nothing was due as from a particular date, because on that date the incapacity had determined, it would be the duty of the Court to grant an adjournment so that the dispute as to the duration of the compensation could be referred. If on such reference the arbitrator found that the incapacity had in fact determined on the date alleged, it would be the duty of the Court to refuse to enforce the weekly payment after that date. It appears from the judgment of Lord Shaw, which I have had the advantage of reading, that though the procedure for enforcing or suspending a decree-arbitral in Scotland is somewhat different, the same results would follow. There is, therefore, nothing in paragraph 9 of the Second Schedule in any way at variance with the earlier provisions of the Act.

Passing to the 16th paragraph of the First Schedule, it provides that any weekly payment may be reviewed at the request either of the

[1] 1909 S. C. 1292.

employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum thereinbefore provided, and the amount of payment is, in default of agreement, to be settled by arbitration. This paragraph contemplates (1) that the weekly sum payable has already been ascertained by agreement or arbitration; (2) that, notwithstanding such ascertainment, a dispute has arisen as to the amount payable under the Act; (3) that this dispute will be itself settled by a new agreement or arbitration; and (4) that the settlement of the dispute may involve the weekly payment originally agreed or awarded being ended, diminished, or increased. The process by which the last-mentioned result is to be effected is called a review, but there is, I think, no magic in the word.

In the present case 14s. a week was the original amount awarded. Subsequently there was a dispute as to whether it had not ceased to be payable on 24th September 1912, by reason of the incapacity during which alone it was payable having wholly ceased on that date. This dispute was in due course referred, and the arbitrator found that the incapacity had in fact wholly ceased on 24th September 1912. The result seems to be that the weekly payment wholly ceased on 24th September 1912. There has been a review, with the result that the liability to make the payment was ended on that date. If it had been a case of partial incapacity, and the workman had alleged a total incapacity as from 24th September 1912, and claimed 16s. instead of 14s. a week, and the arbitrator had found in his favour, can it be doubted that the 16s. a week would have been payable as from 24th September 1912? I think not. It would be clearly inequitable and contrary to the true intent of the Act so to hold; and it seems to me to be equally inequitable and contrary to the true intent of the Act to hold that a weekly payment continues after the incapacity during which it is payable has wholly ceased. With great respect to the learned judges who were parties to the decision in *Donaldson Brothers* v. *Cowan*,[1] it appears to me that they took too technical a view of the 9th paragraph of the Second Schedule and the 16th paragraph of the First Schedule to the Act. They treated the award by which the amount payable was originally settled as though for all purposes, and not only for the purposes of enforcement, it was a judgment or decree, and as if the subsequent arbitration proceedings were in the nature of an action to set aside or vary such judgment or decree, whereas in truth the arbitration tribunal set up by the statute is a tribunal for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employer's liability under the Act.

I agree, therefore, that the appeal ought to be allowed.

Lord Sumner.—[In his Lordship's absence his opinion was read by Lord Parmoor]—I agree, and would add nothing if it were not that your Lordships are reversing part of a unanimous decision, now five years old, of seven judges of the Court of Session, without having had the advantage, since the respondent does not appear, of any argument in support of

[1] 1909 S. C. 1292.

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it. Out of deference to those learned judges, I think that I ought to state my reasons for differing from them.

The Sheriff-substitute of the Lothians and Peebles had before him an application by an employer, under paragraph 16 of the First Schedule to the Workmen's Compensation Act, 1906, dated 4th November 1912, to review, by terminating them as from 24th September previous, the weekly payments awarded to the workman under the original award. He found as a fact that the workman's incapacity had completely ceased on that day; and in fact, also, the employer had disputed the workman's right to be paid thereafter by the sufficient process of stopping the payments as from that day. The original award, though it is not before your Lordships, may be presumed to have been correctly worded, and so to have provided that the weekly payment was "to continue during the total or partial incapacity of" the respondent, "or until the same be ended, diminished, increased, or redeemed in accordance with the provisions" of the Act. The case states that "a decree of Court" was made thereon, but does not give any date or particulars.

The Sheriff-substitute stated in the case two questions of law: "(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation at that date?" And he adds that but for the authorities as to the effect of the decree of Court he would have done so. The judges of the Second Division, following the case of *Donaldson*,[1] said "No" to the first question and nothing to the second. The appellants submit, and I think rightly, that the answer to both is "Yes."

In connection with the review of an award of weekly compensation there are four occurrences the dates of which are, or may be, material. (1) The alteration or cessation of the workman's incapacity in fact. (2) Default of agreement to deal with the compensation accordingly, which involves a contention actually raised *inter partes* as to the continuance of the original or any payment, and the absence of any agreement determining that contention. In point of time either of these occurrences may precede the other. (3) An application duly made to have the weekly payments reviewed. (4) An actual decision upon that application. Where, by that decision, a weekly payment has been varied or terminated, a memorandum thereof must be sent under paragraph 9 of the Second Schedule to the registrar of the County Court, and when it has been registered "the memorandum shall for all purposes be enforceable as a County Court judgment," or in Scotland as a "recorded decree-arbitral." Not until this has been done has the review resulted in any adjudication; until this has been done the original award, if duly recorded without stay or suspension, is a judicial act still in force. The application for review does not of itself affect or suspend the operation of the award, and it has been laid down in Scotland, though it is otherwise in England, that "if a workman registers a memorandum and by that means gets power of execution, then the only proper way of getting out of the liability which that memorandum imposes is for the employer to end it in

[1] 1909 S. C. 1292.

the way provided by the statute, viz., by a petition under section (16), and that he cannot get out of it by any other process such as suspension": *per* the Lord President in *M'Ewan* v. *William Baird & Company*.[1] The same proposition, in substance, is to be found in *Fife Coal Company* v. *Lindsay*,[2] *Lochgelly Iron and Coal Company* v. *Sinclair*,[3] and in *Wilsons and Clyde Coal Company* v. *Cairnduff*.[4] On the other hand, if no memorandum has been recorded, and it is proved that the workman has acquiesced in a discontinuance or variation of the payments, then, as was held in *Lochgelly Iron and Coal Company* v. *Sinclair*,[5] suspension of the payments may be granted.

What, then, is the relation of the tribunal of review to the original recorded award? To what date, if any, prior to the date of its actual decision may its order relate? "Review" here does not, of course, mean appeal; for the review may be effected by the parties consensually, and there is besides a separate provision for an appeal against the original award. For the purposes of review the arbitrator who decides the second issue has co-ordinate jurisdiction with the arbitrator who decided the first, and often, as in the present case, is the same person. A review is a further arbitration and, as such, involves a submission which at the same time confers and limits jurisdiction.

Under the Workmen's Compensation Act, 1897, it was held some years ago that the tribunal of review can discontinue or vary the prior payment only as from the date of its actual decision: *Steel* v. *Oakbank Oil Company*[6] and *Pumpherston Oil Company* v. *Cavaney*.[7] The ground was that "the judgment still subsisted, notwithstanding an application to review it, until it was reviewed, and a judgment in the review pronounced, and ought to have been obeyed, notwithstanding the application for review, so long as it remained unreviewed and unaltered": *per* Lord Young in the case of *Steel*.[8] "It is not stated" (in paragraph 12 of the First Schedule to the Act of 1897, to which the present paragraph 16 corresponds) "at or from what time the ending, diminution, or increase of the weekly payments is to be made, but it appears to me that upon a sound construction of the section it cannot be assumed to have been intended that the review should take effect at any time prior to the judgment upon the application": *per* the Lord President in the *Pumpherston* case.[9] This view never was taken in England. Before either of these cases had been decided *Morton & Company* v. *Woodward*,[10] in the Court of Appeal, had laid down the contrary rule; and the decision in the case of *Donaldson*[11] in 1909 definitely abandoned the principle of these two cases. The first question, therefore, is whether they were rightly overruled.

Morton's case[10] was decided on the principle that the function of the tribunal of review is to arbitrate upon such disputes as may be duly brought before it. Hence the arbitrator is not limited in his jurisdiction

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[1] 1910 S. C. 436, at p. 440.
[2] 1908 S. C. 431.
[3] 1909 S. C. 922, at p. 930.
[4] 1911 S. C. 647, at p. 650.
[5] 1909 S. C. 922.
[6] (1902) 5 F. 244.
[7] (1903) 5 F. 963.
[8] 5 F., at p. 247.
[9] 5 F., at p. 966.
[10] [1902] 2 K. B. 276.
[11] 1909 S. C. 1292.

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to deciding the existence or extent of the workman's incapacity at the date of his award; but may, and, if either party desires it, must, decide it on the date "when the matter was first initiated before the Court," that is, at the date of the application to review, provided that a dispute as to the workman's then condition is then distinctly formulated. As Cozens-Hardy, L.J., tersely puts it (p. 282), "The matter which was referred to the learned County Court Judge, and which he was competent to deal with, was whether, at the date of the initiation of these proceedings, the incapacity to work had ceased." The argument for the employers in that case did not make it necessary for the Court to consider whether there was jurisdiction to review the weekly payments as at any date anterior to that of the application to review.

Two cases on this subject came before the Court of Appeal in 1909, *Upper Forest and Western Steel and Tinplate Company* v. *Thomas*[1] and *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots*.[2] In both the arbitrator terminated the weekly payment on review as from a date anterior to that of the application for review. In neither did the application state a date for the workman's alleged recovery. In the first case, on the workman's application to record, the County Court Judge, finding that it was opposed on an allegation that the incapacity had ceased, recorded the memorandum, but stayed execution to give time for an application for review. No exception seems to have been taken to this in the Court of Appeal, and the cases of the *Fife Coal Company*[3] and of the *Lochgelly Company*[4] were not cited. The Court of Appeal unanimously decided that on the form of the application to review the arbitrator had exceeded his jurisdiction, for "it was not referred to him to ascertain what was the state of the injured man at a previous date." The earliest competent date was, therefore, the date of the initiation of the review. The question whether, if the matter had been duly referred, he could have decided that the incapacity had ceased at a previous date was deliberately left open. In the second case the Court, now somewhat differently constituted, adhered to its former decisions that the arbitrator on a review cannot go outside the submission, and that he can review as from a date anterior to that of his own decision. Cozens-Hardy, M.R., intimated distinctly the opinion that "if there is a formulated dispute as to a workman's incapacity at a particular date, it is competent to the arbitrator to decide that dispute" (p. 644). He did not expressly put the case when the date particularized is anterior to the application for review itself, but there can be little doubt that his opinion was meant to cover that case. Kennedy, L.J., (p. 650) was also favourably inclined to that jurisdiction. Here again the County Court Judge, when recording the memorandum, had simultaneously stayed execution pending an application to review, and the majority of the Court of Appeal, expressing no doubts of its propriety, found authority for this course in paragraph 9 (*b*) of the Second Schedule. Buckley, L.J., held that the order to record the agreement ought to have been made, but so that the record

[1] [1909] 2 K. B. 631.
[2] [1909] 2 K. B. 640.
[3] 1908 S. C. 431.
[4] 1909 S. C. 922.

should not be enforceable as a judgment under the Second Schedule, paragraph 9. In other words, an order "that execution of the order for registration of the agreement be stayed" is right; an order "that execution of the judgment for enforcement of the agreement shall be stayed" would be wrong. He further considered that the facts sufficiently raised the question of the arbitrator's jurisdiction to terminate as from a date prior to that of the application to review, and that the form of the application also was adequate. Accordingly he held definitely that, as from such prior date, there was jurisdiction to decide that the workman was entitled to nothing. He expressly says "There is nothing in the statute to prevent it" (p. 648), an opinion in which I concur.

It is to be noted that the unanimous judgment of the Court continued the stay imposed in the County Court, which, whatever its form, effectually prevented the workman from getting payment, as from the date on which his incapacity was alleged to have ceased until the date of the employer's application to review, without making a further application for its removal, on which application cessation of incapacity prior to the date of the application to review could be alleged in answer and proved by the employer.

The conflict between the English and the Scotch decisions had attracted such attention that already in 1908 the question was mooted of bringing it before a fuller Bench in order to decide whether the cases of *Steel*[1] and of *Pumpherston*[2] should stand (see *Southhook Fire Clay Company* v. *Laughland*[3]), but all that was then decided was that if no memorandum had been recorded but mere voluntary payments had been made, there was nothing in the nature of an operative decree to stand against the fullest exercise of the power of review; and here the Court appeared to recognise that, in terms, paragraph 16 itself does not limit that exercise at all. This was the state of the authorities when *Donaldson's*[4] case fell to be decided.

The dates in that case are important. The workman got the agreement recorded on 5th October 1908. On 24th October 1908, as the Sheriff-substitute found, his incapacity entirely ceased. As from that date the employers had made no payment, and when, on 28th December, the workman charged them to make payment, they on 30th December brought a suspension of this charge. The Lord Ordinary refused the note of suspension, and the employers reclaimed. Meantime the Sheriff-substitute had heard the employers' application to review, which also was dated 30th December, and had stated a case with this question of law for the opinion of the Court: "Should the compensation payable to the respondent have been ended on the date of my judgment, viz., 23rd February 1909, or on the date on which the incapacity of the respondent had ceased, viz., 24th October 1908?" The stated case and the reclaiming note in the suspension were heard together. Upon the reclaiming note the Court, following the case of *Lochgelly*,[5] held that the suspension was

[1] 5 F. 244.
[2] 5 F. 963.
[3] 1908 S. C. 831.
[4] 1909 S. C. 1292.
[5] 1909 S. C. 922.

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rightly refused by the Lord Ordinary. The Court, further, overruling the cases of *Steel* [1] and *Pumpherston*,[2] held that the date of the Sheriff-substitute's judgment was not the date at which the payment should have been terminated, but, instead of finding in terms of the question of law stated, directed that the compensation should have been ended as on the date of the application to review, and so remitted the case to the Sheriff-substitute to proceed as accords.

Part of the reasoning of the Court appears to have been that until the application to review is made there can be no "formulation of a dispute," to use the phrase which originated with Collins, M.R., in *Morton & Company* v. *Woodward*,[3] except in a sense so wide that it would include a mere case of cessation of payment by an employer, which, unless the workman acquiesces in it or the employer acts from carelessness or want of money, shows of itself that the parties are in difference about it; that this would amount to the employer's "determining at his own hand" when incapacity ceases by taking the law into his own hands and disregarding the terms of a recorded memorandum; and that he is bound to continue to pay in accordance with it at his peril unless and until on an application to review he gets the weekly payments altered.

It is to be regretted that the Court of Session only had the *Charing Cross* case[4] before it in the form in which it is reported in 25 Times Law Reports, 683, a form which, while stating the reasons of the Master of the Rolls at length, fails to report the other judgments at all, and gives a most meagre and unsatisfactory note of their effect. It is evident that the learned judges of the Court of Session felt some difficulty in apprehending the reasoning of the Court of Appeal in that case, and I cannot but think that a full report, and particularly the observations of Buckley, L.J., at p. 648 of the Law Reports, [1909] 2 K. B., might probably have led them to a different conclusion.

So far as the decision in the case of *Donaldson Brothers* v. *Cowan* [5] overruled the cases of *Steel* [1] and of *Pumpherston*,[2] and held that the review might go back to a date anterior to the decision on the review, it seems to me that it was indubitably right, and that *Morton & Company* v. *Woodward*,[3] too, was rightly decided. There is a marked difference between the scheme of the Workmen's Compensation Acts, 1897 and 1906, and the Employers Liability Act, 1880. Section 1 of the latter provided that "where . . . personal injury is caused to a workman . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman." That right was to be asserted and those remedies pursued by action brought in the county court. The Workmen's Compensation Act provides otherwise. Section 1, while keeping alive an employer's pre-existing civil liability, declares that, "if . . . personal injury . . . is caused to a workman . . . his employer shall . . . be liable to pay compensation," and subsection 3 provides that, "if any

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[1] 5 F. 244.
[2] 5 F. 963.
[3] [1902] 2 K. B. 276.
[4] [1909] 2 K. B. 640.
[5] 1909 S. C. 1292.

question arises in any proceedings" not only as to liability, but also "as to the amount or"—mark this—"duration of compensation under this Act, . . . the question, if not settled by agreement, shall be . . . settled by arbitration, in accordance with the Second Schedule to this Act." As my noble and learned friend Lord Kinnear says in the case of *Pumpherston*,[1] "Procedure under the Workmen's Compensation Act is not ordinary litigation, or indeed litigation at all. The right given to the workman is a new and statutory right, to be expiscated by arbitration, and not by an action-at-law; and we must consider what the statute says with reference to the way in which it may be determined or modified."

Now, although there is provision for giving effect to the arbitrator's various decisions as if they were judgments of a Court, the awards themselves are not judgments, and a special paragraph (9 of Second Schedule) is required to enable them, after being duly recorded, to be enforced as if they were. That enforcement in its turn is affected by the provision for review. The statute does not contemplate a judgment for a sum of money recovered once and for all as compensation for the cause of action, in which judgment the cause of action merges. In the case of an injured workman it creates a right in the workman and a liability in the employer to receive and make respectively a weekly payment during incapacity, which weekly payment may be reviewed, and on such review be ended, diminished, or increased. This right persists instead of merging in the award when made as it would do in a judgment when recovered upon an ordinary cause of action; and the employer continues liable not simply to perform that award but to pay compensation during the workman's incapacity. Again, the right to the weekly payments does not belong to the workman without restraint, as his general choses in action would do. This right is dependent on continued residence in the United Kingdom, subject to one exception, and it cannot be assigned, charged, or attached, nor does it pass by operation of law (paragraph 19 of First Schedule). So far does this go that, although the workman can agree with his employer for the redemption of the weekly payments by a lump sum, that lump sum itself he can neither assign nor charge. It is therefore plain that the ordinary incidents of a judgment in an action do not attach to the decree-arbitral on the original award, nor, in so far as concerns the fluctuations in the condition of the workman's health from time to time, does the original award operate as *res judicata* to estop either party from claiming to reopen it after a change of circumstances and on fresh materials: *Sharman* v. *Holliday & Greenwood*.[2] The question how long and how far the prior decree continues to be "operative" and "subsisting" depends entirely on the construction of paragraph 16. To ask how the decree or review can divest the vested right to payments which are due, overdue, or payable under the original award is only a different way of stating the same thing. There is nothing in the mere language of that paragraph to limit the power of review in respect of the date at which the decision on the review may begin to operate. The object of the

[1] 5 F. 963, at p. 970. [2] [1904] 1 K. B. 235.

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power of review obviously is to enable the tribunal to adjust the payment to the incapacity from time to time, so that, as far as possible and for the sake of justice to both parties, the amount payable may increase or diminish as the incapacity increases and diminishes, and so that both may terminate together.

Upon the second question, I think the case of *Donaldson*[1] cannot be supported. The Court apparently thought that the Legislature meant the injured workman to get his payments regularly. So I should think it did. It was then thought that a retrospective review, not restricted to the date of the application, would encourage the employer to stop the payments as soon as he suspected that the workman's health had mended, and would be inconsistent with the decision in the case of *Lochgelly*,[2] above stated. The first reason assumed that a payment once made could not be recalled, however far the review might relate back, and that an employer would be tempted to stop payments at once, since otherwise, though he might succeed on the review, some part of his success would be barren. The second assumed that the paragraph which provides the right of review was concerned with the means of enforcing a recorded award, a matter for which the statute makes adequate provision elsewhere. As to the latter, if the workman fails to get the award registered, and then to enforce it, he must abide the consequences of his own want of diligence. Those consequences are not to be cured by attaching to the right of review a restriction which is not expressed. In the former case the employer could always arrive at the same result by making his application to review synchronize with his cessation of payment; and thus the construction adopted in *Donaldson's* case[1] achieves nothing. For my part, I think there is here no question for decision, either of the employer's right to recover from the workman sums paid between the date of his restoration to health and that of the employer's application for review, or of the exact procedure to be adopted in order to regularize the cessation of such payments pending a decision on review. Regard must be had in England to the practice established as to county court judgments, and in Scotland to the special incidents of procedure which attach to the "decree-arbitral" as a "recorded decree." I am glad to think that a procedure may be adopted which in effect will leave the working of the Act identical and uniform in both countries, and I am clearly of opinion that both the scheme and the language of the Act itself suffice to prevent any inference adverse to the full retrospective effect of the review being drawn from the provision that the award is to have the force of a "recorded decree-arbitral." So, too, I think your Lordships are not now concerned with the other assumption, that the employer can never recover from the workman payments once actually made. On that topic contrary expressions of opinion are to be found, on the one hand by the Lord President and Lord Adam in the *Pumpherston* case,[3] on the other by Cozens-Hardy, M.R., and Fletcher Moulton and Farwell, L.JJ., in *Hosegood & Sons v. Wilson*.[4] I have no opinion to express about it, though I apprehend that

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[1] 1909 S. C. 1292.
[2] 1909 S. C. 922.
[3] 5 F. 963, at pp. 966 and 968.
[4] [1911] 1 K. B. 30.

the ordinary rules about money paid voluntarily, or under compulsion of law, or under mistake of fact, will suffice to decide the point.

When the language of the Legislature is clear, suppositions as to the policy of the Act can rarely assist in its interpretation. Here, however, the *argumentum ab inconvenienti* is not in favour of, but overwhelmingly against, the decision on this point in *Donaldson's* case.[1] If the decision stands, workman as well as employer must, in self-defence, apply for review at the first inkling of any change in the former's incapacity. Each will await the effect of time and resort to repeated examination or prolonged observation at his peril. Each will recoil from negotiating with a view to a settlement of the dispute by consent for fear of prolonging the interval during which the original award must be rigorously implemented, no matter how the workman's health may have altered for better or for worse in the meantime. Each will hasten to claim a review as early as possible, in order that the fruits of success may be as ample as possible. It is to be presumed that the Legislature foresaw and provided for these contingencies. One would expect the power of review to be expressed without limitation, in order that the workman's incapacity, on which his right to compensation depends, may be followed as closely as possible in its fluctuations by an award for an adequate payment; and, in my opinion, the power is so expressed.

The problem is not a new one, though the expression "review" is, I think, new in this kind of legislation. Under the Matrimonial Causes Acts, 1866, 1878, and 1884, various provisions were made for weekly or other periodical payments by a husband to a wife, and it was foreseen that the circumstances of either parties, or both, might so change as to require those payments to be from time to time increased, diminished, or suspended. To effect this object, power was given to the Court which ordered the payment to vary it by further order as under the circumstances should be just. So here, the Legislature has dealt with a similar necessity in a similar way, and, making the changes incidental to arbitration, it gives to the arbitrator full control over the weekly payments by means of review. How the dispute is to be formulated, how the absence of agreement to settle it is to be proved, how it is to be submitted to arbitration, and how it is to be notified to the other side, are questions belonging to a different category altogether, which need not now be discussed.

I think that in the present case the arbitrator had full power to terminate the payments as from the date at which he found that incapacity had ceased; that the appeal should be allowed and the judgment below should be set aside; that the questions in the stated case should both be answered in the affirmative; and that the case should be remitted to the Sheriff-substitute to proceed as accords.

Lord Parmoor.—I agree. The facts in this case are simple. The question for decision is the construction of certain statutory provisions under the Workmen's Compensation Act, 1906. The respondent in May,

[1] 1909 S. C. 1292.

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1912, was awarded under the Act a sum of 14s. per week in respect of injuries by accident arising out of and in the course of his employment as a dock labourer with the appellants. In accordance with this award, the appellants paid compensation to the respondent up to 24th September 1912, at which date a dispute arose and the payments were discontinued. On 4th November 1912, the appellants presented an application for reviewing the compensation payable to the respondent, averring (*inter alia*) that the respondent had completely recovered from his incapacity by 24th September 1912, and asking (*inter alia*) that the payment of compensation should end as from that date. The Sheriff-substitute found as a fact that on 24th September 1912, the respondent had recovered completely from his incapacity for work; but held that it was not competent for him to end compensation at that date, since by doing so he would be disturbing a decree of the Court as at a date when there was no proper application enabling this to be done. Had it been competent for him to do so he would have ended the compensation at the date at which the incapacity of the respondent had ceased. The questions of law for the opinion of the Court are: (1) Was it competent for the Sheriff-substitute to end the respondent's compensation on 24th September 1912? (2) Ought the Sheriff-substitute to have ended the compensation at that date?

The case came on for hearing before the Second Division of the Court of Session. The first question of law was answered in the negative. No answer was given to the second question, and the determination of the Sheriff-substitute was affirmed. From this interlocutor the appellant appealed. The Second Division of the Court of Session in giving their decision held that they were bound by the case of *Donaldson Brothers* v. *Cowan*,[1] which it was not possible to distinguish. The question, therefore, is whether that case was rightly decided.

The general scheme of the Workmen's Compensation Act, in cases where total or partial incapacity for work results from injury, is to be found in section 1, subsection 1, and First Schedule, paragraph 1 (*b*). In such cases a weekly payment is provided as compensation during the incapacity of the workman, that is to say, during the period of time for which the workman is disabled from earning wages, either wholly or in part. For all ordinary cases an applicable form of award is given in the appendix to the Workmen's Compensation Rules. This form, following the scheme of the Act, orders that the weekly payment for compensation shall continue during the total or partial incapacity of the workman, or until the same shall be ended, diminished, increased, or redeemed, in accordance with the provisions of the Act. In the present case it was said that the award was in the ordinary form, so that under the terms of the award the weekly payment as compensation would only be payable during the total or partial incapacity of the respondent, but if a dispute arises whether and at what date total or partial incapacity has ended, this can only be determined under the statutory procedure in the Act. This procedure was put into operation at the instance of the appellants.

[1] 1909 S. C. 1292.

When an award of compensation has been made, a memorandum thereof is required to be recorded under the Second Schedule, paragraph 9. In the present case a memorandum of the weekly payment due to the respondent was duly recorded, and thereupon such memorandum became enforceable as a recorded decree-arbitral. In the same way a memorandum of variation in any weekly payments can be recorded, but to obtain such variation the statutory requirements must be followed. The Sheriff-substitute in refusing to end the compensation on 24th September 1912, at which date he found that the respondent had recovered complete capacity for work, based his decision on the ground that to do so would be to disturb a decree of Court at a date when there was no proper application to enable this to be done.

In my opinion, there is no ground for holding that the recorded memorandum is a decree of Court incapable of retroactive alteration by the Sheriff-substitute. Whether the recorded memorandum is to be regarded as a decree, or simply as a record of the terms of payment enforceable as a decree of Court, it is by express statutory provision open to variation and review under statutory procedure if conditions change.

The statutory requirements to be followed when it is desired to review any weekly payments ordered to be paid in a recorded memorandum are to be found in the First Schedule (16). It is enacted that in default of agreement, the ending, diminishing, or increasing of weekly payments shall be settled by arbitration under the Act. In the present case a dispute had arisen as to the continuance of the incapacity of the respondent, the appellants alleging that the incapacity of the respondent had ended on 24th September 1912, and ceasing to make payment from that date. There may be a difficulty in some cases in deciding at what date a dispute has arisen so as to determine the ambit of the jurisdiction of the arbitrator; but I think it is clear that such dispute did arise in the present case at the date of the cessation of the weekly payment. No agreement was made, and, in default thereof, the appellants applied to the Sheriff-substitute, averring that the respondent had at 24th September 1912 completely recovered from his accident, and asking that the weekly payment should be ended as from 24th September 1912. It was clearly within the jurisdiction and duty of the Sheriff-substitute to determine the dispute as to the date at which the incapacity of the respondent had ceased, and on this point he found in favour of the appellants. The further question is whether, having found the date in favour of the appellants, it was competent for him to alter the recorded memorandum in accordance with the finding. This further issue was undoubtedly submitted to him in the application to review. In my opinion it was within his power and jurisdiction to entertain it and he had competent authority to alter the time in the recorded memorandum by ending the compensation payable on 24th September 1912, this issue having been properly submitted to him under the statutory procedure. There is no limitation of time expressed in the statute and no reason why such a limitation should be inferred. I apprehend that the question is simply one of construction, and that considerations based on policy are irrelevant. I agree with the opinion expressed by Buckley, L.J., in the case of *Charing*

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Cross, Euston and Hampstead Railway Company v. *Boots*,[1] that there is nothing in the statute which would prevent the Sheriff-substitute going back to the relevant date, and that the question is only one of what are the issues which have been presented to the tribunal in the case in which the decision is invited.

In the case of *Donaldson Brothers* v. *Cowan*,[2] a case of great authority, which was heard by seven Judges, it was held that the Sheriff-substitute had a power of retroactive decision, but limited to the date of the application to him. This limitation is adopted on the ground that when compensation is once fixed the only way to alter it is that provided by the statute, an application to vary. No doubt the only way to alter compensation is by the statutory procedure but the tribunal to which the application is made is not thereby placed under any disability to determine the whole dispute referred to it, including the alteration of the recorded memorandum so as to accord with its determination on questions of fact. Assuming, as the Court of Session held, that there may be retroactive alteration in a memorandum enforceable as a recorded decree-arbitral, I am unable to find any ground for limiting the period for retroactive alteration to the date of the application to review, although differing with hesitation from so authoritative a judgment. In England the recorded memorandum under the Act is enforceable as a county court judgment, but this difference does not, in my view, in any way affect the power of the arbitration tribunal to which the application for review is made.

I desire to express no opinion on questions of procedure which do not arise in the present case. In my view both questions should be answered in the affirmative, and the appeal allowed.

INTERLOCUTOR appealed against reversed and the questions of law answered in the affirmative, no costs being allowed to either side either in the House of Lords or in the Court of Session.

BOTTERELL & ROCHE—BOYD, JAMESON, & YOUNG, W.S.

No. 8.

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Nasmyth's Trustees v. National Society for Prevention of Cruelty to Children.

THOMAS GOODALL NASMYTH AND OTHERS (A. H. Nasmyth's Trustees), Pursuers and Real Raisers.
THE NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, (Claimants) Appellants.—*Younger, K.C.—Church.*
THE SCOTTISH NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, (Claimants) Respondents.—*Clyde, K.C.—Hon. A. Shaw.*

Succession— Testament— Construction— Proof— Admissibility of extrinsic evidence—Ambiguity in designation of beneficiary—Bequest to a society—Designation exactly corresponding only to a foreign society.

Where there is an ambiguity as to the identity of the party to whom a testator has bequeathed a legacy, the fact that the description of one only of the claimants corresponds exactly to the description of the legatee given by the testator does not *per se* conclude the

[1] [1909] 2 K. B. 640.

[2] 1909 S. C. 1292.

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question in favour of that claimant, and does not preclude inquiry into the question whether another claimant, whose description does not exactly correspond, may not be the legatee intended by the testator; but there is a strong presumption in favour of the party exactly described which cannot be overcome except by cogent positive evidence.

A Scotsman, living in Scotland, left, among other legacies to charities, all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children," a society working in England, and "The Scottish National Society for the Prevention of Cruelty to Children," a society working in Scotland,—

Held (*rev.* judgment of the Second Division) that the legacy fell to be paid to the English society in the absence of clear proof that the testator intended that it should go to the Scottish society.

(In the Court of Session, 17th December 1912—1913 S. C. 412. Also 5th July 1913.)

Earl Loreburn. Ld. Dunedin. Ld. Atkinson. Lord Shaw of Dunfermline. Lord Parmoor.

Following upon the interlocutor of the Second Division of 17th December 1912, a proof was taken before Lord Salvesen, of which the import appears from the opinions of their Lordships of the Second Division printed in the footnote *infra*.

On 5th July 1913 their Lordships pronounced an interlocutor preferring the Scottish National Society for the Prevention of Cruelty to Children to the fund *in medio*.*

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* Their Lordships delivered the following opinions:—

Lord Justice-Clerk.—There can be no doubt that this is not a very easy question in some respects, and it is the more difficult because the circumstances of the case are highly complicated—indeed, so complicated that I doubt if anyone, even if he got a book and made excerpts of everything about the Society, would thoroughly understand it.

The effect of what is proposed on the part of the Society of London is that a desire for the protection of children uttered by a Scotsman, and a bequest given by a Scotsman to aid that desire, is to be of no benefit whatever to any Scottish child, or to any society that protects children in Scotland, but that the money is to be carried off to London and none of it is to be applied for any Scottish purpose whatever. Now that is rather a strong thing to ask for, but of course one always says if it is the law it must be carried out.

This Society carries on work in London, and is no doubt under its charter a National Society for the Protection of Children. But it is a National Society which recognises that it has nothing to do with Scotland. It has no duties in Scotland; it says it has none, and it does not fulfil any. But the peculiarity of this case is that in the two societies which had been formed there was a movement for affiliation; and the Scottish Society was most willing to affiliate with the English Society upon one condition, very expressly indicated, that if any Scottish testator left money to the Society it was to belong to the Scottish branch. When things were in that position this gentleman left a sum of £500 to the National Society for the Prevention of Cruelty to Children, and that sum necessarily, if he had died before 1907, must have come to Scotland. About that there cannot be a shadow of doubt. By the arrangement and the condition which the English Society agreed to that money would have come to Scotland.

Then it turned out that there was some legal difficulty about this affiliation. Apparently counsel both in England and in Scotland advised

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The claimants, the National Society for the Prevention of Cruelty to Children, appealed to the House of Lords.

The case was heard on 13th and 14th July 1914.*

that the Societies had no right to make it, and it was abrogated; but in no way did that alter the work that was carried on, because the work was carried on in England by the English people and in Scotland by the Scottish people. But there was nothing to indicate to the testator that any change had taken place at all. This affiliation subsisted until 1907. Now at the time that the testator made his will, could it be suggested for a moment that he did not intend the money to go to Scotland? If that was his intention, is it to be altered by the fact that these two societies separated once more and were no longer one parent stem of two branches, but each branch became once more a separate plant? I am unable to see it. It is no doubt perfectly true that if you take the word "national" in only one sense, it applies to England in this particular case. But that is a mere question of name, and has nothing to do with real nationality at all, because in this country there is a nationality as regards the State, which nationality is neither English nor Scottish nor Irish, but is the nationality of the United Kingdom. Nevertheless there is a nationality of the individual countries, and nowhere is that more clearly shown than in this country. We have never been absorbed in another country, but we are united to another country for practical purposes, and we retain our own laws. Therefore questions about nationality cannot be interpreted in every case in the same way.

I am not sure that, even if it had been brought home to the knowledge of this gentleman that the affiliation had been broken up, there might not have been considerable ground for saying still that upon the face of his proceedings he did intend to benefit Scotland and not to benefit England. That this bequest is mixed up with a number of other bequests is significant. He gave instructions to his solicitor to draw up his will in a particular form, and he gave instructions and notes. In note 22 we have a string of bequests, and each of these is a bequest for the purpose of helping some institution in Scotland except this one, if the contention of the London Society is sound. Practically in the middle of the list you have —the National Society for the Prevention of Cruelty to Children £500.

If there is room for interpretation at all in such a case, I should say that if there is a National Scottish Society for the purpose of preventing cruelty to children it would be reasonable to read his bequest as meaning that it is that Society he desires to favour. But I do not think there is any necessity to go upon that in the special circumstances of this case, where most undoubtedly at the time he gave these instructions the instructions meant that the £500 was to go to Scotland and not to England. That being so, I think it is vain to say that he must have seen—because he was a Scotsman—that some alteration had taken place as regards affiliation and that that made a difference. There is no evidence that he had seen it; and there is no evidence either of any desire on his

* The following cases were cited in the course of the argument:—Charter v. Charter, (1874) L. R., 7 H. L. 364; *In re* Kilvert's Trusts, (1871) L. R., 12 Eq. 183, 7 Ch. App. 170; *In re* Wolverton Mortgaged Estates, (1877) 7 Ch. D. 197; Higgins v. Dawson, [1902] A. C. 1, at p. 10; *In re* Fish, [1894] 2 Ch. 83; Henderson v. Henderson, [1905] 1 Ir. R. 353, at pp. 358-9; Wilson's Executors v. Scottish Society for the Conversion of Israel, (1869) 8 Macph. 233, at p. 237; Murdoch v. Magistrates and Ministers of Glasgow, (1827) 6 S. 186; Johstone's Executors v. Johnstone, (1902) 10 S. L. T. 42; Jarman on Wills, (6th edition) vol. i. pp. 513, 518.

EARL LOREBURN.—I greatly regret, and I am sure every one will greatly regret, that there should have been this unfortunate litigation between two most excellent societies, both of whom must command our entire sympathy; but, if there is any recompense to those who have heard the argument, we must find it in the excellence of the arguments which have been addressed to us on both sides.

In this case a Scotsman living in Scotland left, by a Scotch will, £500 to "The National Society for the Prevention of Cruelty to Children," using that name to describe the legatees. That is a society with its head-quarters in London, which does not appear actively to operate in Scotland. Now, there is a "Scottish National Society for the Prevention of Cruelty to Children" also in existence, and it claims that, under the circumstances, it is entitled to this bequest. The Courts in Scotland have

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part whatever to benefit the Society in England, whereas he did indicate an interest in the prevention of cruelty to children in his neighbourhood, and knew that there was a society and that it had officials for the purpose of carrying out the work of the society.

On the whole matter, and really without difficulty, I come to the conclusion that the judgment the Lord Ordinary pronounced has not been impinged upon by the proof which has been led, but rather supported, and that we ought to adhere to his interlocutor.

LORD SALVESEN.—I also agree that the judgment of the Lord Ordinary ought to be affirmed. I think, however, that we have got the grounds of judgment more clearly now that the facts have been inquired into. To use the language which is quoted by the Lord Ordinary from the opinion of Lord Chancellor Cairns in the case of *Charter* (L. R., 7 H. L. 364), the facts which were known to the testator at the time that he made his will ought to be known to the Court, so that the Court may place itself in the testator's position in order to ascertain the bearing and application of the language which he uses.

Now the facts as so ascertained are that this gentleman was a Scotsman whose whole interests were in Scotland, who very rarely visited England at all, who knew of the existence of the Scottish Society for the Prevention of Cruelty to Children in Scotland, and who was not known to have had any knowledge whatever of the English Society. The objects of his beneficence otherwise are purely Scottish. These being the ascertained facts of the case I think there can be no moral doubt that when the testator used the designation the National Society for the Prevention of Cruelty to Children he intended to benefit the Scottish Society. I agree with what your Lordship in the chair has said, that the word "national" may be used in two senses. A Scotsman generally speaks of institutions the full name of which may be "Scottish National" or the "National of Scotland" by using the description "National." He feels no occasion when he is speaking in Scotland to differentiate the institutions of this country from institutions similarly named in England. He speaks of a Scottish thing in Scotland, and he speaks of it as a Scotsman generally does.

This is not a case of a designation which does not fit a Scottish society such as the testator intended to benefit. No doubt it is true that the designation is the complete designation of the London Society, and is not the complete designation of the Scottish Society, because the London Society having come into existence first it was necessary to differentiate between the two by indicating that the sphere of operations of the Scottish Society was confined to Scotland. At the same time one cannot resist the view

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said we will examine—and they did examine—the circumstances of the testator, and the evidence in regard to his presumed intention, and they came to the conclusion that the testator did really intend to benefit, not the society which he had by name designated, but the Scottish National Society for the Prevention of Cruelty to Children.

I regret, as I always must do in differing from the Court of Session, that I am unable to come to that conclusion. When Mr Younger opened his argument he laid down, as a general proposition, that when once a *persona* is accurately named in a will then the rigid rule descends which forbids under any circumstances any further inquiry or consideration in regard to the person who is to take the benefit. I am not prepared to affirm so wide a statement. I do not enter upon it now. If I did so, the discussion would be academic, and it is not necessary for the decision

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that the testator's intention was to benefit the Scottish Society, of which he knew, and not to benefit a society with which he had never come in contact, and of which, so far as the evidence goes, he had no knowledge whatever.

It is an additional specialty of this case, to which your Lordship has referred, that at the time the will was drawn the funds bequeathed by Scottish testators to the National Society for the Prevention of Cruelty to Children would, under a domestic arrangement between the Scottish branch and the general Society, have gone to Scotland. But apart from that altogether, I think here there is sufficient ambiguity in the designation which the testator used to admit of proof of his intention, as that intention can be gathered from the language he used in relation to the surrounding circumstances and the state of the testator's knowledge.

On these grounds, which are substantially those on which the Lord Ordinary has proceeded, I am of opinion that his interlocutor should be affirmed.

Lord Guthrie.—I am of the same opinion. The Lord Ordinary had assumed certain facts which it was thought desirable should be investigated. I think the result of the proof is to show that the Lord Ordinary was right in the view he took of the facts, as well as in the result which he reached in reference to the will itself. With reference to the will, which was the second will, the testator was Scottish with none but Scottish interests, the trustees were Scottish, and, with the possible exception of the legacy in question, all the legacies are to Scottish beneficiaries, the one in question being embedded between a legacy to the Edinburgh Deaf and Dumb Benevolent Society and a legacy to the Edinburgh Hospital for Incurables, the Longmore Hospital.

It is certainly not impossible, even in such circumstances, that the testator might have desired to benefit the English Society, which no doubt is in itself an excellent Society, and is dealing incidentally with Scottish children in England. But certainly, although not impossible, it would not be probable that, being interested as he evidently was in children, he should make a bequest to a society which is purely an English Society, having only an incidental and remote interest, the one I have mentioned, in Scottish children.

Mr Constable argued that there was no room here for evidence at all, because the description of the English Society, which he represents, is exactly given by the testator, and that is a description which does not fit any other society; and he maintained that, if his clients were in that position, the Court was bound to give effect to his claim without any other consideration. It is not necessary to consider what the result might be

of this case. I will only take leave to observe that an extreme danger is apt to lurk in general rules like that. Some unforeseen circumstances may arise. No one—not even a Judge—can prophesy all the events of the future, and the Court may find itself confronted by a rule, which, applied in unexpected conditions, might lead to something quite shocking to its sense of justice. After that had happened a series of refinements upon that rule might find their way into the Law Reports, until in the end the Courts would rebel against further subtlety. Quite recently a venerable rule of equity—or supposed rule of equity—which had been long undermined, was finally and of necessity exploded by a decision of this House.

I think that the true ground upon which to base a decision in this case is this, that the accurate use of a name in a will creates a strong presumption against any rival claiming who is not the possessor of the name mentioned in the will. It is a very strong presumption, and one which cannot be overcome except in exceptional circumstances. I use, as a convenient method of expressing one's thought, the term presumption. What I mean is that what a man has said ought to be acted upon, unless it is clearly proved that he meant something different from what he said. Mr Shaw, in an argument from which I derived profit as well as pleasure, said that you have first to establish an ambiguity, and that then the scales would be even. The statement in itself, if you do establish an ambiguity, is an accurate statement. In that way he proposed to displace presumption.

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in a case where you had a description which did not contain any word that was possibly ambiguous, such as some of the illustrations which were given to us in the course of the argument. Here you certainly have the adjective "national," a word which seems to me to introduce such ambiguity as makes it possible for evidence to be competently submitted to the Court.

If evidence is to be considered, then it appears that the parties are agreed as to the origin of this bequest. It goes back to the year 1904, at which time a legacy, in the terms here contained, would have gone to the Scottish Society, and would have been spent for the benefit of children in Scotland. Moreover, these notes, which are under that date, were the foundation of the will of 1906, the first will he made. At that time the same result would have followed, because it was not until 1907 that the alteration was made under which we are now considering the present question.

The will of 1911 which we are now considering is, however, admitted to be, in the words of Mr Constable's clients, "a verbatim copy of an earlier will made by him in 1906." That seems to me, as your Lordship in the chair has said, to be a special element, which would be sufficient for the decision of this case; but if one looks at evidence contained in the proof and other matters, it appears that the testator, so far as we know, never heard of the English Society. He was not a member of the Scottish Society and did not contribute to it, but he certainly knew about it and had an interest in it, that interest being in regard to a particular case connected with his own estate, which got the benefit of the Society's operations.

On the whole matter I think there can be no moral doubt whatever of the man's intention; and I think there are ample legal grounds for supporting the judgment of the Lord Ordinary.

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I do not think that in this case any ambiguity has been established. The position is that the name of a certain society has been used, and it is necessary for those who question the right of that society to displace that. Counsel for the respondents sought to do so by saying that the name of a society is not necessarily to be treated in the same way as that of an individual, and the presumption is not so strong that the Society was intended, as in the case of an individual. It is a circumstance perhaps to be considered, but I confess I do not see that there is much difference between the two.

It was then urged that in the mouth of a Scotsman the use of the term "National Society" would of itself mean the Scottish Society; but it must be remembered that the testator here used this term, not as expressive of his own thoughts, but as part of a title or name which had been adopted by people living outside Scotland. It was then urged that the other charitable bequests in the will were given to Scottish charities. I do not see what conclusion is to be derived from that. Perhaps that is a reason for thinking that in this part of the will England should participate. It was said that, being a Scotsman, he probably meant to benefit Scotsmen. I should think that very likely; but I do not know why he would not also wish to benefit others of his countrymen living in the southern part of the island. We were told that all his interest and his residence were to be found in Scotland, and that he actually knew of a case, and had had brought to his notice a case, in which the Scottish National Society had intervened.

I think that concludes the evidence by which it is sought to strike out from a will the name of the Society designated in that will to receive the bounty of the testator, and to substitute the name of another society, of which there is actually no proof that the testator ever heard. With the utmost respect to their Lordships of the Court of Session, I am quite unable to accept that view, and I think this appeal ought to be allowed.

Lord Dunedin.—I candidly regret that I do not see my way to differ from the opinion that has just been expressed, because I cannot help having the moral feeling that this money is probably going to the society to which, if we could have asked him, the testator would not have sent it. But that is not the question for a court of law, the question for a court of law is, taking the will as it stands, who is the beneficiary—what is the meaning of the words used? On the one hand we have a perfectly full and perfectly accurate description of an existing society, of the existence of which the testator may quite well have known, although upon that matter our minds must necessarily be a blank. On the other hand we have a description which, if taken as the description of another society, is not fully accurate.

I think that the argument, as is really almost conceded now, of the appellants' learned counsel in this matter went too far. He would have it that so long as you had an accurate description of one person, and that accurate description did not exactly fit in its terms another person, no ambiguity could arise. I do not think that is the law. I think that the test whether the ambiguity does arise would be quite

fairly indicated in what I ventured to put at a very early stage of the argument, namely, Would the description, standing as it does, supposing there had been no competitor who had the exact name, have fitted the second competitor? If that is so, I think the question of ambiguity arises; but then that question of ambiguity has to be solved. The effect of a question of ambiguity arising is this, that it allows of an inquiry not into intention, but into any such facts and circumstances as may help to give you a key to the meaning of the words which the testator used.

Now, we have gone into that inquiry. I do not myself put it, so much as my noble and learned friend who has just spoken has done, as a presumption, but I put it thus: that here you have an accurate description of the one person, and a description which is admittedly not quite accurate of the other. You must, I think have positive evidence of some cogent sort to make you prefer the latter to the former. Such evidence, unfortunately, in this case I do not find. I do not think there is anything here in the very meagre facts which are before us which can make me prefer a description which is admittedly short of perfect accuracy to one which suffers under no such defect; and I therefore concur in the motion which my noble and learned friend proposes to make.

Lord Atkinson.—I concur with my noble and learned friend on the woolsack. I think that in this case the testator has used the well-known name of a certain society. In the name itself there is nothing ambiguous or difficult to construe and, *prima facie*, of course, those words in which he describes it should receive their ordinary meaning.

Now, it is sought to show that he meant some other society, not the society which he so describes; but it appears to me that this one circumstance disposes of the case, that there is no sufficient evidence to show that he intended to benefit any society different from that which he has accurately described. His language is in no way ambiguous. He selects the name and description of the society, which it bears and which no other society bears. I think therefore that there is no just reason for applying any principles applicable to a case where an ambiguity is raised on the face of a man's will to a will whose terminology is clear and unambiguous.

Lord Shaw of Dunfermline.—I agree with the judgment pronounced by the noble and learned Earl on the woolsack.

Lord Parmoor.—I agree with the judgment pronounced by the noble and learned Earl on the woolsack. I think the leading principle in all cases of this character is that the Court has not to make a will but to interpret the words which the testator has used. On this occasion I can find no ambiguity. The words he used are "The National Society for the Prevention of Cruelty to Children," which are the actual words to be found in the charter which was granted to this society a few years ago. I also agree—as was said by the noble and learned Earl on the woolsack—that it is important to remember that the descriptive words in this case were not selected by the testator. The arguments which we have

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had addressed to us as to the use of the word "National" are hardly relevant to the present case. The words here to which attention has been called are not the words of the testator at all, but are descriptive words taken from an outside document.

So far as the extrinsic facts are concerned, I think that most of the evidence here is quite irrelevant and inadmissible, but so far as it is relevant and admissible it appears to me to be of little or no assistance.

Lord Parmoor.

I agree with the view put forward by the noble and learned Earl on the woolsack, that the accurate use of the name "The National Society for the Prevention of Cruelty to Children" creates a very strong presumption in favour of the institution so named, a presumption which can only be rebutted in some abnormal case of a special character. I think that no evidence has been brought before your Lordships' House which in any way interferes with the principle that the language used by the testator should be given its ordinary natural meaning, and I think that the language is precise and accurate.

I agree with the motion of the noble and learned Earl on the woolsack.

INTERLOCUTOR appealed from reversed with costs.

CHURCH, RACKHAM & Co.—JOHN BURNS, W.S.—LITHGOW & PEFFER—R. C. GRAY & PATON, S.S.C.

No. 9.

July 16, 1914.

THE FARMERS' MART, LIMITED, (Pursuers) Appellants.—*Sandeman, K.C.—Holman Gregory, K.C.—W. Mitchell.*
JOHN MILNE, (Defender) Respondent.—*Younger, K.C.—Wilton.*

Farmers' Mart, Limited, v. Milne.

Contract—Pactum illicitum—Trustee in bankruptcy—Agreement to share fees with certain creditors.

A firm of land-agents agreed with their manager that all fees which he earned from any appointment which he might obtain as trustee or factor on any estate should be pooled with all fees which they derived as salesmen or valuators in connection with that estate, and that the fees so pooled, after payment to the firm of the balance of any debt due to them by such estate, should be divided equally between the parties.

In an action by the firm against their manager to recover, under this agreement, a proportion of fees alleged to have been earned by him as trustee on various insolvent estates.

Held (*aff.* judgment of the Second Division, but on different grounds) that the agreement was illegal and therefore unenforceable, in respect that it involved a violation of the fundamental principle of bankruptcy law providing for the equal distribution of assets among creditors; and action *dismissed.*

Ld. Dunedin. Ld. Atkinson. Lord Shaw of Dunfermline.

(IN the Court of Session, 9th December 1913—*infra*, Court of Session Cases, p. 129.)

The pursuers appealed to the House of Lords.

The case was heard on 14th and 16th July 1914.[1]

[1] The following cases which were not referred to in the argument in the Court of Session were cited in the House of Lords:—Waugh v. Morris, (1873) L. R., 8 Q. B. 202, at p. 208; Hire Purchase Furnishing Co., Limited v. Richens, (1888) 20 Q. B. D. 387, at p. 389; Lewis v. Davison, (1839) 8 L. J. Exch. 78; Holman v. Johnson, (1775) 1 Cowper, 341.

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LORD DUNEDIN.—In this case the pursuers and appellants are a firm of auctioneers who carry on business also as valuers, and they made an agreement with the defender, the respondent, to act for them as manager. The agreement dealt with the terms of his employment, and included a fifth clause, upon which the question arises. The fifth clause provides that "The second party"—that is the defender—"shall be entitled, but shall not be bound, to undertake any factorship or trusteeship on, or other office involving the management of, any estate, provided always that before undertaking any such factorship, trusteeship, or office, he shall first obtain the consent of the first parties, unless in the case of a testamentary or other gratuitous trusteeship, executorship, or factorship, any of which he shall be entitled to accept without the consent of the first parties," that is the pursuers; and then it provides that any fees that the second party derives from such employment shall (I am reading the clause short) "be pooled with all fees and commissions, including fees for measurements derived by the first parties from any sales or valuations in connection with any such estate . . . and the proceeds therefore shall be divided in the proportion of one-half to the first parties, and the other half to the second party, provided always that before any such division shall take place there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate, after giving credit for all sums received, or falling to be received, on account of such debt, and that whether from the principal or any subsidiary or collateral obligant therefor, or from the respective estate of any such obligants."

The effect of that agreement is not doubtful. If the defender acted as a trustee in a sequestration he would in terms of this agreement be bound to put the fees that he got as remuneration as trustee into a pool with any fees which they, the pursuers, got for employment which he gave them as trustee, and then in the division there would not be absolutely equal division of those pooled fees, but before anything else the pursuers, if they were creditors on the estate on which he was a trustee, would receive such an allowance over and above the dividends which they would get in common with ordinary creditors as would give them 20s. in the £. The action is raised in the form of a count and reckoning by the pursuers against the defender, in which he is asked for a count and reckoning of the particulars set forth of three particular occasions on which he acted as trustee and in respect of which transactions they say there is money due to them upon an accounting, if the accounting is worked out in terms of that very clause which I have just read. To that action the defender pled by his third plea that "The agreement founded upon by the pursuers being void, in respect it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed"; and that is the plea to which the learned Judges of the Second Division have given effect.

As to the general proposition that you cannot sue upon an illegal contract, there is, of course, no doubt; the question is whether a contract of this sort is an illegal contract. Now, taking it upon Scotch authority first, before coming to English authority, I find that the matter is very

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clearly dealt with, as it always is, by Mr Bell in his Principles. After setting forth that there are such things as illegal and immoral contracts, he deals in section 37 with contracts void at common law. He first sets forth contracts properly immoral, *contra bonos mores*, then certain rules as to *pactum illicitum*, and so on; and then he says this: "Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements are invalid." One best sees what is the true meaning of the words he there uses by going to the illustrations that he gives in the note in which he sets forth the cases on which his proposition is founded; and in the clause which I have read,—"prejudicial or offensive to the public or to third parties"—he adds this "such are, *exempli gratia*, agreements in which a creditor in fraud of an agreement to accept a composition stipulates for a preference to himself"; and he gives a reference to his well-known work—the large work—Commentaries on the Law of Scotland. Now the Commentaries give more than one illustration of this matter. They give the one I have just read, and they give also a case where a creditor has got a sum in order to accede to a trustee; that is a case, not of regular sequestration, but of private arrangement with the creditor where his concurrence has been bought. And another very good instance of the same thing is given by a case which is referred to in Lord Hunter's judgment and has been cited to your Lordships—the case of *M'Gown* v. *Tod* in the Faculty Collection.[1]

Now the truth is that a case of this sort really comes in either division; it is not only prejudicial to third parties, but it is inconsistent with public law and arrangement; and it is equally inconsistent with public law and arrangement whether it contravenes an actual section of the Bankruptcy Act, of which *Thomas* v. *Waddell*[2] may be taken as an example, or whether it goes against those general principles which are just as much applied to private arrangements even in Scotland—as trust deeds—as they are to the general arrangements which are prescribed in a sequestration.

I have so far kept only to Scotch authority. In English authority the matter is dealt with in precisely the same way. I note in the admirable work on Contracts by Sir Frederick Pollock that he expresses the matter in almost the same terms as Mr Bell, where he says[3]: "An agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons." And then he goes on and points out that when you come to this question of agreement in fraud of creditors you may really look at it from either point of view—either bearing directly on the sentence I have just read, or bearing on the general idea of being an interference with general arrangements of justice. So that if you look at the agreement and take it as it stands with this provision that in certain circumstances—that is to say, whenever these people are creditors—they are to eke out their

[1] 13th December 1808, F. C. [2] (1869) 7 Macph. 558.
[3] 8th ed., at p. 292.

dividends by getting from the trustee part of his remuneration, I think it is clearly an illegal bargain.

But that does not quite end the matter, because it might be said that the persons who really are prejudiced in this way are the other creditors, and this litigation is not a matter with which the other creditors have anything to do. There, again, I think the matter has been settled by a long course of decisions. The test was laid down so long ago as 1816 in the case of *Simpson* v. *Bloss*,[1] and the headnote there expresses it perfectly correctly: "The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case." The same thing was again said in the very celebrated case of *Fivaz* v. *Nicholls*,[2] in which Chief Justice Tindal says[3]: "I think that this case may be determined on the short ground that the plaintiff is unable to establish his claim as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant." It was repeated again in 1869 in the case of *Taylor* v. *Chester*,[4] where Mr Justice Mellor says: "The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*" (he is there referring to the words of Lord Mansfield in the leading case of *Holman* v. *Jackson*,[5] which was quoted to your Lordships) "is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." And it was again applied in the case of *Scott* v. *Brown, Doering, M'Nab, & Company*, in 1892.[6]

Now, taking that test here, it seems to me to solve the whole matter. The pursuers have solved it for themselves, because they cannot get the accounting they seek without getting it through the aid of that very clause which I have already said was illegal; they want that very clause to help them. And it is this test that really turns the flank of all those cases which have been quoted by Mr Holman Gregory. There are certain cases where an agreement is so divisible that it may be that the pursuer or plaintiff can enforce his demand without having recourse to the illegal part of the agreement, but here the pursuers cannot do so, because the only reason why they want this accounting is in order that, when the money has been pooled, they may be allowed to get 20s. in the £ in respect of the three transactions set forth.

On the whole matter I am of opinion that the judgment appealed from is right, and I move your Lordships that the appeal be dismissed with costs.

Lord Atkinson.—I entirely concur. I think this is a case of the greatest possible simplicity. The pursuers sue for an account of certain moneys received by the defender, and they base their right to get an account on a certain clause in this agreement. The moneys in respect of which they ask for an account are moneys received in three bankruptcy matters in which the defender was trustee. It is alleged that there were

[1] (1816) 7 Taunton, 246.
[2] (1846) 2 C. B. 501.
[3] *Ibid.*, at p. 512.
[4] (1869) L. R., 4 Q. B. 309, at p. 314.
[5] 1 Cowper, 341.
[6] [1892] 2 Q. B. 724.

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other matters in which he was trustee, but they are not specifically mentioned. The pursuers, however, sue for an account in reference to the moneys he received as trustee.

Now what is the particular clause of this agreement on which they base their right to that relief? There may be a dozen other clauses on which they would have other relief, but the particular clause that they wish to enforce here, and upon which they base their right to the relief that they claim, is the fifth clause, which to my mind is simply a device between the pursuers and the defender, in fraud of the bankruptcy laws, to secure to the pursuers a larger dividend than the other creditors in that estate are receiving. It is that, and nothing less. The provision is that this gentleman cannot act as trustee without their consent, and the clause of the agreement on which they rest their case might, I think, be conveniently stated thus: that, in consideration that they would consent to the defender acting as trustee in certain bankruptcy matters in which they were creditors, he would allow part of his remuneration, which was paid out of the assets, to be applied in part to secure to the plaintiffs a larger dividend than the other creditors in those bankruptcy matters were receiving.

I have not the slightest hesitation in holding that such an agreement is a fraud upon the bankruptcy laws, the great object of which, as distinguished from the Statute of Elizabeth, is not merely to secure that the assets of a bankrupt shall be distributed amongst his creditors, but that they shall be distributed equally. Equality is the great object and virtue of the Bankruptcy Acts, and it is to defeat that equality that this agreement was entered into.

For that, and for other reasons which have been given by the noble and learned Lord on the woolsack at greater length, I have no hesitation whatever in saying that this is an agreement which should not be enforced. Therefore the appeal must be dismissed, and the judgment below affirmed.

Lord Shaw of Dunfermline:—This is an appeal from a decision of the Second Division of the Court of Session. Having looked carefully through the judgments of the learned Lords, I agree with the conclusion reached therein. But I do not find myself in agreement with the opinions and grounds of judgment stated by their Lordships, and it is only in view of this that I venture to add any observations of my own.

I agree with my noble and learned friends who have preceded me. I think this action is pivoted upon one fact, and essentially, in so far as it is relevant, upon one fact alone. It is an action directed by the former employers of the respondent, Mr Milne, in order to obtain from him an accounting with regard to certain receipts that he obtained in respect of transactions carried out under the terms of a certain agreement. That agreement under head 5 provides that Mr Milne, being the acting manager and valuator and auctioneer for this farmers' mart, should be entitled to accept, *inter alia*, trusteeships under arrangements with creditors, or under bankruptcy, and that his fees as trustee should be dealt with in the manner to which I will presently allude. In head 5 it is

indicated that, being trustee of those estates, he shall, although there is no clause compelling him to do so, be entitled to employ his own firm for all purposes of valuations and the like.

The judgments in the Court below, in my opinion most unfortunately, give prominence, and, in the case of the Inner House, give entire prominence, to the relations thus existing between Mr Milne and his firm; and the ground upon which this agreement is said by the Second Division to be an improper arrangement which cannot be maintained is a ground of what their Lordships call double interest.

There are many cases in Scotland in which one member of a legal firm or a member of a firm of accountants becomes a trustee in bankruptcy also, and I have listened with some surprise to the argument that, because the firm of which that individual is a partner is employed without any suggestion of overcharges or the like in the business of the trust or the bankrupt estate, therefore a double interest has been created which entitles the parties to void the entire bargain.

All I will say upon that head at present is this: that in affirming the conclusion reached by the Second Division I must not (and I assume your Lordships are in the same position) be held to commit myself to any one of the propositions under which the Second Division reached that conclusion. It would require a very great deal of argument, as I am at present advised, to enable me to assent to the general and somewhat astonishing proposition of the Lord Justice-Clerk that "A contract of this kind may be innocent in the sense that it may be possible to carry it out without committing any illegality"; and his Lordship proceeds to say that if an innocent contract which might be carried out without any illegality might also be carried out by way of illegality, therefore the contract itself is a void contract. In building transactions there are what are known as time and lime contracts; in many transactions in which tradesmen are employed the customer is at the mercy of a tradesman, who, if he be dishonest, can act illegally and make overcharges and the like. There is hardly any innocent contract for the doing of an act or rendering of a service which may not, by reason of dishonesty, be converted into something improper. But I have never yet heard it suggested that that is a reason for voiding such a contract. And I withhold my assent entirely from the argument contained in the judgments both of the Lord Justice-Clerk and of Lord Guthrie under the head of there being that double interest which made this contract a voidable bargain.

But there is a much simpler approach to real justice in this case, and it is that which I am glad to think your Lordships have taken. Under head 5 of this agreement it is provided that when the fees of the trustee in bankruptcy come to be pooled along with the auctioneering and other charges of the firm by which he was employed, then out of these proceeds there shall be paid to the first parties—that is to say, to the appellants—the balance of any debt remaining due to them from such estate. I agree with my noble and learned friend Lord Atkinson in the language he has just employed. That is a distinct bargain of an illicit character.

This does not depend in Scotland on any Act of Parliament although,

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if the statute of 1856 and other Bankruptcy Acts were applied to it, it would be found that there is confirmation, in every line of those provisions against illegal preferences, of the proposition that when once an estate is thrown into bankruptcy every creditor upon that estate is entitled in the distribution of its assets to equal terms and nothing but equal terms. Special preferences created under special contracts or by special circumstances there may be, but that is the general rule. But equality of treatment is destroyed if, in respect of any services rendered by the trustee, he has a private bargain with certain creditors that out of his fees they shall be preferred as to the balance unpaid to them out of the estate in general. It is manifest that the trustee in such circumstances is in the position of having to distribute a part of his fees to one set of creditors in preference to others. If that part of his fees was distributable among creditors at all, it was distributable among the whole body. Accordingly, on that ground I should be prepared to affirm the conclusion reached by the learned Lords of the Second Division, although by no means for any of the reasons assigned in their judgments.

I have dwelt upon this because it occurred to me, when I read the judgment of the Second Division, that this case could surely not have been argued as it was presented at your Lordships' bar in the Court below. But Mr Wilton has assured me that it was so argued, and I call your Lordships' attention to a passage in the judgment of Lord Hunter upon this subject. Anything under the hand of Lord Hunter is entitled to great weight, and his Lordship puts the matter in this way: "The stipulation as to the pursuers receiving payment in full of any debt due to them by the bankrupt out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties." In the view that I take it is much more than an unfortunate condition; it is a condition expressly contrary to that equality of honest distribution of the estate which ought to prevail in all bargains with respect to trusteeships of sequestrated estates in Scotland.

But Mr Holman Gregory said, and said with much force, that this occurs only in one clause of the contract; and the action is a general one for count and reckoning, and may apply to a series of circumstances in which it did not operate. Most unhappily for such an argument, the language of the condescendence of the pursuers makes this unavailing. I find on a perusal of this record that the broad proposition radically affecting the finance of the matter and the claims of the appellants occurs in cond. 5, where there is a reference to an unpaid balance of £168 due from the estate of a Mr John Fairweather. With regard to that unpaid balance, the scheme of the present count and reckoning is this, that that unpaid balance, in the language of cond. 5, "falls to be first paid to the pursuers out of the sum pooled in terms of said article fifth," that is to say, it falls to be paid out of the trustee's own remuneration.

I do not think Mr Wilton, in drawing these pleadings, was wrong when he stated that "such a transaction if carried out would be a fraud upon the other creditors who accepted their dividends in the belief that

all the creditors, including the pursuers, were receiving equality of treatment from the defender as trustee." I think that is a sound proposition; it is in accordance with all that equitable distribution of assets under the law of Scotland. (I may say in passing that I have not heard anything in the argument to suggest to me that any different rule from that prevailing north of the Tweed prevails to the south of it.)

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I agree with the conclusion at which your Lordships have arrived.

APPEAL dismissed with costs.

HELDER, ROBERTS, WALTON, & GILES—TAIT & CRICHTON, W.S.—GRAHAMES, CURREY, & SPENS—J. C. BRODIE & SONS, W.S.

No. 10.

MRS MARY KERR OR LENDRUM AND ANOTHER, (Pursuers) Appellants.
Clement A. Edwards—W. T. Wetenhall.
AYR STEAM SHIPPING COMPANY, LIMITED, (Defenders) Respondents.
—Horne, K.C.—Alex. Neilson.

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Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Unexplained death—Seaman found drowned—Inference from proved facts.*

In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation.

Circumstances in which the House of Lords (*rev.* judgment of the Second Division) *diss.* Lord Dunedin and Lord Atkinson, *affirmed* the award of the arbitrator, *holding* that there was evidence from which a reasonable man might draw the inference that the accident which caused death arose out of the employment.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58)—*C. A. S.* 1913, *L. xiii.* 17 (*g*)—*Process—Appeal by Stated Case—Remit to arbitrator for further information.*

Observations on the principles which should guide the Court in remitting stated cases back to the arbitrator for further information.

(IN the Court of Session, 5th December 1912—1913 S. C. 331.)
The pursuers appealed to the House of Lords.
The case was heard on 16th July 1914.[1]
At delivering judgment on 17th July 1914,—

Earl Loreburn.
Ld. Dunedin.
Ld. Atkinson.
Lord Shaw of Dunfermline.
Lord Parmoor.

EARL LOREBURN.—In this case the arbitrator found that the applicant came within the statute, and awarded compensation accordingly. The Court of Session set aside the award, and the question before your Lordships is simply this—Was the conclusion of the arbitrator such as a reasonable man could reach? In the case of *Mackinnon* v. *Miller*,[2] Lord Dunedin laid down that principle and it is now quite ascertained. Any

[1] The following cases which were not referred to in the argument in the Court of Session were cited in the House of Lords:—Hawkins v. Powells Tillery Steam Coal Co., [1911] 1 K. B. 988; Macdonald v. Owners of s.s. "Banana," [1908] 2 K. B. 926.

[2] 1909 S. C. 373.

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of us may think that we can see the truth better than the arbitrator. Perhaps we may be right, perhaps we may be wrong. It is, however, no business of ours. We have no jurisdiction to decide the question of fact as we think right. Our jurisdiction is confined to the more modest duty already described.

The deceased was steward on a ship lying in harbour. He was lying in his bunk. The captain told him to get tea ready for the men. The next thing known is that he disappeared and was found some time later drowned in the sea. He was sober. He was subject to nausea. The bulwarks were 3 feet 5 inches above the deck. These are, to my mind, the material facts found by the arbitrator in the case stated.

This class of case has led to much refinement. I do not find it very profitable to consider whether the arbitrator's award proceeded on inference or on some kind of speculation, which was described in argument by four words successively, namely, conjecture, probability, guess, and surmise. I am not qualified, and I do not know anyone who is qualified, to draw a precise line between the thoughts suggested by these several words. They seem to me to run into one another. Nor can I define wherein any of them differ from an inference.

Nor am I impressed by arguments proceeding upon a comparison between the facts of one case and the facts of another. Precedents are valuable and authoritative when they lay down a principle. They are otherwise merely illustrations of the way in which Judges look at facts. Unfortunately, Judges are human like other people, and different Judges look at facts differently. Nothing has struck me more than this circumstance. When the question is whether or not an arbitrator, as a reasonable man, could arrive at a particular conclusion, I find that in some instances Courts have held that he could not, while some of the Judges who took part in the decision have actually agreed in the conclusion. That is my position to-day. I hope I am a reasonable man, but if I had been the arbitrator, I should, on the facts that he has found, have come to exactly the same conclusion. I think the moral is that we should regard these awards in a very broad way, and constantly remember that we are not the tribunal to decide. I shall always be slow to say that no reasonable person could think differently from myself.

This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived. Suicide is negatived. No suggestion was made either of the one or the other, and the arbitrator has negatived both. He was on the ship—a place of some danger if you are careless—in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I think he must have fallen over by accident while on board as his duty required. But my opinion is not the point. The point is that the arbitrator took that view; and though I could understand his taking a different view, I think there was evidence which justified him in inferring that the man died by accident arising out of his employment. It surely cannot be necessary to show either the particular way in which he fell or the particular thing he was doing when he fell. An applicant has to prove

his case, but he is not required to demonstrate his case or to exclude by evidence every possibility that may be suggested.

Accordingly, I think this appeal should be allowed.

I desire to add a few words about the remit. Where a case is stated incompletely or ambiguously, a Court may remit for further information. But I think that here the remit went beyond that. Among other things, it asked some questions which must have been suggested at the bar from perusal of the evidence, the answers to which would not affect the question whether or not there was sufficient evidence to support the award. A remit is not intended to assist the Court in substituting itself for the arbitrator.

Lord Atkinson.—I regret that with every disposition to come to the same conclusion as my noble and learned friends I have been unable to do so. I concur, however, on the question of remit. I think that cases should be remitted where the findings of the arbitrator are incomplete and ambiguous or obscure. Since the superior Court cannot look at the evidence, it is necessary that the findings on important facts should be clear and precise, and if they are neither clear nor precise it is, I think, the privilege and the duty of the Court before which the case comes to remit it to the arbitrator in order that he may make complete what was incomplete, and make plain what was obscure. I concur, however, that in this case the remit was directed to matters that were really not relevant or bearing upon the important facts.

In this case the widow of Edward Lendrum, deceased, and Edward Lendrum, her son, sued the respondents under the Workmen's Compensation Act of 1906 to recover compensation in respect of the death on the 16th December 1911 of the deceased, alleged to be caused by an accident arising out of and in the course of his employment as a steward in a ship of the appellant company named the "Turnberry." The arbitrator, the Sheriff-substitute, has found in favour of the applicants' claim (1) that the deceased met his death by an accident arising out of his employment, and (2) that he met with this accident in the course of his employment. And the question of law put by the arbitrator in the case stated for the opinion of the Second Division is, to use his own language, whether on the facts admitted and proved he was justified in so finding. By the word "justified" he must, on the authorities, be held, I think, to have meant whether upon the evidence in the case his findings on these two points were conclusions which, as a reasonable man, he might in good faith have arrived at. It is not disputed that the employment of the deceased was a continuous employment as distinguished from an intermittent employment. In my view, however, that consideration is wholly immaterial. Whether a workman's employment be continuous or intermittent, those claiming compensation in respect of his death are bound to prove that the death resulted from an injury by accident arising out of and in the course of the workman's employment. That burden of proof is as heavy in the one case as in the other, and it must be discharged by the same means and according to the same rules of evidence in the one case as in the other. It is not, I think, legitimate in the case of a

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continuous employment any more than it would be in the case of an intermittent employment if suicide and external violence be negatived, as it was said to be, to assume that an unexplained accident, as it has been styled, arose out of the workman's employment. By an unexplained accident in this connection I mean an accident the evidence as to which does not show how it occurred, or shows with equal cogency that it may have occurred in two or more distinct and different ways, or be the result of two or more distinct and different causes.

I think the case of *Wakelin* v. *The London and South-Western Railway Company*,[1] which has been so often referred to, decided by Lords Halsbury, Watson, Blackburn, and Fitzgerald, has a bearing upon this case. There the action was brought against the railway company for so negligently and unskilfully driving their train across a certain level-crossing, and so neglecting to take precautions in respect of the train at the level-crossing, that the train struck and killed the plaintiff's husband, whose dead body was found near the level-crossing in a condition which showed that he was struck by the passing train. The jury found a verdict for the plaintiff. It was necessary for the plaintiff to show that the company were guilty of negligence which caused her husband's death. It was assumed for the purpose of the decision that the company had been guilty of negligence in not whistling as the train approached the level-crossing, but it was held that there was no evidence to connect that negligence with the accident, that there was therefore no case to go to the jury, and that the company were not liable. Lord Halsbury, at page 45 of the Report, is reported to have expressed himself thus: "In this case I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level-crossing; but, assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" And Lord Watson, with whose judgment Lord Blackburn expressed his agreement said, at page 49: "The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied that it has also been proved, that they [the company] were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

I feel that I follow a good example in using the language of those noble Lords. I think the principle of that judgment applies to the present case. In this case, as in that, the claimant, the plaintiff or plaintiffs, was or were bound to produce evidence furnishing data from which an inference could reasonably be drawn as a matter of fact that the particular fact or circumstance from which liability arose existed. In that case this fact

[1] (1886) 12 App. Cas. 41.

was the existence of negligence causing the injury. In the present case the fact is that the accident arose out of and in the course of her husband's employment. If the evidence be equally consistent with the accident arising out of and in the course of his employment and not arising out of and in the course of his employment, the burden of proof which lay upon the plaintiffs has not been discharged. If there be no evidence to support the affirmative issue rather than the negative, the evidence in truth becomes perfectly neutral. And the conclusions of the arbitrator, however confidently and positively asserted to be findings of fact, are in truth mere guesses or surmises, which, with equal justification and plausibility, might have taken quite an opposite form.

Now I turn to the evidence. This vessel, the "Turnberry," was on the 16th of December 1911 lying in the harbour of Larne. There is no evidence as to the state of the weather, or as to where or how the ship was moored, or whether she was motionless or to any extent labouring. A map of the ship was produced and proved, but beyond such evidence as this map affords there is no evidence whatever as to the condition of the vessel's deck, whether it was slippery and encumbered or dry and clean. From the map it appears that the rail of the bulwarks was 3 feet 5 inches above the ship's deck, and it is found that the deceased man was 5 feet 6 inches in stature. The deceased served the crew of the ship with breakfast in the usual way. The crew then rested. The ship was to sail at 6 P.M. on this day, and until shortly before that hour the deceased had no meal to prepare. It was customary for him to rest in the afternoon, especially on the afternoon of Saturday, as he would get little sleep on Friday night, when his work was heavy. From the map it appears that there is a deck-house on this vessel containing a saloon, an ill-ventilated room, containing the bunk in which the deceased slept, a pantry off this room, and a lavatory, which was the lavatory used by the deceased when on board. The room containing this bunk was entered directly from the saloon, and in going from it to the saloon the deceased would pass this lavatory. About four o'clock the captain of the ship went to the bunk of the deceased and told him to prepare tea for the crew before the ship sailed. Lendrum turned in his bunk, looked at the captain, but made no reply. The captain then saw that Lendrum had his waistcoat on, but could not tell whether he had his trousers or his coat on. Nor did he observe whether any of the clothes of the deceased were in the saloon. The captain some time afterwards sent the chief officer to see if Lendrum was preparing tea for the crew. This officer could not find him, and he and the captain went to search for him at about 5.30 P.M. and failed to find him, but they found on a settee in the saloon Lendrum's jacket, waistcoat, trousers, cap, neck-tie, collar, boots, purse, and watch, the latter two of which were not in his clothes, but on the settee beside his clothes. No underclothing was found. The body of the deceased dressed in his underclothing was found next day in the sea at a point between where the stern of the ship lay on the 16th of December and a certain neighbouring slip. It does not appear from the evidence what was the distance between this slip and the berth of the steamer, or whether the harbour was tidal or not, or, if so, what was the set of the tide at any

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time between the finding of the body and the departure of the ship, or whether the action of the screw or the paddles of the steamer as she started would have had any effect upon the body. It was plain from the evidence that the deceased met his death by drowning. No marks of violence were found upon him. Evidence was given as to a strange occurrence which took place when this ship apparently was lying in the harbour of Ayr. The deceased was seen hanging over her side by a rope which was fastened to the taffrail at one end and tied round his waist at the other, that he was holding on by the rope with both his hands held over his head, but was not in the water, and that he afterwards explained he did this to recover a towel which fell overboard. No date whatever is given for this occurrence, and no evidence as to whether any towel was seen overboard, or had fallen overboard, or what the man's condition or state of health was when this occurrence took place. The Sheriff-substitute finds that he was a good, temperate, sociable man, able to do his work, and pleasant to deal with, and though not a teetotaller, was never seen by his captain to be the worse for intoxicating liquor. He further finds that the deceased on this same night left his bunk, went on deck, and accidentally fell overboard and was drowned, and apparently that he did not commit suicide. If the learned Sheriff-substitute meant by this latter finding that it was not proved that the deceased committed suicide, and, the presumption being against suicide, that he, relying on that presumption, found against suicide, I think he was right; but if he meant that the evidence established affirmatively that the death was brought about by some cause other than suicide, I think he was clearly wrong. I find in several cases that the expression "suicide being negatived" is used in cases on this Act as if the evidence justified the conclusion that it was affirmatively proved that the death was due to some cause other than suicide, and not merely that the presumption against crime not having been rebutted the Judge was justified in finding against suicide. Stated baldly it is, I think, a most misleading expression. The evidence in this case, in my view, left the accident entirely unexplained, and, apart from this presumption against the commission of the crime of *felo-de-se*, was quite as consistent with suicide as with any other cause. An effort was made, however, to show how the deceased came to get into the water. It is stated in the case that the deceased "was subject to attacks of nausea and sickness, and was seen on previous occasions vomiting over the side of the ship." In the supplemental report sent in by the Sheriff-substitute in consequence of the remit I find the following passage: "The said plan accompanies this report, and shows the half-rounds where Lendrum was seen vomiting on two occasions previous to his death." Whether this means that these were the only occasions when he was seen vomiting, or the only occasions on which he was seen vomiting at this particular place, is, like many other matters in this ill-drawn and loosely-stated case, left in doubt, but there is no evidence whatever when and under what circumstances this vomiting took place—whether it was at sea or in harbour, in fair weather or in foul, in a calm or in stormy water, or what state of health the man was in at the time, or what he had eaten or drunk before the attack. There is not a particle of evidence

that he was ill on the 16th of December 1911, or that he complained of being ill, or that to anybody who saw him he appeared to be ill. Two of the rails comprising the bulwarks are removed at these places called the half-rounds for the purpose, apparently, of facilitating the mooring of the vessel. It is possible, no doubt, that a man might, if he got on his hands and knees, crawl through these spaces, but it is not suggested that when, on the two occasions Lendrum was seen vomiting near this place, he assumed that attitude. No evidence was given as to whether this vessel was lighted up or not, whether anyone was about the deck or not, whether any cry for help was heard or not—everything is left vague and uncertain. No explanation is given or suggested as to why all the clothes, watch, &c., of the deceased were found in the saloon. No evidence to indicate whether he had commenced making the tea or not, but a conjecture is made that the deceased was attacked with nausea, rushed to the side of the ship to vomit, and fell over the bulwarks, only 25 inches lower than his own head. The only other suggestion is that he crawled through one of the open spaces I have mentioned. That conjecture, if it be a conjecture, remains the same though it be styled by the Sheriff-substitute an inference of fact.

In my view this case comes within the principle of *Wakelin's* case,[1] and is distinguishable from *Swansea Vale* v. *Rice*,[2] where an officer in a sick and giddy condition is sent to perform duties which would necessitate his being sometimes on the bridge of the ship and sometimes on the deck of the ship. I think it is also distinguishable from the case of *Mackinnon* v. *Miller*.[3] There the deck of the ship was found to be greatly encumbered; the bulwarks were only 20 inches high, the passage along between those bulwarks and the engine-house was very narrow. The deck of the ship was in absolute darkness. The body of the deceased was found dressed in his ordinary sleeping-clothes, his working-clothes being laid beside his bunk. It would have been necessary for the deceased to have traversed this encumbered deck from the cabin where he slept to a fire-hole forward, used as a lavatory, if he wanted to get to it for the purposes of nature, and if he tripped or made a false step the low bulwarks would have been more of a trap than a protection. The rule as to the burden of proof may press hardly on claimants in cases such as this as it does in cases such as *Wakelin's*,[1] but if the law is to be altered to meet them, it should, I think, be done by legislation. I think the decision appealed from was therefore right and should be upheld, and this appeal dismissed with costs.

Lord Shaw of Dunfermline.—I agree with my noble and learned friend who has preceded me in reference to the point as to the remit made by the Court of Session in this case. A remit can only, in my opinion, properly be made when the material furnished in the statement of the case is such as to raise doubt and difficulty as to its completeness or its clearness. When I examine this remit I find in it two striking paragraphs, referring to additional particulars and details of evidence,

[1] 12 App. Cas. 41. [2] [1912] A. C. 238. [3] 1909 S. C. 373.

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which must have been mentioned at the bar of the Court of Session; and the remit is made to the learned judge to state as arbitrator whether these statements at the bar as to little details of the facts were proved.

Anything of that sort appears to me to be a procedure accompanied by some danger. I admit that it is right, and, indeed, in some circumstances, it would be the duty of the Court of Session, to clear up an ambiguity on the line mentioned by my noble and learned friend who preceded me. But I look with much disrelish upon any procedure which would go further than that; because, observe to what consequences it would lead. If the employers' counsel makes the statement that certain items of fact ought to have been stated which might affect the mind of the Court, I presume that common justice would dictate that in every case the counsel for the workman might say the same thing, and you would have an interminable series of discussions as to whether the learned judge, charged by the Legislature with the duty of stating a case, had with meticulous completeness stated all the particular facts leading up to his conclusions. I could imagine a procedure of that kind to be productive of inconvenience, sometimes to be accompanied by a distortion of the balance of evidence, and never very likely to show confidence in the arbitrator.

In regard to the merits of the case, I much regret the difference of opinion in your Lordships' House. I should state my main proposition thus: that we in this House are not considering whether we would have come to the same conclusion upon the facts stated as that at which the learned arbitrator has arrived. Our duty is a very different—a strikingly different—one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to a conclusion which could not have been reached by a reasonable man. Had I been the arbitrator, had the noble Earl on the woolsack been the arbitrator, had my noble and learned friend on my left (Lord Parmoor) been the arbitrator, we should each of us have reached the same conclusion as that reached by the arbitrator in this case. Had my noble and learned friends opposite, either of them, been the arbitrator, they would have reached an opposite conclusion. I let it be freely granted that we are all reasonable men, and I will also freely grant that as such each of us is willing to concede of the others that the conclusions which we respectively reach on the same facts, although quite opposite conclusions, are such in each case as might have been reached by a reasonable man. I ask myself what right have we to deny similar treatment, not in this case to each other, but to the arbitrator set up by the Legislature to determine the facts in the first instance. I could conceive of no circumstance more luminously favourable to the proposition that we are not here determining evidence for ourselves, but we are settling the main proposition, and that alone, whether the arbitrator appointed by the Legislature has reached a conclusion as to which we here, differing among ourselves, are able to affirm that he could not have been a reasonable man in coming to that conclusion. So stated, the proposition in favour of supporting this judgment seems to be completely self-destructive.

On the facts I will only say this: that I see no occasion to invoke authority. As we have experienced, authority in this case is too often a source of much confusion; because, when you enter the region of authority in discussing propositions in fact so elementary and so simple as occur here, you are extremely apt, as a Court of law, to be led by the temptation of legal formulæ into what is essentially a usurpation; that is to say, into the position of upsetting, for a supposed legal reason, something which exists and remains from beginning to end in the region of fact.

As I look at this case, a steward on board ship is lying in his bunk, and is ordered to leave his bunk to make tea for his comrades, and he leaves his bunk. All that is admitted. I infer that he left his bunk because he got an order to do so, and obeyed it. Is that a surmise, or is it a conjecture? I am responsible, I observe, in some of these decisions for raising a distinction between an inference and a conjecture. The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not. Now, when you come to the region of inference, no one has ever suggested that the inference should be in syllogistic form, so that all the points of its premises shall with apt and exact completeness justify the conclusion reached. Whenever you are in the position of saying that what you are determining is what a reasonable man would have done, *ex concessis* you admit that you are in a region in which from premises, more or less ample, a conclusion may be reached in one direction or another. Accordingly, being out of the syllogistic region and into the work-a-day region of inference from fact, I ask myself, was I wrong to infer that this steward when he obtained the order to go and make tea, he being then in his bunk, left his bunk in obedience to the order?

Next, what sort of a man was it who thus left his bunk? In the first place, he was a man subject to attacks of nausea and sickness; secondly, he was a man who at this odious call of nature had been in the habit of relieving his sickness by going to the ship's side. I infer that this sick man, suddenly ordered to leave his close bunk, took refuge at once in the fresh air and just did what he had done, as is proved, frequently before—he went to the side of the ship.

It is precisely in those cases where I think the Legislature, with great wisdom, has said, let the man who sees and hears things at first hand and has to consider the main issue determine it for himself. He has determined it favourably to this proposition with which he concludes, that this man sustained his death by an accident arising out of his employment.

I will add now to the narrative which I have given these further facts: that it is conceded in this case, firstly, that insobriety is not proved; it is conceded, secondly, that suicide is not proved; and, thirdly, it is conceded that homicide is not proved; and, therefore, insobriety, suicide, and homicide being out of the case, accident remains to a seaman occurring immediately after an order, in circumstances which, if the order was normally conformed to, would place him exactly where he had been before, his constitution in the few days not having changed from one which was apt to be attacked by nausea and sickness.

Were it not that my noble and learned friends opposite differ from this

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I should say that a fairer case, upon the whole, for the inference that this unfortunate man met his death by an accident arising out of his employment I could not conceive. There are no judicial differences in these cases greater, strange to say, than the difference between Judges as to whether a reasonable man could have come to a certain conclusion; and I again repeat that, if the arbitrator appointed by the Legislature has come to that conclusion, and if even among ourselves we differ with regard to it, how can we charge as against him appointed by the Legislature that his conclusion was so unreasonable that no Court of law can support it?

It appears to me that to do so would be a usurpation upon the part of a Court of law. I have used, in more than one of these cases before, the expression that Courts of law must take care that they do not usurp a function consigned to another quarter. I think it would be usurpation, because it is making a Court of law enter the arbitrament of fact, and in that arbitrament I think the arbitrator is the final judge, unless the conclusion which he reaches can be declared to be so unreasonable as necessarily to involve its being upset.

I say nothing further on this case, except that I view with satisfaction the judgment of Lord Guthrie, who appears, although he differs from myself in regard to the facts, to have taken what I humbly regard as the correct judicial view of this subject when he says that it was not for him to form a conclusion himself, but he says: "It appears to me that we"—that is, the Division of the Court—"are not asked to draw any inference. What we are asked to do is to consider whether a certain inference could be reasonably drawn." I think that states the proposition with complete accuracy, and I cannot take upon myself the responsibility of saying that this arbitrator did not reasonably reach the inference to which he came.

Lord Parmoor.—On the general question I agree with the noble Earl, but I desire to add a few words, since I am differing from the carefully-prepared judgments of a majority of the Judges in the Court of Session.

I cannot, however, say that the case appears to me to be one of any serious difficulty, or that it requires a close analysis of the differing conceptions involved in inference and conjecture. I have found no assistance by reference to cases which depend on different circumstances.

The only question of law which arises on the appeal is the competency of the arbitrator making the award which he has made in favour of the appellant. It is competent for him to make the award, unless there are no relevant facts found by him which would support his conclusion, or the relevant facts found by him are of such a character that it is not possible for a reasonable man to come to the same conclusion. No question as to the weight of the evidence adduced before the arbitrator, on which his findings of fact are based, comes, or can come, before your Lordships. This House is not concerned with the evidence before the arbitrator in any way, and I cannot think that in this respect this House can go behind the findings as stated in the special case. I agree with the protest made by

counsel for the respondents against printing in the appendix the evidence taken before the arbitrator, but no reference was attempted to be made to it in the course of the argument. The point of law to be determined depends upon the special circumstances of the particular case. I agree with what was said in this respect by Lord Dunedin in the case of *Mackinnon*[1]: "It seems to me" (these are the words of his Lordship) "that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

In this case the appellant was the wife of Lendrum, who was cook and steward of the s.s. "Turnberry" at the time when he was drowned. The first question for the determination of the arbitrator is whether the drowning was an accident as distinguished from violence or suicide. I cannot doubt that there are relevant facts on which it was competent for the arbitrator to come to the conclusion that the death of Lendrum was due to accident. It is not challenged that the accident occurred in the course of Lendrum's employment, and the real objection, as stated in the able argument on behalf of the respondents, is that there is no evidence, or at least that there is no relevant evidence, on which it is possible for the arbitrator to come to the conclusion that the death of Lendrum was due to an accident arising out of his employment, and that his decision is founded on mere conjecture. I cannot assent to this argument, and I agree with the judgment of Lord Guthrie.

It is not necessary, after the full analysis by Lord Guthrie, to restate the facts found by the arbitrator on which he bases his decision; but there are special factors which appear to me conclusive in favour of the case for the appellant.

Lendrum was drowned while employed on a vessel, and his death therefore resulted from an accident which might naturally arise out of his employment. This consideration appears to me to answer the somewhat extravagant general propositions which it was said might result from upholding the claim of the appellant, and to bring the case within much narrower lines. It was further proved that shortly before the accident Lendrum was ordered by his captain to prepare and serve tea for the crew, and it was quite within the competency of the arbitrator to infer that he left his bunk for the purpose of fulfilling this duty. It was also proved that he had never been seen by the captain of the ship to be the worse for intoxicating liquor, but was subject to attacks of nausea and sickness, and was seen on some occasions vomiting over the side of the ship. I can see nothing impossible in a reasonable person drawing the inference that the accident happened during a vomiting fit while Lendrum was carrying out the orders of his captain. There are other factors which point in the same direction, but I do not propose to carry the analysis further. In my opinion it is not necessary to do so, so soon as the conclusion is formed that the finding of the arbitrator is not impossible on the recognised test.

I wish to express no opinion either way on the reasonableness of the finding in itself as long as it is a possible finding for a reasonable man.

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[1] 1909 S. C., at p. 380.

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This consideration is not only, in my opinion, quite irrelevant, but to enter upon it in any form opens a door which should be kept shut.

I am of opinion the appeal should be allowed.

LORD DUNEDIN.—While I agree with what has been said by the noble Earl on the woolsack and by my noble and learned friend beside me as to the principles on which remits should be made, I confess I am just a little apprehensive that the remarks made by your Lordships to-day may be taken as going rather further than they were intended to go. Your Lordships will pardon me for saying that I am really here now rather speaking from my experience in the Court of Session, and my knowledge of how impossible it would be to do justice to many of these cases without having remits. And I think it not out of place to remind your Lordships that this remit did not spring from any idea of the judges in this case, but is exactly in terms of section 17, subsection (*g*), of the Act of Sederunt,[1] which is equivalent to what your Lordships are familiar with as rules of Court in England, and as to which power is given by statute to the Court to make them, and which, dealing with these cases, says: "They," that is the Court, "may also before giving their determination send back the case to the Sheriff for amendment." That is the real basis of a remit. The Court has got to deal with the case stated, and, if the case is in itself incomplete, the Court has the right to have it made complete. Certainly the only facts which the Court is entitled to ask the Sheriff to give are facts which are relevant to the discussion before it, and the discussion before it is limited to a question of law, and therefore the only facts are facts which are necessary to raise the question of law, including in it, of course, the question whether there has been any evidence. I may say that there was certainly an attempt made in one quarter at one time to stop the Court of Session in this matter by refusing to state facts. That was dealt with in the case of *Euman* v. *Dalziel*[2] in the year 1912, in which I said at the time, and I have no cause to go back upon what I said: "It has been conclusively settled by decisions of the House of Lords and of this Court that, although such [general] appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported upon the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion. It has been said more than once that this criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence. It is not a question of whether the decision is right or wrong, but a question of whether there was evidence led upon which the decision can be supported. I think, as soon as that position is laid down, it is quite impossible for us to direct our minds intelligently to the question unless we have before us a stated case which will give us a description of what the evidence that was led was."

Now, I admit that when I look at this particular remit I find certain

[1] C. A. S., 1913, L. xiii. 17 (*g*).

[2] 1912 S. C. 966.

facts in it which I consider of more than doubtful relevancy. At the same time the first two of the facts are facts upon which I think it was quite proper for the Court of Session to have the finding of the Sheriff, because they bore directly on the fact whether there was evidence upon which he could go or not; and I should have rather hesitated to express myself as strongly as some of your Lordships have done, because, although I admit that I do not myself see the relevancy of other facts, yet we do not know the precise reasons that made the learned judges give the remit upon that point, and I hesitate to condemn them unheard. And, in particular, I would say this: first, that I do not see how it is possible that the learned judges should discover that the case is incomplete except upon the statements of counsel who are before them; and, secondly, that so far as I know by experience the motions for amendment of a case come just as often from one side as they do from the other.

Now, having said so much upon the remit, I do not propose to trouble your Lordships with any views of mine upon the general question. I had to consider the matter in the case of *Mackinnon* v. *Miller*[1]—a case with which, I apprehend, none of your Lordships disagree—and I refer to my judgment in that case. The conclusion that I came to of the criterion, as it is not long, I shall here repeat. I said in that case, and I repeat it in this: "It seems to me that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony," and then in that case I went on to say: "Here the learned Sheriff-substitute cannot be said to have drawn an inference which no reasonable man could draw, and that being so, that it is not for your Lordships to interfere with his decision." Now, that criterion commends itself to all your Lordships, because you have really expressed the same thing in other, and I doubt not in better, words.

I am bound to say that if the matter was open to me I should agree—in fact I do agree—with the views of my noble and learned friend beside me (Lord Atkinson), and if I may say so, I feel still more certain of this, that if I had been sitting in the Second Division I should have come to the same conclusion as they did; and I should have come to that conclusion not so much upon what I thought myself, but because I should have thought I was loyally carrying out the views of this House as expressed in *Marshall* v. "*The Wild Rose*,"[2] and more particularly would I have thought I should have carried out the views of my noble and learned friend opposite (Lord Shaw) as expressed in that case—although I agree that his argument in one sense cannot be controverted. I quite agree that, taking the criterion as I have set it down, I must admit myself out of court when three of your Lordships say that you would have come to the same conclusion as the arbitrator. I can only say that I look in vain for any evidence in this case. It all turns upon one point, whether there is any evidence which, so to speak, associates this man's duty with his being at the side of the ship. I can find none. I say no more, because my noble and learned friend beside me (Lord Atkinson) has dealt at

[1] 1909 S. C. 373, at p. 380.

[2] [1910] A. C. 486.

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length with that matter. I should not even have dissented were it not for this, that, although the opinions of my noble and learned friend beside me and of myself cannot influence the decision of your Lordships, at least I hope they may serve as a hint to some arbitrators that they really must go upon facts and not confine themselves to guesses.

INTERLOCUTOR appealed from reversed, and award of the Sheriff-substitute restored.

ALEXANDER SMITH—LINDSAY COOK & DICKSON, S.S.C.—BOTTERELL & ROCHE—MACLAY, MURRAY, & SPENS.

No. 11.

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Clark v. Taylor & Co.

HUGH CLARK, (Pursuer) Respondent.—*Moncrieff, K.C.*—*A. M. Stuart.*

GEORGE TAYLOR & COMPANY, (Defenders) Appellants.—*Horne, K.C.*—*Fenton.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (1) (*b*)—*Where incapacity "results from the injury"—Natural tendency to obesity increased by enforced inactivity following injury.*

A miner, aged sixty, received injuries by an accident arising out of and in the course of his employment, which for a time totally incapacitated him for active work. Three years after the accident he had recovered from the direct effects of it, but had become unfit for any except sedentary work. This partial incapacity for work was due to age and obesity; and the obesity was the result of a natural tendency increased by the enforced inactivity following on the accident.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the partial incapacity did not result from the accident, and terminated the compensation.

Held (*rev.* judgment of the First Division) that there was evidence to justify the arbitrator's finding; and his decision *affirmed*.

Opinions that in order to entitle a workman to compensation it is not necessary that the incapacity in respect of which he makes his claim should be the direct result of the accidental injury, or that there should be no contributory source of weakness in the workman.

Earl Loreburn.
Ld. Dunedin.
Ld. Atkinson.
Lord Shaw of Dunfermline.
Lord Parmoor.

(IN the Court of Session, 6th March 1914—*Infra*, Court of Session Cases, p. 432.)

George Taylor & Company appealed to the House of Lords.

The case was heard on 17th July 1914.[1]

EARL LOREBURN.—If I were to act upon my own opinion of the merits of this case, and regarded that as being within my province, I should draw a conclusion from the evidence as contained in the case the same as that which was drawn by the Court of Session. I agree with the reasoning, and the conclusions they arrived at were the same conclusions as I myself should have come to. That, however, is not what we have to consider.

[1] The following case, which was not referred to in the argument in the Court of Session, was cited in the House of Lords:—Hargreave v. Haughead Coal Co., Limited, 1912 S. C. (H. L.) 70.

In this case the only point raised before the arbitrator was whether the present incapacity of this man resulted from his injury. The arbitrator concluded that it did not result from his injury. We may not go into the evidence outside of the award for the purpose of seeing whether we should agree with him; we must take the findings of the Sheriff as to the effect of the evidence as the findings upon which his conclusion rests, and we may look at that conclusion and ask whether a reasonable man could arrive at it or not.

Now, the arbitrator says that the partial incapacity on the 8th of October 1913, which is the crucial date, did not result from the injury sustained by the applicant on the 7th October 1910, and I ask whether that is such a conclusion that I can say a reasonable man could not have arrived at it. The learned arbitrator might think that the increase of obesity and age were, as a matter of substance and looking at it broadly, the real causes which led to this incapacity,—that the incapacity resulted from that and not from the injury. You cannot analyse the chain of causation too closely or you will get into all the labyrinth of argument and disputation which has constantly surrounded the discussion of this subject. The arbitrator may, after puzzling over these considerations, have said to himself in the end, "I think on the whole that it was the disease and the age which were the cause of his incapacity," and, in fact, he has said so.

Mr Moncrieff addressed to us an argument with very remarkable ability, very concise, very powerful, and very much to the point. He said that the arbitrator had made an error in law because he had assumed that, in order to bring the case within the statute, the incapacity must be the direct consequence of the injury, and that the injury must be the exclusive cause of the incapacity. If that were so, then I should think it was an error of law. It is not, as a matter of law, necessary that the incapacity should be the direct result of the injury. It is not necessary that there should be no contributory source of weakness. But in this case I think that the arbitrator may have arrived, and very likely did arrive, at his conclusions from the considerations to which I have referred. When you ask in the language of the statute whether something results from the injury, if we are to refine we may in turn ask what is the meaning of resulting,—how far back are you to carry the chain? It is a question of fact in each case. Each of us must judge in each case how near or how remote the injury is. I do not know how you could lay down a rule of law prescribing the degree of remoteness which excludes the case from the statute, nor could you lay down any formula to guide people to the conclusion that this quantum or that quantum of contributory cause suffices to exclude. How much other causes contributed, if at all, what is the degree of connection which is necessary between the incapacity and the injury, are, in my opinion, questions of fact. It is absolutely impossible to lay down a measure. It must be treated as a matter of common sense.

I do not, therefore, find that the learned arbitrator acted on a wrong view of the law. I do not find that a reasonable man must have decided in a different sense, and therefore I think that his award ought to be

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restored; and in saying so I will expressly repeat that if I had to form an opinion upon the facts of this case I should have come to the same opinion as that which the Court of Session has arrived at.

LORD DUNEDIN.—I think that this case is truly a corollary of the last.[1] I do not find that there is any necessity for me to think that the arbitrator here made a mistake in law. The test of that always is this:—assume the law to be rightly stated, and then put to yourself the question, Could he have arrived at the result that he did with that law so rightly stated? I think he could upon a certain view of the facts, and I think there were sufficient facts for him to come to that result.

I say no more except that I agree with the judgment of Lord Johnston, and I concur in the remarks which have just fallen from the noble Earl on the woolsack.

LORD ATKINSON.—I concur with the judgment delivered by my noble and learned friend on the woolsack. At the same time I must confess that I am not at all certain that the arbitrator did not arrive at the conclusion to which he has come under the mistaken view of the law that, under section 1, subsection (*b*), of the First Schedule, the injury must be the direct result of the accident. That upon the case is left obscure, but if there be any obscurity about it, I think it is entirely due to the way in which the parties have thought proper to conduct the case.

Practically the case was decided upon the medical evidence of the gentleman most wisely selected as the person who was to be, in reality, the medical witness of both parties, and I think that the parties should, if they desired to raise this question, have endeavoured to get a more definite statement from the learned judge in the case he was about to submit upon this point. That being so, I do not feel that there are materials before us which enable me to say that the Sheriff-substitute misdirected himself upon a point of law, or came to a wrong conclusion in point of law upon the construction of the statute. As to the question of fact, if he did not misdirect himself and took a proper view of the true meaning of the statute, I do not think upon the findings of fact that his award can be disturbed.

LORD SHAW OF DUNFERMLINE.—In the last case[1] upon the facts I agreed with the arbitrator; in the present case I should have come to a different conclusion from the arbitrator. In both cases alike, however, I hold that it would be invading the arbitrator's province to reverse his verdict. And for brevity's sake I may say that, for the reasons shown by me and explained in the case of Lendrum, I agree to the course now proposed in this case of Taylor.

LORD PARMOOR.—I concur. I think the only possible ground on which the arbitrator's decision could have been questioned would be the ground that he had made a mistake in law in excluding matters of indirect damage. For a time I thought that might be so, having regard to the

[1] Lendrum v. Ayr Steam Shipping Co., Limited, *supra* p. 91.

able argument of Mr Moncrieff; but I have satisfied myself that no such mistake of law has been committed by the arbitrator, and I entirely concur in the judgment of the noble and learned Earl on the woolsack.

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INTERLOCUTOR appealed from reversed, and determination of the Sheriff-substitute restored, with costs.

R. S. TAYLOR, SON & HUMBERT—MACPHERSON & MACKAY, S.S.C.—BELL & SUGDEN—SIMPSON & MARWICK, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1913-1914.

HIS MAJESTY'S ADVOCATE.—*Lord-Adv. Ure—W. Mitchell, A.-D.*
PATRICK HIGGINS, Panel.—*Kemp.*

No. 1.

Sept. 11, 1913.

H. M. Advocate v. Higgins.

Crime—Murder—Culpable homicide—Insanity—Mental degeneracy not amounting to insanity.

At the trial of a person on a charge of murder *direction* to the jury (*per* Lord Johnston) that mental degeneracy, not amounting to insanity, at the date when the alleged murder was committed is not an extenuating circumstance which can reduce the crime from that of murder to that of culpable homicide.

***Dicta* of Lord Deas in *H. M. Advocate* v. *Dingwall*, (1867) 5 Irv. 466, *commented on* and *doubted*.**

HIGH COURT. Ld. Johnston.

PATRICK HIGGINS was charged on an indictment in the High Court at Edinburgh with the murder of his two sons, which he was alleged to have committed sometime between 25th October 1911 and 1st January 1912.

The accused pleaded not guilty, and also stated a special defence that he was insane at the time when the crime was alleged to have been committed.

The case was tried before Lord Johnston and a jury on 10th and 11th September 1913.

Counsel for the panel in the course of his speech maintained that, even if the panel were not insane at the time when the crime was alleged to have been committed, his mental condition was so impaired by disease that, assuming him to have killed his sons, the crime was culpable homicide and not murder.

LORD JOHNSTON.—[In the course of his charge to the jury]— . . . On considering the whole evidence, you will make up your minds whether the boys' deaths were caused by their father, the panel now under trial. If so, it is for you to say whether he is guilty as libelled—that is to say, guilty of murder. But it is my duty at the same time to tell you that if there are no extenuating circumstances proved in evidence, the crime is one of murder in the eye of the law, unless you are satisfied that, in the then condition of the panel's mind, he was at the date of the act insane, and therefore not responsible for his actions. Now, I would tell you at once that there is not a single circumstance in the case which

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could conceivably be regarded as of an extenuating or exculpatory character, unless there is any force in the concluding argument advanced by panel's counsel. But by the line which counsel took considerable difficulty has been thrown in the way of the simple disposal of the case. A special defence of insanity at the date of the crime charged was lodged. But it was not persisted in by counsel, and the evidence led by him, and the burden of his speech to you, all went to support something which is less than insanity, and which is represented as an extenuating, though not an exculpatory, circumstance. Panel's counsel did not, however, withdraw the plea of insanity, and I am by no means clear that it was within his mandate to do so, or that once such a plea is tabled it can be disposed of except by the jury. And I think that, if not necessary, it is at least safer that it be so disposed of by you.

Now, with regard to the question of the sanity of an accused person, I have to tell you that if a panel is found by the jury to be insane at the date of trial, the trial cannot proceed further. The jury find to that effect, and the panel is then detained in custody during His Majesty's pleasure. On the other hand, if the jury are satisfied that the panel is sane at the time of the trial, and therefore can plead, but that he was insane at the date of the crime alleged, then, even though he did the deed, he cannot be convicted of the crime by reason of his insanity and consequent irresponsibility for his actions. In that case the jury, in acquitting him, are bound to declare that they acquit him on account of his insanity, and he is then in the same way detained during His Majesty's pleasure. All this is statutory.

You are not called upon directly by the panel to consider whether he is sane at the date of trial, that is, at the present moment. And I do not wish to suggest to you that there is any real question on that point, I only tell you that it is within your competency to consider it. But you are, as I have said, called upon to consider whether he was sane at the date of the act charged in respect of the special defence of insanity lodged by him, and I must therefore ask you when you return your verdict to inform me whether in your opinion this special defence, though not persisted in by the panel's counsel, is or is not established to your satisfaction.

But I must now say a few further words to you on the attitude adopted by the panel's counsel. He maintained in effect this proposition, viz., that though the panel was not insane in the end of 1911, his mental condition was so impaired by the effect of a disease from which he suffered that, assuming him to have been guilty of the homicide, it was open to you to find that that homicide did not in his case amount to murder, but only to culpable homicide, and that you ought so to find. Let us consider what that really means. There is no doubt that in homicide there are degrees of guilt. Homicide may amount to murder, or to culpable homicide, or to justifiable homicide; that is to say, given that there has been a homicide, the circumstances may be such as to extenuate the offence, and reduce it from murder to culpable homicide, or the circumstances may be such as to exculpate and render it justifiable. According to my understanding such extenuating or exculpatory circumstances must be

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truly surrounding circumstances, external to the accused, perhaps I may term them objective. To take instances, grievous provocation is an example of an extenuating, self-defence of an exculpatory, circumstance. But I fail to see how what I shall call, for shortness, mental degeneracy, which is a purely subjective circumstance, can be regarded as an extenuating circumstance, unless it amounts to insanity, in which case it is an exculpatory circumstance. To regard it as extenuating, and so affecting the quality of the crime, and reducing its punishment, would appear to me to throw loose altogether the conception of criminal responsibility which has hitherto ruled. I refer in particular to Lord Justice-Clerk Inglis in *Milne's* case,[1] Lord Justice-Clerk Moncreiff in *Barr's* case,[2] and to the English case of *M'Naghten*.[3] It is true that it is the province of the jury to determine whether a crime is murder or culpable homicide, but in doing so they are bound to be actuated by legitimate considerations. The moment that they begin to give weight to impressions of mental degeneracy—it may be congenital, it may be the result of illness, it may be the result of dissipation or immorality, for I fail to distinguish—of mental degeneracy which is not insanity, but leaves to the accused a modicum of responsibility, they must at once fall to drawing impossible distinctions between individual and individual, and therefore to giving weight to considerations which I cannot think to be legitimate. For to say that that man is mentally capable of murder and this man only mentally capable of culpable homicide, that that man is capable of a capital offence, but this one only of an offence not capital, is a proposition which would, I think, unsettle the administration of criminal law. Personally I have very great difficulty in following the chain of reasoning involved in the panel's contention. I can understand limited liability in the case of civil obligation, but I cannot understand limited responsibility for a criminal act. I can understand irresponsibility, but I cannot understand limited responsibility—responsibility which is yet an inferior grade of responsibility.

The argument of counsel is based on a passage in the charge of Lord Deas in the case of *Dingwall*,[4] to the effect that the state of mind of a prisoner might be regarded as an extenuating circumstance although not such as to warrant an acquittal on the ground of insanity, and therefore was one which might be taken into consideration by the jury along with the whole circumstances of the case in determining whether the crime assumed the quality of murder or merely of culpable homicide. Lord Deas returns to the question in two or three subsequent cases, and his doctrine appears to have received some countenance from other Judges. While I am bound to regard their views with the utmost respect, I desire very humbly to enter my protest against this doctrine being accepted as part of the criminal law and practice of Scotland, until the matter is more deliberately dealt with by a larger Court than usually sits nowadays for the trial of criminal cases, and is authoritatively defined and explained. In particular, I cannot help feeling that the combination of the idea of defective, or

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[1] (1863) 4 Irv. 301, at p. 343.
[2] (1876) 3 Coup. 261, at p. 264.
[3] (1843) 10 Cl. & Fin. 200, and 59 R. R. 85.
[4] (1867) 5 Irv. 466, at p. 479.

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impaired, or degenerate, mental condition with the whole other circumstances of the case is fallacious, and really leads either to a groping after temporary insanity or to involving the jury in the assumption of the quality of mercy which resides with the Crown.

Ld. Johnston.

But I am glad to think that I am not called upon to act in opposition to the above opinion of Lord Deas, because I do not think that the substratum on which it must rest has been established in this case. The suggestion is that the panel is an epileptic. [His Lordship criticised adversely the evidence upon which this suggestion was based]—I think, therefore, it is my duty to tell you that, where a panel sets up a defence of insanity—and it would equally hold in relation to this suggestion of impaired mental condition if it were a competent consideration—he is bound to prove it clearly, and that, whether the argument of the panel's counsel could be accepted or not in other circumstances, it is in this case based on an hypothesis, which is not, in my opinion, borne out by the evidence, and which may therefore be disregarded by you. I have also to point out to you that if you are to regard the surrounding circumstances, this homicide was no case of sudden impulse, but of callous deliberation. If you are of the same opinion your plain duty is to consider whether the panel is sane now, so that he may be competently tried, whether he did commit the act alleged, and, if so, whether or not he was sane in the ordinary sense at the time he so committed it. If you are satisfied that he did the deed alleged and was not insane when he did it, then I am afraid that you have no alternative but to bring in a verdict of guilty as libelled; though it is open to you to add such recommendation as you think proper.

The jury found the panel guilty as libelled, with a recommendation to mercy, and he was sentenced to death.

Sir William S. Haldane, W.S., Crown Agent—T. E. Gilbert Taylor, Solicitor—Agents.

No. 2.

Nov. 6, 1913.

Auld v. Pearson.

William Auld (Procurator-Fiscal, Renfrewshire), Complainer (Appellant).—*Sol.-Gen. Morison—W. Mitchell, A.-D.*
James Black Pearson, Respondent.—*Lippe.*

Statutory Offences—Motor car—Heavy motor car—Charge of exceeding speed limit—Speed limit fixed according to axle-weight—Car having one axle above and another below specified axle-weight—Heavy Motor Car (Scotland) Order, 1905, *Art. VII.*

The Heavy Motor Car (Scotland) Order, 1905, Art. VII., provides that if a heavy motor car has all its wheels fitted with pneumatic tyres, the speed at which it may be driven on the highway shall not exceed "(*a*) Twelve miles an hour—where the registered axle-weight of any axle does not exceed six tons; and (*b*) Eight miles an hour—where the registered axle-weight of any axle exceeds six tons."

Held (*dub.* Lord Johnston) that the speed limit for a car of the class referred to, of which the registered axle-weight of the front axle was 2 tons 2 cwts. and that of the back axle over 6 tons, was eight, and not twelve, miles an hour.

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HIGH COURT. Lord Justice-General. Ld. Johnston. Lord Mackenzie. Lord Skerrington.

JAMES BLACK PEARSON, chauffeur, Greenock, was charged in the Sheriff Court at Greenock, on a summary complaint, at the instance of William Auld, Procurator-fiscal of the Lower Ward of Renfrewshire, with having, on 13th May 1913, in a public highway in the burgh of Greenock, driven a heavy motor car "the registered axle-weight of the back axle of which weighs more than six tons . . . at the rate of twelve miles an hour, being a speed exceeding eight miles an hour, contrary to the Heavy Motor (Scotland) Order, 1905, Article VII., duly made and issued by His Majesty's Secretary for Scotland in virtue of the Motor Car Acts, 1896 and 1903." *

The Sheriff-substitute (Welsh) having found the accused not guilty, the Procurator-fiscal appealed on a stated case.

The case set forth:—

"The following minute of admission was engrossed on the complaint:—'Greenock, 6th June 1913.—The Procurator-fiscal and Mr John Cameron, solicitor, Greenock, as agent for accused, admit the facts as set forth in the complaint, and further that the registered axle-weight of the front axle of the car does not exceed six tons, being of the weight of 2 tons 2 cwts., and that the car has pneumatic tyres on all its wheels.' On the facts thus admitted the question arose whether, looking to the terms of headings '(*a*)' and '(*b*)' of that part of Article VII. of the Heavy Motor (Scotland) Order, 1905, which relates to heavy motor cars which have all their wheels fitted with pneumatic tyres, the respondent had contravened the provisions of that article.

"On a consideration of these provisions of that article, I was of the opinion that, although the respondent was entitled to drive on the occasion in question at eight miles an hour in respect that the registered axle-weight of the back axle of his car exceeded six tons, that being in terms of heading (*b*) above referred to, 'the registered axle-weight of any axle,' he was nevertheless, notwithstanding the terms of the second proviso of Article VII. of said Order, entitled to drive at the greater speed of twelve miles an hour in respect that the registered axle-weight of the front axle of his car did not exceed six tons, that being in terms of heading (*a*) above referred to, 'the registered axle-weight of any axle.'

"I accordingly held that, looking to the registered axle-weight of the front axle of the car which the respondent was driving on the occasion in question, he was not guilty of the charge libelled."

The question of law was:—"On the admitted facts, was I right in holding that the respondent was not guilty of the offence charged?"

The case was heard on 6th November 1913.

Argued for the appellant;—The provisos (*a*) and (*b*) of the Motor Car Order which were in question were to be read together, as they easily could be, so as to form a consistent code. As the respondent's car had one axle of a registered axle-weight exceeding six tons, it clearly

* The Heavy Motor Car (Scotland) Order, 1905, issued by the Secretary for Scotland in virtue of the Motor Car Acts, 1896 and 1903 (59 and 60 Vict. cap. 36, and 3 Edw. VII. cap. 36), provides:—Article VII. "The speed at which a heavy motor car is driven on any highway shall not exceed eight miles an hour: Provided that . . . if the heavy motor car has all its wheels fitted with pneumatic tyres or with tyres made of a soft or elastic material, the speed at which the heavy motor car may be driven on any highway shall not exceed—(*a*) twelve miles an hour—where the registered axle-weight of any axle does not exceed six tons; and (*b*) eight miles an hour—where the registered axle-weight of any axle exceeds six tons."

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fell under proviso (*b*), and was unaffected by proviso (*a*). Therefore the speed limit applicable to this car was eight miles an hour.

Argued for the respondent;—Under proviso (*a*) in question a car might be driven at twelve miles an hour if the registered axle-weight of any axle of the car did not exceed six tons, and as the respondent's car had an axle with an axle-weight of only 2 tons 2 cwts. the speed limit was fixed for it by that proviso. It was therefore unnecessary to consider proviso (*b*); but, if its terms created any ambiguity, then the Order should be read, in a question involving penal consequences, in a manner favourable to the respondent.

LORD JUSTICE-GENERAL.—This stated case raises a somewhat difficult and interesting question upon the terms of an Order issued by the Secretary for Scotland in terms of the Motor Car Acts, 1896 and 1903. It appears that the respondent's car was a "heavy motor car" in the sense of the Order, and that its back axle exceeded in registered axle-weight six tons, but its front axle was under six tons, being some 2 tons 2 cwts.; and the question is whether or no a car of that weight and description when driven at twelve miles an hour was contravening the order which we have to construe.

It is certain that if you read clause (*b*), the second of the two branches into which this part of the Order is divided, the respondent did commit an offence. He drove a heavy motor car on the highway at a speed greater than eight miles an hour, to wit, at twelve miles an hour, and the registered axle-weight of his back axle exceeded six tons. Now clause (*b*) says that, if he does so where the registered axle-weight of any axle exceeds six tons, he commits an offence. That would be plain enough were it not that the immediately preceding clause provides that the speed is not to exceed twelve miles where the registered axle-weight of any axle does not exceed 6 tons, and it is said that, inasmuch as the axle-weight of one of the axles here was under 6 tons, the restriction prescribed by clause (*b*) does not apply.

I think that is a wrong construction. I think that the construction which the Solicitor-General put to us in the most concise way is right; that (*b*) is applicable to this case and that (*a*) is not applicable; and accordingly that the respondent has committed the offence with which he was charged.

LORD JOHNSTON.—If I had sat in this case alone I should have come to the conclusion that the reading which the learned Solicitor-General placed upon this Order is probably what its draughtsman intended. But I certainly could not have come to the conclusion that he had expressed himself so intelligibly that an accused could be held bound to understand the offence intended to be created. But as your Lordships are of a different opinion, I do not carry my doubt to the point of a dissent.

LORD MACKENZIE and LORD SKERRINGTON concurred with the Lord Justice-General.

THE COURT answered the question of law in the negative, and sustained the appeal.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—DOUGLAS & MILLER, W.S.—Agents.

CHARLES HERON, Appellant.—*Milne.*
HIS MAJESTY'S ADVOCATE, Respondent.—*Sol.-Gen. Morison—W. Mitchell, A.-D.*

No. 3.
Nov. 6, 1913.

Heron v. H. M. Advocate.

Crime—Habitual Criminality—Evidence—Review—Duty of Court of Criminal Appeal.

Held that, in an appeal to the Court of Criminal Appeal against a verdict on a charge of being a habitual criminal, it is the duty of the Court to consider the case on its merits, and not merely to consider whether there was evidence upon which the jury could reasonably return the verdict appealed against.

Observations as to the evidence which may legitimately be taken into consideration by a jury in dealing with such a charge, and by the Court of Criminal Appeal in disposing of such an appeal.

Opinion (*per* Lord Mackenzie) that the Judge who presided at the trial should not sit as a member of the Court of Appeal.

COURT OF CRIMINAL APPEAL. Lord Justice-General. Ld. Johnston. Lord Mackenzie. Lord Skerrington.

CHARLES HERON was tried before Lord Mackenzie and a jury in the High Court at Glasgow on 10th July 1913, on a charge of attempting to steal, and on a charge of being a habitual criminal. He was convicted on both charges, and was sentenced to three years' penal servitude and five years' preventive detention.

The accused appealed against the latter sentence, on the ground that there was no evidence to warrant a conviction on the charge of being a habitual criminal.

The case was heard before the Court of Criminal Appeal on 6th November 1913. The undernoted cases were referred to.[1]

LORD JUSTICE-GENERAL.—The prisoner in this case was convicted at the recent Glasgow Circuit of the crime of attempted theft, and was sentenced to a term of penal servitude. After his trial and conviction for that crime he was tried and was convicted on a charge of being a habitual criminal under the Prevention of Crime Act, 1908. The jury came to the conclusion, on the evidence laid before them, that the charge of being a habitual criminal was established.

The question which we have to consider in this case is whether the jury came to a right conclusion upon the evidence laid before them. I purposely state the question in that way, because, in my view, we, sitting in this Court, are called upon to review the conclusion at which the jury arrived exactly as if the jury were a Court of first instance—Sheriff, it may be, or Lord Ordinary—which had decided a question of fact that a Court of Appeal was called upon to consider and review. The evidence upon which the jury came to the conclusion at which they arrived is before us, and we have now to say whether in our judgment it was sufficient to warrant a conviction.

I am satisfied, on an examination of the evidence which was then given, that there was sufficient to entitle the jury to come to the conclusion at

[1] *For the appellant.*—H. M. Advocate v. Gillan, 1910 S. C. (J.) 84, 6 Adam, 256; Stirling v. H. M. Advocate, 1911 S. C. (J.) 84, 6 Adam, 451; Baggot, (1910) 4 Cr. App. R. 67. *For the respondent.*—Williams, (1912) 8 Cr. App. R. 49; Hadley, (1910) 4 Cr. App. R. 36.

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Lord Justice-General.

which they arrived. In other words, I am of opinion that this verdict was right. The prisoner seems, for a long period of years, not only to have committed a variety of crimes but, furthermore, to have been constantly associating with convicted criminals. I take as a sample of the type of evidence given before the jury the evidence of Detective-Inspector M'Lelland, one of several officers of police examined. He says he has known the accused for fifteen years; that he has almost never been out of prison during that time. "When he has been at liberty I have had occasion to see the kind of people he associated with, and they were convicted thieves and registered criminals—men known to me, as a member of the police, as convicted thieves. When he has been at liberty I have seen him at all hours, from eight in the morning till ten or eleven at night. I have never seen him engaged at work. He occupies his time going about the streets drunk in company with thieves."

Now, if that evidence is to be believed—and the jury apparently did believe it—and is confirmed—and it seems to be confirmed—by the other evidence in the case, I think it is impossible to avoid the conclusion that this man was, in the terms of the statute, "leading persistently a dishonest or criminal life."[1] No doubt it is said on his behalf that since he last came out of prison, after serving his last sentence, he had made some attempts to procure work—desultory attempts they certainly were; and it is said that he lost the employment which he managed to secure, not because of any fault of his, but because of a certain physical infirmity which is spoken of. All that may be so, but it does not, in my judgment, infer—as we were asked to infer—that he had taken to leading an honest life, and had ceased to lead persistently a dishonest or criminal life. No doubt when people, who have been convicted of crime and have served sentences such as this man has done, make attempts to get back to honest life the difficulties in their way are many, but there are other alternatives to securing and engaging in regular employment besides continuous association with thieves and convicted criminals.

It appears to me that the jury had ample evidence before them on which they could arrive at the conclusion they have reached. I think it unnecessary to say what other evidence the jury might legitimately have before them when considering the question whether a prisoner convicted of a primary offence has also been guilty of the secondary offence charged —that of being a habitual criminal. The same jury tries the man for both offences, and it is, of course, impossible for them to dislodge from their minds, when they come to consider the second question, the evidence which has been given in relation to the primary charge. That evidence is not before us. We are in an inferior position to the jury; and every Court of Appeal must necessarily be in an inferior position to a Court of first instance in reviewing evidence. They had the advantage, which we do not enjoy, of having seen and heard the witnesses, and the conclusion at which they arrived is no doubt strengthened by that fact, and every Court of Appeal will give more or less weight to that circumstance. We do not disregard that circumstance here, but on the whole I am inclined

[1] Prevention of Crime Act, 1908 (8 Edw. VII. cap. 59), sec. 10 (2) (*a*).

to agree with the opinion expressed by Lord Dundas in the case of *Stirling*[1] cited to us, in which he says that "the question whether a man is 'persistently leading a dishonest or criminal life' is one which must be viewed broadly and fairly, and not in a minute and finical spirit." With that I entirely agree; and, applying it, I come to the conclusion in this case that the verdict which the jury gave was right.

LORD JOHNSTON.—I entirely agree with what your Lordship has said, and particularly that the question before us is not whether there was evidence on which the jury might reasonably come to the conclusion which they reached, but whether the jury in coming to that conclusion were right.

I think there is sufficient before us to satisfy us that they were right, although they had necessarily before them the proof of the main charge on which they had just convicted the prisoner, which we have not. I proceed entirely upon the evidence led in the subsidiary charge of habitual criminality, and it is sufficient to satisfy me that the verdict on that subsidiary issue was sound. Looking at that question, as I think we must look at it, in a broad way, I am, I think, bound to look not merely to what has occurred since the last liberation of the panel from prison, but to what we know of his career generally.

Now we know that three convictions of assault and robbery were proved against him between 1903 and 1906. We also know that after he came out of prison from the last of these convictions in March 1910, he was, in 1911 and 1912, frequently before the Police Court for breaches of the peace, and (I take this from the extract conviction of assault and attempt to steal of date 13th April 1912) that he was again convicted on that date, although the punishment must have been a short one. Then on 8th January 1913 he was again sentenced in the Sheriff Court for dishonest appropriation of property. He only came out of prison in March 1913, and again came before the Court in the present case in June of the same year. When I take that series of offences along with the evidence which we have from several members of the police force, that they have known him during these three years since he last left Peterhead in 1910, and have known him to be in constant association with thieves and other disreputable characters, I cannot come to any other conclusion than this, that the jury were fully justified in the verdict which they brought in.

But I should like to say in conclusion that, while I think that it is impossible that the jury should divest themselves of what they have learnt in trying the main issue placed before them, it is, in my opinion, right that they should consider the circumstances so proved and necessarily fresh in their recollection, because in many instances those circumstances throw the most important light upon the life that the panel has been leading during the period preceding the trial. I do not know the circumstances of this case. I do not know whether they did throw such light here. I can only say that they frequently do, and that they are perfectly legitimate considerations for the jury to keep before them. If it were

[1] 1911 S. C. (J.) 84, at p. 86, 6 Adam, 451.

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necessary in order properly to dispose of this appeal that we should be placed in the same position as the jury, I think it would be a question for the Court to consider whether they should not in such a case call for the notes of the main trial made by the Judge who presides; but I do not think that that question arises here, because the more limited facts that we have are amply sufficient to satisfy the Court that the conclusion of the jury was sound.

LORD MACKENZIE.—Your Lordships have arrived at a decision entirely independently of any view that I may have upon the case. I tried the case, and I concur in the result at which your Lordships have arrived. But I think it my duty to say that in arriving at that conclusion it was necessary for me, as far as possible, to divest myself of knowledge that I had of the case, consisting of the evidence of the circumstances attending the crime of which the prisoner was convicted on indictment of an attempt to steal, because, sitting as a member of a Court of Appeal, all that I am entitled to know of the case is what is contained in the print before us.

It is certainly the fact, as has been pointed out, that when a case goes to a jury they as well as the Judge necessarily have before them all the evidence led in Court with reference to the panel. It would be impossible for the jury to divest themselves of the knowledge they had so obtained, and in my opinion it is a necessary consequence of the provisions of the Act that the jury shall take these circumstances into consideration in forming an opinion whether the man is leading persistently a dishonest life.

When, however, the case comes up here on appeal, all that the Court are entitled to look at are the notes of evidence before them. It may in certain circumstances be difficult for the Judge who tried the case to divest himself of knowledge beyond these notes. Whether he is successful in doing so or not it does, in my judgment, lead to objection if the Judge who tried the case sits as a member of the Court of Appeal. If the sentence is confirmed, it may always be open to the prisoner at the bar to think that his case has, in a certain measure, been prejudiced, and that he has not got what he is entitled to under the Act—a judgment upon the notes of evidence alone. It does not appear to me that the case is analogous to that of a Judge who, having tried a civil jury case, sits as a member of the Court to decide whether or not a new trial should be granted. That, as has already been explained by your Lordships, is not the kind of question the Court here has to consider. It is not a motion for a new trial. It is an appeal against a finding of a jury, and the question to be considered is whether that finding is correct or not.

Therefore, with all deference, I submit that it is a matter for consideration whether the Judge who tried a case of this description should sit as a member of the Court of Appeal. In my opinion he should not.

LORD SKERRINGTON.—I agree with your Lordships in the conclusion at which you have arrived, and I concur in the opinion of your Lordship in the chair.

THE COURT dismissed the appeal.

W. LESLIE CHRISTIE, W.S.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

PETER REILLY, Complainer.—*Maclaren.*
JOHN JAMES M'INTYRE (Police Court Procurator-Fiscal, Glasgow), Respondent.—*Sol.-Gen. Morison—M. P. Fraser.*

No. 4.
Nov. 6, 1913.

Reilly v. M'Intyre.

Statutory Offences—Loitering with intent to commit felony—Relevancy of complaint libelling mere theft, without aggravation, as a felony—Vagrancy Act, 1824 (5 *Geo. IV. cap.* 83), *sec.* 4—*Prevention of Crimes Act*, 1871 (34 *and* 35 *Vict. cap.* 112), *sec.* 15—*Penal Servitude Act*, 1891 (54 *and* 55 *Vict. cap.* 69), *sec.* 7.

By the Vagrancy Act, 1824 (as amended and applied to Scotland by the Prevention of Crimes Act, 1871, and the Penal Servitude Act, 1891), it is made a punishable offence for a suspected person or reputed thief to loiter "with intent to commit felony"; and the word "felony" is defined as including "any theft, which in respect of aggravation or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude."

A complaint charging a suspected person and reputed thief with loitering "with intent to commit a felony, viz., theft," *held* irrelevant, in respect that "theft" *simpliciter* was not a "felony" within the statutory definition.

HIGH COURT. Lord Justice-General. Ld. Johnston. Lord Mackenzie. Lord Skerrington.

ON 23rd July 1913 Peter Reilly was charged in the Police Court at Glasgow on a complaint at the instance of John James M'Intyre, procurator-fiscal, which set forth that "you are charged at the instance of the complainer that, being a suspected person and a reputed thief, you did, on the 19th day of July 1913, frequent and loiter about in St Enoch Station, Glasgow, said station being a place adjacent to a street, viz., St Enoch Square, Glasgow, with intent to commit a felony, *videlicet*, theft, contrary to section 4 of the Vagrancy Act, 1824, as amended and extended to Scotland by the Prevention of Crimes Act, 1871, section 15, and as further amended by the Penal Servitude Act, 1891, section 7,* whereby you are liable to imprisonment for a period not exceeding three calendar months, with hard labour. And you have been previously convicted as in the list annexed." The list annexed contained one previous conviction, obtained in Greenock Police Court for the offence of being a "Suspected person or reputed thief, frequenting and loitering with intent to commit a felony," the sentence being thirty days' imprisonment.

The Stipendiary Magistrate found the accused guilty as libelled, and sentenced him to ninety days' imprisonment.

Reilly presented a bill of suspension, in which he averred:—(Stat. 2) "On complainer being called upon to plead to said complaint, his agent objected to the relevany thereof, in respect of want of specifica-

* The Vagrancy Act, 1824 (5 Geo. IV. cap. 83), sec. 4 (as amended and applied to Scotland by the Prevention of Crimes Act, 1871, sec. 15, and the Penal Servitude Act, 1891, sec. 7), enacts:—"Every suspected person or reputed thief frequenting or loitering about or in . . . any street, or any highway, or any place adjacent to a street or highway, with intent to commit felony . . . shall be liable to imprisonment for three months."

The Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 15, enacts further:—" . . . For the purposes of this section, in Scotland the word felony shall mean any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing."

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tion of the felony libelled. The Court repelled the objection. . . ." (Stat. 3) "In repelling said objection to relevancy, allowing evidence to be led, and convicting and sentencing the complainer, the Stipendiary Magistrate was in error. Said section 15 of the Prevention of Crimes Act, 1871, *inter alia*, enacts:—'For the purposes of this section, in Scotland the word felony shall mean any of the pleas of the Crown, any theft, which in respect of aggravation or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing.' Said complaint does not allege any aggravation in the substantive charge, nor anything regarding value in money nor otherwise, and in respect thereof, it is wanting in specification, and irrelevant. Moreover, the previous conviction libelled is not necessarily a conviction aggravating the offence charged."

The complainer pleaded, *inter alia*;—(1) The said conviction and sentence ought to be suspended *simpliciter*, and the complainer set at liberty, in respect that the complaint against him is irrelevant on the grounds stated in the objections thereto and as herein founded on.

The case was heard before the High Court on 6th November 1913.

Argued for the complainer;—The complaint was irrelevant, in respect that it charged the accused with intent to commit theft pure and simple, whereas theft *per se* was not a felony in the sense of the Acts creating the statutory offence charged. The only theft which fell within the statutory definition of felony was a theft which might be punished with penal servitude, either because it was an aggravated theft (*e.g.*, a theft following upon previous convictions applicable to the crime of theft), or because the crime was of such gravity as to lead to indictment in the High Court. The complaint here did not attempt to apply either of these qualifications to the theft which the accused was charged with the intention of committing, and was accordingly irrelevant. It was true that a previous conviction was annexed to the complaint, but it was libelled as an aggravation of the statutory charge and had no application to the word "theft"; and, in any event, it could not have been put in evidence as an aggravation of the crime of theft, because the only convictions which could be so used were convictions of the crimes and offences contained in the exhaustive list of crimes given in section 63 of the Criminal Procedure (Scotland) Act, 1887,[1] and that list did not include the offence of loitering with intent,—the offence of which a conviction was annexed to this complaint.

Argued for the respondent;—The complaint was relevant and sufficiently specific, in respect that it gave an exhaustive reference to the statutory provisions constituting the offence and fixing the penalty.[2] Further, theft was a felony according to the definition, because, to quote the words of Lord Dunedin in *M'Intyre* v. *Morton*,[3] the section "says theft which may be punished by penal servitude, and according to Scots law every theft is so punishable."

LORD JUSTICE-GENERAL.—I am satisfied that this conviction cannot

[1] 50 and 51 Vict. cap. 35.

[2] Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), secs. 5 and 19 (1) (2); Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), sec. 9.

[3] 1912 S. C. (J.) 58, at p. 62, 6 Adam, 634.

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stand. The accused was charged before the Stipendiary Magistrate in Glasgow in that, being a suspected person and a reputed thief, he did on a certain date, which is specified, frequent and loiter about a certain place, which is specified, with intent to commit a felony, viz., theft, contrary to certain statutes which are specified. It is plain upon these statutes, the terms of which have been brought under our notice, that theft simpliciter is not a felony in the sense of the statute founded upon. Theft, in order to constitute a felony in the sense of these Acts, must be "theft, which in respect of aggravation or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude."

There is an observation made by Lord Justice-General Dunedin in the case of *M'Intyre*,[1] which was brought under our notice with which I entirely agree, where he says that an examination of the section of the statute of 1871 shows clearly that the gentleman who drew that section had not a very correct notion of Scots law, because the section speaks of theft which may be punished by penal servitude, and, says his Lordship, according to Scots law every theft is so punishable. That was said in a case where the question was whether or no this particular Act of Parliament applied to Scotland, and it was argued, as I understand, on internal evidence gathered from the statute itself that it was plainly inapplicable to this part of the United Kingdom. That argument was repelled, and it does not, in any degree, help either of the parties in this case; no more than it helped in the case before the High Court in which the opinion of the Lord Justice-General to which I have just referred was given.

Here it appears that the complainer was in a position to have libelled quite correctly the crime which he intended to charge, because the accused had been—so we are told—guilty of theft, and had been convicted of theft, on several previous occasions. But, if that is so, I cannot understand why it was that the complaint was framed in the terms which are before us, which seem to me to be plainly irrelevant, when they could have been made perfectly relevant by specifying clearly—and the accused was entitled to have them specified—the previous convictions which made the crime of theft an aggravated crime, a crime punishable by penal servitude. For that is the language of the statute of 1871. Therefore I come to the conclusion that the complaint as it stands is plainly irrelevant and seriously lacking in specification, and accordingly that the conviction which proceeded upon it cannot stand.

Lord Johnston.—I concur. I confess that I think it almost hopeless in Scotland to apply the provisions of the Vagrancy Act, 1824, as amended by the Prevention of Crimes Act, 1871, sec. 15, because of the inherent absurdity of the explanatory definition of the word felony. The only remedy really is legislation, for though it may be possible to comprehend what is meant by a theft which in respect of aggravation may be punished by penal servitude, it is impossible to realise what is meant in Scotland by a theft which in respect of the value of the articles

[1] 1912 S. C. (J.) 58, at p. 62, 6 Adam, 634.

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stolen may be so punished, particularly when we have to apply the definition here to be applied, not to a case of theft, but to one of hanging about with intent to steal. But this complaint is clearly wanting in specification, because it only charges intent to commit theft, without either of the qualifications contained in the statutory definition above referred to.

LORD MACKENZIE.—I agree that this conviction should be quashed. The complainer is charged with a statutory offence. That statutory offence is that, being a suspected person and a reputed thief, he did frequent and loiter about a certain place with intent to commit a felony, viz., theft. The complaint winds up: "And you have been previously convicted as in the list annexed," and then follows a schedule in which there is one conviction of being a suspected person or reputed thief, frequenting and loitering with intent to commit a felony. One thing is perfectly clear upon that, viz., that that previous conviction has no application to the word "theft"; it is libelled as an aggravation of the statutory charge.

Inasmuch as this is a statutory charge, it is necessary to go to section 15 of the Prevention of Crimes Act, 1871. The concluding words of the section are: "For the purposes of this section, in Scotland the word felony shall mean any of the pleas of the Crown, any theft," and the section does not stop there, if it did, then the complaint would be good; it goes on—any theft "which, in respect of aggravation or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing."

It may be difficult to spell out of intent to commit a theft intent that the theft shall be of money or goods of a certain value; but it is quite possible to libel that the person charged has such a record that theft in his case would involve a sentence of penal servitude. This would constitute an aggravation as contemplated by the statute. I read the section as meaning this, that if you find a suspected person or a reputed thief loitering about under such circumstances that you are entitled to infer that his intent was to commit a felony, viz., theft, and if you libel that his previous record (specifying his previous convictions) has been such that a theft of any article which it may reasonably be supposed he intended to steal would carry a sentence of penal servitude, then you may proceed under this section.

It appears from what we are told at the bar that there was apparently sufficient material in this case to warrant a conviction of the complainer. But then the question we have to decide is whether he had any information from the terms of the complaint of what was to be proved against him. As the complaint stands, it is absolutely bare of any reference to any previous conviction at all applicable to the charge of theft. There is not a word in the complaint that the man had been previously convicted. If it is intended to draft a relevant complaint under this section, in my opinion it is necessary to set out, after the word "theft," the aggravation in respect of which the Procurator-fiscal says the prisoner charged may be punished with penal servitude.

LORD SKERRINGTON.—I agree with the opinions delivered by your Lordship in the chair and by Lord Mackenzie. Nov. 6, 1913. Reilly v. M'Intyre.

THE COURT quashed the conviction.

R. D. CAMPBELL M'KECHNIE, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

No. 5.

Nov. 8, 1913.

Solicitor-General v. Lavelle.

THE SOLICITOR-GENERAL FOR SCOTLAND.—*Sol.-Gen. Morison—Morton, A.-D.*
JOHN LAVELLE, Panel.—*Sandeman, K.C.—Haldane.*

Procedure—Instance—Indictment—Removal of Lord Advocate from office—Lord Advocate appointed to the bench—Indictment at instance of Solicitor-General during vacancy in office of Lord Advocate—Competency—Solicitor-General appointed to bench prior to sentence—Lapse of indictment—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 2 *and* 3.

An indictment dated after the Lord Advocate has been raised to, and has taken his seat upon, the bench, and before the appointment of his successor, rightly proceeds in name of the Solicitor-General and may be signed by a procurator-fiscal, "by authority of the Solicitor-General." Further, the fact that the Solicitor-General has been raised to the bench prior to the conclusion of the case does not cause the indictment to lapse.

HIGH COURT. Lord Justice-General. Ld. Johnston. Lord Mackenzie. Lord Skerrington.

ON 22nd October 1913 John Lavelle, a prisoner in the prison of Glasgow, was, under section 31 of the Criminal Procedure (Scotland) Act, 1887, served with an indictment charging him with theft by housebreaking, and libelling previous convictions. The indictment was "at the instance of Andrew Macbeth Anderson, Esquire, Solicitor-General for Scotland," and was signed "by authority of the Solicitor-General, James N. Hart, Procurator-Fiscal."

The fact that the indictment was at the instance of and was signed by the authority of the Solicitor-General, instead of the Lord Advocate, arose from the circumstance that the Right Honourable Alexander Ure, the Lord Advocate, was appointed to the office of Lord Justice-General on 15th October 1913 and took his seat upon the bench on 17th October, and that his successor, Mr Robert Munro, K.C., was not appointed Lord Advocate until 31st October.

The prisoner pleaded guilty and was remitted to the High Court for sentence.

On 4th November 1913, when the panel was brought before the Lord Justice-Clerk, his counsel stated objections on his behalf to the form of the indictment in respect that when it was served there was no warrant (1) for the Solicitor-General's instance, (2) for the procurator-fiscal's signature "by authority of the Solicitor-General." *

* The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), enacts:—Section 2. "All prosecutions for the public interest before the High Court of Justiciary and before the Sheriff Court where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate . . . and such indictment . . . shall be signed by Her Majesty's Advocate or one of his deputes, or by a procurator-fiscal, and the words 'By authority of Her Majesty's Advocate' shall be prefixed to the signature of such procurator-fiscal."

Section 3. "The Lord Advocate and his deputes shall not demit office

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The Lord Justice-Clerk continued the diet that the objections might be considered by a fuller bench, and the prisoner was again brought before the High Court on 6th November 1913.

Argued for the panel;—(1) There was no warrant for indictment at the instance of the Solicitor-General at the time when the present indictment was served. The only warrant for an indictment at the instance of a Solicitor-General was that given by section 3 of the Criminal Procedure (Scotland) Act, 1887, and as that was a permission to interfere with the liberty of the subject it must be strictly construed. The warrant was limited to cases where the Lord Advocate had died or had been "removed from office." Neither of these events had occurred in the present case. The word "removed" implied a termination of office against the will of the holder, and therefore could not apply where the Lord Advocate had accepted the office of Lord Justice-General. That acceptance might imply a resignation of office as Lord Advocate, but the resignation did not take effect until another Lord Advocate was appointed.[1] A Lord Advocate on becoming a Judge did not necessarily cease to be Lord Advocate, there being nothing inherently inconsistent in the two offices, as was shown by the fact that prosecutions were originally instituted by the Justice-Clerk at the command of the Justiciar.[2] Accordingly the indictment should have been at the instance of the Right Hon. Alexander Ure, the Lord Advocate. (2) The procurator-fiscal had no warrant to sign the indictment "by authority of the Solicitor-General," because it was only "by authority of His Majesty's Advocate" that indictments could ever be signed by procurators-fiscal.[3]

Argued for the Crown;—(1) It was impossible for anyone to hold at the same time the office of Lord Advocate and the office of a Lord Commissioner of Justiciary, and therefore when a Lord Advocate was appointed by His Majesty to be a Judge, he was "removed from office" in the sense of the Act—which clearly differentiated between resignation and removal. Accordingly the provisions relating to the case of removal applied, viz., that, during the interregnum between the Lord Advocates, indictments should run in the name of the Solicitor-General—the provisions relating to the case of resignation being inapplicable.[4] (2) The panel having been indicted at the instance of the Solicitor-General in accordance with statutory requirements, it

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on the resignation of the Lord Advocate, but shall continue in office until their successors respectively receive their appointments . . . and all indictments which have been raised by any Lord Advocate shall continue in force and effect notwithstanding such resignation and may be taken up and proceeded with by his successor; and where any Lord Advocate shall die during his tenure of office, or otherwise be removed from office, it shall be lawful to indict persons accused in name of the Solicitor-General then in office until another Lord Advocate is appointed, and the Advocates-Depute and procurators-fiscal shall have power, notwithstanding such death or removal from office of the Lord Advocate, to take up and proceed with any indictments already raised in name of such Lord Advocate, and any indictments that may be raised in name of such Solicitor-General."

[1] Criminal Procedure (Scotland) Act, 1887, sec. 3; Halliday v. Wilson, (1891) 19 R. (J.) 3, 3 White, 38.

[2] Hume on Crimes (3rd ed.), vol. ii., 130-131.

[3] Criminal Procedure (Scotland) Act, 1887, sec. 2; Macdonald's Criminal Law, (3rd ed.) 285.

[4] Criminal Procedure (Scotland) Act, 1887, sec. 3.

followed logically that the indictment should bear the signature of the procurator-fiscal "by authority of the Solicitor-General," because the statute placed procurators-fiscal in the same position as Advocates-depute, and conferred upon them power to take up and proceed with any indictments raised in the name of the Solicitor-General.[1]

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At advising on 8th November 1913,—

Lord Johnston.—The prisoner in this case having applied to have his case taken under the 31st section of the Criminal Procedure Act, 1887, was served with an indictment and notice under that section and the relative Schedule L. The date of his indictment must admittedly be taken as the date of service, and that date was 22nd October 1913. The late Lord Advocate, now Lord Justice-General, had not only received his appointment as Lord Justice-General in the technical sense on 15th, but had presented it to the Court of Justiciary on the 17th October 1913. His successor did not receive his appointment as Lord Advocate until the 31st of that month. Accordingly, on the assumption that, in the interim between the 15th and 31st October, there was no Lord Advocate, the indictment of the prisoner (1) proceeded at the instance of the Solicitor-General, and (2) was signed by his authority by the procurator-fiscal. Exception is taken to the instance. I do not experience any difficulty in repelling the objection, though I think that it is necessary to distinguish the case from that of *Halliday*.[2]

The question depends upon the second and third sections of the Act of 1887. Section 2 provides that all prosecutions for the public interest before the High Court shall proceed on indictment, in name of His Majesty's Advocate, and shall be signed by His Majesty's Advocate, or by one of his deputes, or by a procurator-fiscal, and that the words "by authority of His Majesty's Advocate" shall be prefixed to the signature of such procurator-fiscal. Section 3 provides for the interregnum which must occur on the resignation, death, or removal of a Lord Advocate. And it deals differently with the situation created by resignation, and that created by death or removal. In the case of resignation the Lord Advocate does not demit office on his resignation, but continues in office until his successor receives his appointment, and his deputes do the same. On the other hand, if the Lord Advocate dies during his tenure of office or is otherwise removed from office, it is declared to be lawful to indict accused persons in name of the Solicitor-General "until another Lord Advocate is appointed."

Under what category, then, comes the case of a Lord Advocate demitting office by reason that he is appointed to the office of Lord Justice-General? It is not, in my opinion, a case of resignation, nor is it a case of death, but it is, I think a case of removal. It is always in the power of the Crown to remove a Lord Advocate at pleasure, and I think that the Crown by implication removes him from the office of Lord Advocate when it appoints him to the office of Lord Justice-General, the tenure of

[1] Criminal Procedure (Scotland) Act, 1887, sec. 3.
[2] 19 R. (J.) 3.

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which is inconsistent with that of Lord Advocate, and accordingly that, during the interval which elapses between one Lord Advocate receiving an appointment to the office of Lord Justice-General and the appointment of another Lord Advocate in his place, indictments lawfully run in name of the Solicitor-General, and therefore that, so far, there is no good objection to the instance here.

But objection is taken to the signature of the indictment by the procurator-fiscal. I should have thought that by necessary implication the provision at the end of section 2, empowering the procurator-fiscal to sign by authority of His Majesty's Advocate, includes power to him to sign by authority of His Majesty's Solicitor, where *pro tempore* the Solicitor-General comes *vi statuti* in place of the Lord Advocate. But if there is any doubt, I think it is entirely removed by the last clause of section 3, which provides that the Advocates-depute, whose deputations have *ex hypothesi* fallen, and procurators-fiscal, shall have power, notwithstanding the removal from office of the Lord Advocate, to proceed with any indictments which may be raised in name of such Solicitor-General. I think that this, if it were necessary, confers on the procurator-fiscal power to prefix to his signature to indictments legally running at the instance of the Solicitor-General the words "by authority of" that officer. In my opinion, therefore, the second objection also fails.

At first sight the case of *Halliday*[1] might appear to lead to a different conclusion. But I do not think that it is really inconsistent with the above judgment. I refer to the report in Rettie, for that in 3 White, 38, is too imperfect to disclose the circumstances. These were, that on 1st October 1891 a letter passed the Flying Seal giving the Royal approval to the appointment of Sir Charles Pearson, as Lord Advocate, in room of Lord Advocate Robertson; that on 6th October a warrant, also under the Flying Seal, was received at the Crown Office for issuing Sir Charles's commission; and that on 13th October the commission was issued. The report does not give the date on which Lord Robertson received his commission as Lord Justice-General, but I have ascertained that it was dated 21st September 1891, and was therefore presumbly received on that or the following day. There was therefore an interval from 21st or 22nd September to 6th or to 13th October 1891—whichever of these latter dates is to be held the date of the receipt of his appointment by Lord Advocate Sir Charles Pearson—between the two appointments.

Halliday's indictment proceeded in the name of Lord Advocate Robertson and was dated 3rd October 1891. But the objection taken to it was inept, because the plea taken was that the indictment should have proceeded at the instance of Sir Charles Pearson, as the new Lord Advocate, instead of at the instance of Lord Advocate Robertson as the old Lord Advocate; whereas the plea ought to have been, that it should have proceeded in the name of neither Lord Advocate, but of the Solicitor-General of the day. It was thus that the sole question debated in the case came to be what is to be taken as the date of the reception by the Lord Advocate of his appointment. It was certainly held that neither the issue of the letter

[1] 19 R. (J.) 3.

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under the Flying Seal approving the appointment nor its publication in the *Gazette* was the receipt of such appointment in the sense of the statute of 1887. And as the date of the indictment was 3rd October 1891, and so before the issue even of the warrant, that seemed enough for the decision of the question, and the validity of the instance was sustained; though had the proper objection to the instance been taken, the objection would have been sustained. But the judgment leaves it doubtful whether the receipt by the Crown Office on 6th October of the warrant to issue the commission, or the issue of the commission itself on 13th October, is to be taken as the statutory receipt by the Lord Advocate of his appointment, and therefore his authority to act. I should have thought the latter, because until his commission is issued nothing reaches the Lord Advocate designate on which he can act, or which he can produce as his authority for requiring the Court to receive him. But it was immaterial in the case of *Halliday*[1] to determine the point. It was enough that, as at the date of the indictment in question nothing had occurred except the intimation of the Royal approval and the *Gazette* notice, Sir Charles Pearson had in no view as yet received his appointment. No other question was raised or considered, and thus the attention of the Court was, I think, diverted from the true question. Certainly the question raised in the present case was not before the Court.

The LORD JUSTICE-GENERAL, LORD MACKENZIE, and LORD SKERRINGTON concurred.

Counsel for the Crown moved for sentence.

Counsel for the panel objected to the motion and argued;—As the Solicitor-General at whose instance the panel was indicted had become a Judge,* the instance had lapsed, as in the case of the death of a private prosecutor whose heir or executor could not be sisted.[2] The instance having lapsed there was no indictment, because the present Solicitor-General could not proceed with a prosecution instituted by his predecessor; though a Lord Advocate could because his instance subsisted notwithstanding any change in the identity of the holder of his office, the indictment in his name being really at the instance of His Majesty. Even the Lord Advocate could not proceed with an indictment at the instance of the Solicitor-General, because the statute which gave the only mandate for such indictment conferred no power upon the Lord Advocate to do so.[3]

Argued for the Crown;—Section 3 of the Act of 1887, which authorised an indictment such as the present at the instance of the Solicitor-General, also authorised Advocates-depute (which included the Solicitor-General) and procurators-fiscal to "take up and proceed with" such an indictment.

THE COURT repelled the objection and sentenced the panel.

Sir WILLIAM S. HALDANE, W.S., Crown Agent—J. MAXWELL YOUNG, S.S.C.—Agents.

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[1] 19 R. (J.) 3.

* Lord Anderson took his seat upon the bench on 4th November 1913.

[2] Hume on Crimes, ii. 123.

[3] Criminal Procedure (Scotland) Act, 1887, sec. 3.

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JOHN THOMSON WILSON, Complainer (Appellant).—*Blackburn, K.C.*—*Keith.*

WILLIAM FLEMING, Respondent.—*Sandeman, K.C.*—*A. M. Stuart.*

Public Health—Food and Drugs—Sale of milk deficient in fat—Sale by servant of accused—Complaint—Specification of modus—Sale of Food and Drugs Act, 1875 (38 *and* 39 *Vict. cap.* 63), *sec.* 6—*Master and Servant.*

Where, in a prosecution under a complaint charging a dairyman with selling milk which was not genuine, in contravention of sec. 6 of the Sale of Food and Drugs Act, 1875, it appeared at the proof that the sale was effected, not by the accused, but by his servant—

Held (*diss.* Lord Johnston) that the complaint was lacking in specification, in respect that it did not set forth that the sale was effected by the hand of a servant; and complaint *dismissed.*

HIGH COURT. Lord Justice-General. Ld. Johnston. Lord Mackenzie. Lord Skerrington.

WILLIAM FLEMING, dairyman, Dalserf, was charged in the Sheriff Court at Hamilton on a complaint at the instance of John Thomson Wilson, Medical Officer of Health for the county of Lanark, under the Sale of Food and Drugs Acts, 1875 to 1907. The charge against the accused was:—"That on 19th March 1913, at Dunlop Place, Dalserf, opposite to No. 37 thereof, you did, in response to a demand made for the complainer by Charles MacAra, County Buildings, Hamilton, an inspector appointed by the County Council of the County of Lanark as Local Authority for the said county, under the Sale of Food and Drugs Acts, 1875 to 1907, to assist the complainer in the execution of the said Acts, for three-halfpence worth of sweet milk, sell to the complainer milk which was not genuine, as it contained less than 3 per cent of milk fat, contrary to the Sale of Food and Drugs Act, 1875, section 6."

The Sheriff-substitute (Shennan) after a proof dismissed the complaint, whereupon the complainer appealed on a stated case.

The case set forth that the following facts were proved:—

"On the date libelled the respondent's milk cart was in charge of his son, Robert Fleming, as his servant. On that date at the place libelled Charles MacAra, a duly authorised inspector acting on the complainer's (appellant's) behalf, demanded from Robert Fleming, and was supplied by him with three-halfpence worth of sweet milk. The respondent himself was not present at the time of the demand or the sale, being then at his farm. The milk contained only 2·73 per cent of milk fat, and the evidence led for the respondent did not in my opinion prove that the milk was genuine.

"I found that the respondent had failed to discharge the onus resting on him of proving that the milk was genuine. But I held that the facts proved did not establish the charge contained in the complaint, because the complaint *prima facie* narrates a demand made on the respondent personally, and a sale and delivery made by him personally. In my opinion, proof of demand to and delivery by the respondent's servant in the respondent's absence was not sufficient to prove sale by the respondent in response to a demand by the inspector, as narrated in the complaint. I held that in the circumstances of the present case the complainer was bound as a matter of reasonable specification to state in the complaint that the demand was made to a servant of the respondent, and that the complaint as framed could not be reasonably interpreted as covering such a case.

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I therefore refused to convict the respondent, and dismissed the complaint."

The question submitted for the opinion of the Court was:—"On the facts proved, ought I to have convicted the respondent?"

The case was heard on 7th November 1913.

Argued for the appellant;—The complaint was sufficiently specific. It gave the accused due notice of the facts which he had to meet, and the Sheriff-substitute should have convicted him. "Selling" under the Act was not limited to the actual operation of handing over the article and receiving the price, but was used in its ordinary commercial sense of supplying in return for payment. It was accordingly immaterial whether the sale was actually effected by the true purveyor of the milk or by his servant; in both cases the former had sold the milk, provided always the servant, if he carried out the sale, was employed to sell, and was thus acting within the scope of his employment. This principle had been recognised in many cases dealing with sales, and particularly in prosecutions for breach of public-house licences, where the actual sales were effected by servants of the publicans.[1] The offence charged was in no sense a personal offence and it did not necessarily involve any moral stigma, because, if the milk which was sold was in fact not genuine, and if the salesman who sold it was authorised by the master to sell, the master was guilty of a contravention of the statute, even although the milk had been adulterated without his knowledge by his servant or by some other party[2]; guilty intention being, as in other cases of statutory offences,[3] not essential to the constitution of the offence. *Macaulay* v. *Mackirdy*,[4] which was the exact converse of the present case, directly supported the appellant's contention. A different ratio, of course, applied if the offence was one personal to the servant, as in *Downie* v. *Fraser*,[5] a case of cruelty to a horse, or in *Gray & Company* v. *Mackenna*,[6] a case of a contravention of the Truck Acts. Admittedly the accused must be given proper notice of the case which was to be made against him, but he had in fact had ample notice, because, although the servant was not named in the complaint, the time and place of the sale of milk were specified, which sufficiently informed the respondent that the sale in respect of which he was charged must have been carried out by a servant whom he could at once identify. Further, the complaint was in the form prescribed by statute.[7]

Argued for the respondent;—The question in the case was not whether the accused was responsible for a sale carried out by a servant, but whether the complaint gave fair notice that the charge was made, not in respect of anything done by himself, but in respect of

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[1] Linton v. Stirling, (1893) 20 R. (J.) 71, 1 Adam, 61; Patrick v. Kirkhope, (1894) 21 R. (J.) 27, 1 Adam, 360; Galbraith's Stores, Limited, v. M'Intyre, 1912 S. C. (J.) 66, 6 Adam, 641; Galloway v. Weber, (1889) 16 R. (J.) 46, 2 White, 171.

[2] Parker v. Alder, [1899] 1 Q. B. 20, Lord Russell of Killowen, C.J., at p. 25.

[3] *Cf.* O'Brien v. Macgregor, (1903) 5 F. (J.) 74, 4 Adam, 202.

[4] (1893) 20 R. (J.) 58, 3 White, 464.

[5] (1893) 1 Adam, 80.

[6] (1899) 1 F. (J.) 65, Lord Moncreiff, at p. 68, 2 Adam, 691.

[7] Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), secs. 18, 19, and Sched. C.

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something done by his servant. In a quasi-criminal charge it was the duty of the prosecutor to specify the *modus* of the offence charged, and, if the act complained of was not that of the accused personally, then the name of the party by whom it was alleged to have been committed should be specified, or at all events the act should be described as that of a servant of the accused whose name was unknown.[1] Such specification was important in the present case because it was not admitted that the respondent's servant had authority to sell milk,[2] and if he was unauthorised the respondent was not responsible for his acts.[3] As regarded the public-house cases founded on by the appellant, the sales were by shopmen in their employers' shops, and their authority to sell could not be questioned; moreover, the charge in these cases was merely of breach of certificate, and, further, the question of sufficiency of specification was not raised.

At advising on 8th November 1913,—

LORD JUSTICE-GENERAL.—The respondent here was charged with an offence under the 6th section of the Sale of Food and Drugs Act of 1875. The complaint sets out that, on the 19th March 1913, at a specified place, he (the respondent) sold to the complainer a certain quantity of milk which was not genuine because it contained less than 3 per cent of milk fat.

When we turn to the stated case, we find that it was proved that not the respondent but his son, acting as his servant in charge of his milk cart at the time, supplied to the prosecutor the quantity of milk specified. Now, on these facts so stated, I should have been of opinion that it was impossible to convict under this complaint, because the vital fact that there was a sale is nowhere found to be stated in the facts set out as proved in the stated case. For aught that appears this case is identical with the case of *Lindsay* v. *Dempster*,[2] where this Court held, affirming the decision of the Sheriff-substitute at Edinburgh, that no sale had been effected where not the master but a servant had supplied the milk—milk which was in his hands solely for delivery to a customer to whom it had already been sold. Accordingly, if the question put to us had been whether an offence was proved under this Act, it being merely found that there had been a supply of milk by the respondent's servant to the prosecutor, I should have come to the conclusion that the Sheriff-substitute was right in dismissing the complaint.

But apparently that was not the ground upon which the Sheriff-substitute here proceeded when he found the charge not proven; for we see from the stated case that his ground of judgment was this, that he was unable to hold that the complaint charging the respondent with the offence was sufficient to cover the case proved before him, which was the supply of milk, not by the respondent, but by a servant of the respondent. The Sheriff-substitute thought that in all fairness to the accused he ought to have been told in the complaint that the charge was not that he (the respondent) had made the sale, but that one of his servants had

[1] Gray & Co. v. Mackenna, 1 F. (J.) 65, 2 Adam, 691.
[2] Lindsay v. Dempster, 1912 S. C. (J.) 110, 6 Adam, 707.
[3] Kearley and Another v. Tonge, (1891) 60 L. J. Mag. Cas. 159.

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made the sale; he thought, in short, that the complaint was lacking in specification, and did not give the respondent the notice to which he was entitled of the character of the offence which it was intended to prove against him. In my opinion the Sheriff-substitute was right. If this had been an ordinary crime, a crime pure and simple, there would be no question that a conviction of William Fleming for the act of Robert Fleming could never stand. And, on the other hand, if this were a pure breach of civil contract, then I think a sale by the respondent would be quite accurately and precisely described in a civil pleading as a sale by him although it was actually effected by his servant or authorised agent. *Qui facit per alium facit per se.* But in the present instance we have to deal with an offence charged under a certain statute which imposes a very substantial penalty for breach of its provisions, and the question we have to consider is whether or no the respondent had sufficient specification of the *modus* of the offence.

In my opinion he had not, and in so holding I think we are following and applying the principle which was laid down and applied, certainly not for the first time, in the case of *Gray & Company* v. *Mackenna*.[1] I freely allow that the terms of the Truck Acts which were there under the consideration of the Court do differ, in some respects, from the terms of such statutes as the Food and Drugs Act of 1875. By the terms of the Truck Statutes it seems to be made very clear that the offences struck at were offences personal to the doer. It was individuals alone that were to be charged. That is brought out very clearly in the opinion of Lord Moncreiff, although it is beyond doubt that the judgment of the Lord Justice-Clerk, and of Lord Trayner who concurred in it, was based upon the broader ground. But it is not immaterial to observe that an offence can be committed under the Truck Acts by an employer acting through an authorised agent, and in that respect an offence under the Truck Acts stands distinguished from an ordinary crime as to which the maxim *culpa tenet suos auctores* always applies.

Now it was urged upon us in this case that an offence charged under the 6th section of the Food and Drugs Act, 1875, really dealt with an ordinary commercial sale, that it signified nothing whether that sale was effected by the master or by his authorised servant, and that a conviction under that section inflicted no personal stigma and reflected no blame upon the accused who was convicted—that the *mens rea*, in short, was not necessary to a conviction under this 6th section. All that may be true, but it does not appear to me to affect the question which we have to decide, which is whether or no there was sufficient specification here to give the accused fair notice of the precise mode in which it was proposed to prove that he had committed the offence charged.

We were referred to a case said to be very like the present—*Macaulay* v. *Mackirdy*[2]—which counsel for the appellant urged upon us was to be regarded as the converse of the case which we have before us. It, too, was a complaint under the 6th section of the Food and Drugs Act, and the complaint alleged that the purchase of the milk had been made by the

[1] 1 F. (J.) 65, 2 Adam, 691.

[2] 20 R. (J.) 58, 3 White, 464.

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prosecutor, whereas the actual purchase had been made by his assistant, who went to the milkman and paid the money to the milkman. The complaint was held to be unobjectionable; and, although at first sight it might appear to be the converse of the present case, upon examination it will be found to be entirely different, for there the Court held the complaint to be unobjectionable for this reason, that it was a mere question of description and did not in any way affect the essence of the criminal charge. In short, the purchaser was not the accused.

I have, for my own part, found more difficulty in dealing with what have been called in the course of the discussion the public-house cases, of which *Linton* v. *Stirling*[1] is a typical example. These were all cases in which publicans were charged with breach of the conditions of their certificates in respect that they had sold liquor to persons who were already intoxicated, and the charge was expressed in the same way in which the complaint is set out in the present instance, without specifying the servant, and even without saying that the sale was made by a servant or agent. Now the answer to the argument which was founded on these cases seems to me to be threefold. First, it is noticeable that the question of insufficiency of specification was never raised; it was neither considered nor decided. In the second place, it would be very difficult to see that it was a matter material to the charge to specify the servant, because a salesman or shopkeeper at the back of a counter in a public-house who effected a sale could never be said to be an unauthorised person on the part of the publican, and it never could be said that the publican would be entitled to shelter himself behind a defence that it was his servant—a servant unauthorised to make the sale across the counter,—and not he, who had done the act. Such a case therefore is materially different in that respect from the present case, where the imperfection which was held to be fatal to the complaint in *Lindsay* v. *Dempster*[2] is present. But, third and most material of all, it appears to me that the public-house case is not analogous to the present case for this reason, that it was not, in the proper sense of the word, a criminal charge or even a statutory offence that was being tried but a breach of the conditions of the licence, and the distinction between a criminal or a quasi-criminal charge and a breach of the conditions of the licence was brought out with great clearness and distinctness in the opinion of Lord M'Laren in *Linton* v. *Stirling*,[1] where his Lordship says, "If legislation on this subject had taken the line of making it an offence to supply liquor to a person in a state of intoxication, on account, it might be, of danger to the public or to himself, then the argument stated to us would have been relevant. We should then have had to consider whether the person charged was guilty of supplying drink to an intoxicated person, that is to say, whether he was guilty of the intention to do so and did it knowingly. That, however, is not the principle of legislation on this subject. The licensee is put under the conditions of a certificate, and for a breach of such certificate he is made liable to a civil action for penalties." And his Lordship goes on to develop the same idea in subsequent paragraphs of his judgment.

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[1] 20 R. (J.) 71, 1 Adam, 61. [2] 1912 S. C. (J.) 110, 6 Adam, 707.

Now I think it is incumbent on the prosecutor in a case such as the present to give the accused full and clear specification of the *modus* of the offence in order to enable him to protect himself by adequate evidence against the charge brought against him; and, as Lord Skerrington pointed out in the course of the discussion, that is not imposing an undue and excessive burden upon the prosecutor, because if he does not know the name of the servant he has only to set that forth, stating that it was a servant of the accused and not the accused himself.

I should not have so held had I thought that the effect of our judgment would be to defeat the objects of this useful Act of Parliament, or to cause any undue or unnecessary embarrassment to the inspectors in the performance of their often difficult and delicate duties. I cannot think that that is so, and I agree, therefore, with the Sheriff-substitute when he finds that the complainer was bound, as a matter of reasonable specification, to state in the complaint that the demand was made to a servant, and that the complaint as framed cannot be reasonably interpreted as covering such a case. I propose therefore to your Lordships that we should answer the question put to us in the negative.

LORD JOHNSTON.—I have considered this case carefully since it was heard yesterday, and I am confirmed in the opinion which I then held and which, I regret to say, does not coincide with that which your Lordship has just delivered.

Section 6 of the Sale of Food and Drugs Act of 1875 enacts that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty. The respondent, William Fleming, a dairyman, was charged with so selling an article of food, namely, milk. There is no question raised in the case as to the statute having been infringed by someone, that someone being Robert Fleming, acting as his father's servant. I say that because of the positive statement in the case that on the date libelled the respondent's milk cart was in charge of his son Robert Fleming, of whom the milk was demanded and by whom it was sold, but also because there is no suggestion by the Sheriff-substitute, who stated the case, that any question was raised about the fact that Robert Fleming, who made the sale, was acting as his father's servant. The Sheriff-substitute asks: On the facts proved, ought I to have convicted the respondent? His statement of the case shows that he had no doubt that he ought to have convicted him. But he had taken up the idea in the end of the day, after the respondent had appeared, had defended himself, and had failed, that he ought never to have proceeded with the case, because the respondent was not told in the indictment that the sale libelled was made not by himself, but by his son.

From the complaint it is made perfectly clear that William Fleming is a farmer and dairyman, carrying on his trade at Auldton Farm, Dalserf, and that he is not the keeper of a dairy shop in town. It is also made perfectly clear that the sale alleged took place, on a date mentioned, in a street named Dunlop Place, Dalserf, and at a specific point—opposite No. 37 thereof. But the complaint does not say anything about the

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respondent's son or servant. It merely charges that William Fleming did, in response to a demand made for the complainer, who is the County Medical Officer of Health, by Charles MacAra, a county inspector, sell to the complainer the milk in question. The objection taken by the Sheriff-substitute, for it does not appear to have been suggested by the respondent, is that the complaint is wanting in specification, because it does not say that William Fleming, the respondent, "did by the hand of his servant, Robert Fleming, or of a servant whose name is unknown to the complainer," sell the milk in question. The Sheriff-substitute thinks that the complainer "was bound, as a matter of reasonable specification, to state in the complaint that the demand was made to a servant of the respondent, and that the complaint as framed could not be reasonably interpreted as covering such a case." It is a curious comment on this deliverance that the respondent did without any hesitation apparently so interpret it, appeared, and pled not guilty, and again appeared at an adjourned diet.

In respect that the sale by a servant is, in the sense of the statute, a sale by the employer and entirely on his responsibility, I think that this is carrying the demand for specification beyond what is reasonable. I would even say that the course taken by the Sheriff is fantastic. The precise place at which the sale was made and the date are given, and I do not see how the respondent was prejudiced by not being told that the complainer did not mean to suggest that he made the sale personally, but that it was made by his servant, named or unnamed. I do not delay your Lordships by referring to the case of *Parker*,[1] in which Lord Russell of Killowen laid down the law of liability in cases under this Act to the effect that, quite independently of any personal act or any personal intention, the dairyman himself is the offender if an offence is committed. The really important question in such cases is the nature, substance, and quality, of the thing sold. Careful provision is made by section 14 for the partition of the article sold into three parts for the purposes of analysis, for notification "to the seller or his agent selling the article" of the purchaser's intention to have the same analysed, and for delivery of "one of the parts to the seller or his agent." That all this was done correctly, is shown by the fact that the Sheriff-substitute states that "The milk contained only 2·73 per cent of milk fat, and the evidence led for the respondent did not, in my opinion, prove that the milk was genuine." In these circumstances, to find the charge not proven because there was want of sufficient specification appears to be somewhat incongruous and absurd. It is certainly carrying formality beyond reason. I, therefore, think that the question submitted to the Court should be answered in the affirmative, and the case remitted to the Sheriff-substitute.

That is the opinion which I should have formed without any reference to authority, but I feel I am bound to consider the authorities which have been referred to, and I take on them, I am sorry to say, an opposite view to that which your Lordship has expressed.

I take, in the first place, the case of *Gray*.[2] The case of *Gray* [2] does not

[1] [1899] 1 Q. B. 20.

[2] 1 F. (J.) 65, 2 Adam, 691.

differ from the present in immaterial circumstances, but it differs *toto coelo*. It was not a case, as under the Food and Drugs Act, 1875, in which the personal intervention of the employer is immaterial. It was a case in which, on the statute under which the prosecution proceeded, a question might arise whether the principal employer or his agent was the person who would ultimately be found liable. I refer, as your Lordship does, to Lord Moncreiff's opinion, and I think that he will be found to show in great detail how emphatically that circumstance ruled the whole consideration of that case. If, then, *Gray's* case [1] is totally different in its circumstances from the present, and if its circumstances are such as to require that there must be tabled not merely an agent, but the actual agent—because it is only the actual agent who will ultimately be liable—it seems to me that that can be no authority for the judgment which your Lordship proposes to pronounce here.

Passing to another point I would refer to the recent Summary Jurisdiction Act of 1908. The 19th section of that statute, which, I may remind your Lordships, was largely passed for the purpose of shortening forms and so shortening procedure, says this with reference to proceedings under the Act such as the present:—"The charge in such complaint shall be stated in accordance with the forms contained in Schedule C to this Act. No further specification shall be required than a specification similar to that given in said forms, and (1) The description of any offence in the words of the statute or order contravened, or in similar words, shall be sufficient." When I go to the schedule I do not find that the form for every case is included, but I find that a similar case to the present is that provided for sales of liquor. In these cases the principal in the business is also the person solely liable, though he may have had no personal concern. And not one of the forms given, which are to be held sufficient, indicates that anybody but the principal in the business is to be included in the complaint. I take one of them:—"A B, hotelkeeper at so-and-so, you are charged that on Sunday . . . you did sell a half-gill of whisky to C D," and so on. There is no suggestion that it is necessary to indicate "by your servant," named or unnamed. Now, it seems to me that in this connection the case of *Macaulay* [2] is important. If this offence of selling milk in contravention of one statute is necessarily to be charged with the specification of the person who actually sold the milk in question, it must be so charged not merely when the sale is made from a cart in the street as here, but when it is made in a shop. You must say, "by C D, the girl who serves the shop," or if you do not know the girl's name, you must say, by "some employee to the complainer unknown." Now, if this be necessary where the sale is of milk over the counter in a shop, I cannot see on what grounds of reason it should not be equally necessary if the sale is, not of milk, but of whisky across the bar in a public-house. I cannot make any distinction between them.

When, then, I come to the case of *Macaulay*,[2] I am sorry to say that I read it again differently from your Lordship. In that case, which was one under the same Food and Drugs Act, the objection was that the purchase,

[1] 1 F. (J.) 65, 2 Adam, 691.

[2] 20 R. (J.) 58, 3 White, 464.

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not the sale, was libelled as having been made by the complainer, who was the inspector of weights and measures. The proof showed that the purchase was not made by the complainer at all, but that it was made by a subordinate on his behalf. Now, I confess I cannot distinguish between sale and purchase, or between the seller and the purchaser, if it be a question of necessary specification, in order reasonably to give information to the accused. I should say that it is rather more necessary to specify the actual purchaser than the actual seller. Because if you say that the purchase is made by A B, and the man knows that A B was never near him or his shop, it does not follow that he knows that C D, who has been, is A B's agent. If he is a seller he knows perfectly well who his own agent is. And therefore I should say that specification was more necessary in the case of the purchaser than of the seller. The Sheriff convicted, as I consider he ought to have done here, and the conviction was sustained notwithstanding the objection to want of, or rather to erroneous, specification. The ground of judgment upon which the Court proceeded is made perfectly clear. The Lord Justice-Clerk says,—"I hold that a person who sends a messenger to buy the article of food for him is the purchaser within the meaning of the Act." If I read that as applicable to the present case, it seems to me *mutatis mutandis* exactly to fit it. But Lord M'Laren makes it still more clear. He says,—"The purchase was made for the inspector by his servant. The inspector was creditor for the delivery of the goods under the contract of sale, and was therefore rightly described as the purchaser." Why should I not be entitled to say: The sale was made for the accused by his servant; the accused was debtor for the delivery of the goods under the contract of sale, and was therefore rightly described as the seller? It seems to me that the judgment proposed cannot stand along with that in *Macaulay's* case.[1]

For these reasons I am confirmed in the conclusion that the Sheriff-substitute has gone wrong.

Lord Mackenzie.—We are sitting here as a Court of review, and are asked to alter the judgment of a very experienced Sheriff-substitute upon the question whether, in the circumstances of the present case, the complainer has given reasonable specification or not. The Sheriff-substitute, after hearing the evidence in the case, came to the conclusion that there was not reasonable specification. I regard the finding of the Sheriff-substitute as meaning this, that he was proceeding upon no mere technicality, but was proceeding upon the view that substantial injustice might be done to a person charged under this section of the Act if he were not told, in the body of the complaint, that the sale for which he was sought to be made criminally responsible was not made by himself but was made by the hand of a servant. The Sheriff-substitute expressed his opinion in this form: "In my opinion proof of demand to and delivery by the respondent's servant in the respondent's absence was not sufficient to prove sale by the respondent in response to a demand by the inspector, as narrated in the complaint."

[1] 20 R. (J.) 58, 3 White, 464.

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I may at once make this observation in regard to *Macaulay's*[1] case that it appears to me to have nothing to do with the present, for the simple reason that there the person who purchased through an agent was not the person accused. The whole point in this case is that a person who sells by the hand of a servant may defend himself by saying the servant was not acting within the scope of his employment. It is plain that this defence is open to him in Scotland, not only on the authority of *Lindsay* v. *Dempster*,[2] but on the authority of cases such as *Linton* v. *Stirling*[3] and of *Patrick* v. *Kirkhope*.[4] But unless the prosecutor specifies in the body of the complaint that the sale was by the hand of a servant the person charged has not the notice necessary to enable him to prepare his defence.

Offences under the Food and Drugs Acts seem to me of a different nature from breaches of certificate under the Licensing Acts. I may perhaps be permitted to draw attention to the preamble of the Act of 1875. These Acts were originally entituled Acts to Prevent the Adulteration of Food. That expression has been taken out of the Act of 1875. It is now entituled An Act to repeal the Adulteration of Food Acts and to make better Provision for the Sale of Food and Drugs in a pure State; and the preamble sets out thus: "Whereas it is desirable that the Acts now in force relating to the adulteration of food should be repealed, and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." When one goes on to see in what association section 6 occurs, we find that section 3 deals with the prohibition of mixing any injurious ingredients and of selling the same. Section 4 deals with the prohibition of mixing drugs with injurious ingredients; and then you come on to section 6, which provides that "No person shall sell to the prejudice of the purchaser." Now, I cannot accept the argument which was ably stated by Mr Keith, that there is no suggestion of any moral stigma if a man contravenes the provisions of the Food and Drugs Act of 1875. I do not think that the offence is in the same category as that which is constituted by a breach of a public-house certificate. In confirmation of that I may point to the amending Act of 1879 (42 and 43 Vict. cap. 30), which applies to the case in hand, and to the second section. It truly is a complaint against this man of selling something which was adulterated.

It is in these circumstances that the Sheriff-substitute has arrived at the conclusion which he has reached. I cannot find anywhere stated in the case that the son of William Fleming (the man charged) had any authority to sell this milk at all. The Sheriff-substitute finds that on the date libelled the respondent's milk-cart was in charge of his son Robert Fleming as his servant, but whether he was an agent for sale or was merely the messenger sent for the purpose of delivering milk I do not know. I do not think that the provisions of the Summary Jurisdiction Act of 1908, or the form in the schedule thereto applicable to the Food and Drugs Acts, help the complainer. The form in the schedule would be applicable if William Fleming had himself sold the milk. But he did not.

In the public-house cases the point was not taken that there was no

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[1] 20 R. (J.) 58, 3 White, 464.
[2] 1912 S. C. (J.) 110, 6 Adam, 707.
[3] 20 R. (J.) 71, 1 Adam, 61.
[4] 21 R. (J.) 27, 1 Adam, 360.

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notice, and one can see there is a difference where the sale is by a servant who is put behind a counter or at a bar and can be put there for no other purpose. Therefore I do not think that the fact that the form of the complaints in the three public-house cases to which we were referred does not bear that the offence was committed through the hand of a servant is a warrant for omitting the specification here. It is not necessary in the present case to say anything about the case of *Parker*.[1] It plainly appears that, in Scotland, if the facts were as brought out in *Lindsay*,[2] that would supply a good defence.

On these grounds I agree with the view taken by the Sheriff-substitute.

LORD SKERRINGTON.—I agree with the opinions which have been delivered by your Lordship in the chair and by Lord Mackenzie. I desire to add that I am very much influenced by the nature of the charge which was made against the respondent, because I think that, as to the question whether a party has or has not received fair notice of a charge, it is impossible to shut one's eyes to the kind of offence with which he is charged. Counsel for the appellant laboured hard to establish that the only question before the Court was whether what he called a commercial sale had been effected by or on behalf of the respondent, and he further argued that a conviction under section 6 of the Act of 1875 involved no moral stigma against the respondent. I entirely disagree with that suggestion. The charge, as I read it, is a charge of fraud, viz., that the respondent in response to a demand for sweet milk supplied something which was not sweet milk. I assume, of course, that cases may occur under this statute where an employer may be made vicariously responsible for the fraudulent act of his servant acting within the scope of his authority, but these cases are exceptional; and if it is proposed to make a person vicariously liable it is only fair that he should be informed, on the face of the complaint, that such an exceptional case is to be made against him. It is a rule of pleading, both in civil and in criminal practice, that a charge of fraud must be made with full specification.

I have one other observation to make. Reference has been made to Schedule C appended to the Summary Jurisdiction (Scotland) Act, 1908, and to the forms which are there given for complaints in regard to public-house offences. The schedule further contains a form applicable to the offence with which we are here concerned, namely, that the respondent did, "in response to a demand for twopence worth of sweet milk, sell,"—and so on. I refer to that in order that it may be seen that I have not overlooked it. But the circumstance that the person who framed this schedule did not, as I think, contemplate what was the proper form of charge in the case where the offence was committed by a servant, does not seem to me to throw any light one way or the other upon the question which has been argued to us.

THE COURT answered the question in the case in the negative, and dismissed the appeal.

ROSS SMITH & DYKES, S.S.C.—HUTTON & JACK, Solicitors—Agents.

[1] [1899] 1 Q. B. 20.

[2] 1912 S. C. (J.) 110, 6 Adam, 707.

No. 7.

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ROBERT RHIND, Appellant.—*Paton.*
JOHN PAULEY WIMPRESS (Officer of Customs and Excise, Dundee), Respondent.—*Sol.-Gen. Morison—J. A. T. Robertson.*

Rhind v. Wimpress.

Revenue—Excise—Passenger vessel liquor licence—Restrictive endorsement—Contravention—Penalty—Statutory Offences—Passage Vessel Licences Act, 1828 (9 *Geo. IV. cap.* 47), *sec.* 3—*Passenger Vessels Licences Amendment (Scotland) Act*, 1882 (45 *and* 46 *Vict. cap.* 66), *secs.* 1 *and* 2—*Finance* (1909-10) *Act*, 1910 (10 *Edw. VII. cap.* 8), *secs.* 49 (1), 50 (3), 52, 92, 96 (1) *First Schedule, D.*

Held (1) that the Commissioners of Customs and Excise in issuing a licence for the sale of intoxicating liquors on a "passenger vessel" under the Finance (1909-10) Act, 1910, sec. 49 (1), and First Schedule D, are entitled to endorse upon the licence the condition against the sale of liquor on Sunday authorised by the Passenger Vessels Licences Amendment (Scotland) Act, 1882, sec. 1, with regard to vessels plying in Scotland; (2) that the penalty for an infringement of such a condition is that enacted by sec. 50 (3) of the Finance Act, viz., £50, and not that incorporated into the Act of 1882 from sec. 3 of the Passage Vessel Licences Act, 1828, viz., £10.

HIGH COURT. Lord Justice-General Lord Mackenzie. Lord Dewar.

ROBERT RHIND, steward of and residing on board the passenger vessel "Marchioness of Bute," sailing from Dundee, was charged in the Sheriff Court at Perth on a summary complaint at the instance of John Pauley Wimpress, officer of customs and excise at Dundee. The complaint was in these terms:—"You are charged at the instance of the complainer that you, being the holder of a passenger vessel licence authorising you to sell by retail while the said vessel is engaged in carrying passengers, any intoxicating liquor and tobacco on the vessel to passengers for consumption on the vessel, said licence having endorsed thereon the condition that no intoxicating liquor shall be sold, retailed, bartered, or supplied on board the said vessel during any voyage commenced and terminated on the same Sunday, from one part of Scotland to another, or from and to the same place in Scotland, did on Sunday, the fourth day of May Nineteen hundred and thirteen, on board the said 'Marchioness of Bute,' while the same was on a voyage between Dundee in Forfarshire and Newburgh in Fifeshire and Perth in Perthshire and back to Dundee, commenced and terminated on said fourth day of May, and was at the time in the estuary of the River Tay" sell certain intoxicating liquors to a person specified "in contravention of the said condition of the said licence, said contravention of said condition being deemed and taken to be, by virtue of section 2 of the Passenger Vessels Licences Amendment (Scotland) Act, 1882 (45 and 46 Victoria, chapter 66),* a retailing or selling

* The Passenger Vessels Licences Amendment (Scotland) Act, 1882 (45 and 46 Vict. cap. 66), enacts:—

Sec. 1. "It shall be lawful for the Commissioners of Inland Revenue, or for any officer duly authorised by them to grant licences for the retail of intoxicating liquors on board packets, boats, and other vessels employed for the carriage of passengers from one part of Scotland to another, or going from and returning to the same place in Scotland on the same day, in terms of the recited Acts, to endorse on such licences a condition that no intoxicating liquor shall be sold, retailed, bartered, or supplied on board such vessels during any voyage commenced and terminated on the same Sunday."

Sec. 2. "If any person holding a licence having such a condition as afore-

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intoxicating liquors without having taken out a licence, contrary to section 50 of the Finance (1909-10) Act, 1910 (10 Edward VII., chapter 8), whereby you are liable to a penalty of fifty pounds, which penalty the Commissioners of Customs and Excise have elected, and in default of payment to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, sections 47 and 48."

The accused, having been convicted after a trial by the Sheriff-substitute (Sym), appealed to the High Court of Justiciary on a stated case.

The case set forth:—

"The appellant is the holder of a licence. . . . It is headed 'Finance (1909-10) Act, 1910. United Kingdom, Passenger Vessel Licence.' It is dated at Dundee, and bears to be granted by a Collector of Customs and Excise duly authorised. It bears to grant licence to the appellant, a person belonging to the 'Marchioness of Bute,' to sell by retail, while the vessel is engaged in carrying passengers, any intoxicating liquor and tobacco on the vessel to passengers for consumption on the vessel from its date 19th June 1912 until and including 28th May 1913,

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said endorsed thereon shall sell . . . or shall permit to be sold . . . any intoxicating liquor on a Sunday on board any such vessel, in contravention of the said condition, such contravention shall be deemed and taken to be a retailing or selling intoxicating liquors without having taken out a licence, and such person shall be guilty of an offence within the meaning of the third section of the first recited Act [the Passage Vessel Licences Act, 1828 (9 Geo. IV. cap. 47)], and shall be liable to the penalties therein provided."

The Passage Vessel Licences Act, 1828 (9 Geo. IV. cap. 47), enacts:—

Sec. 3. "If any person shall retail or sell, on board any packet, boat, or other vessel employed for the carriage or conveyance of passengers from one part of the United Kingdom to another part thereof, any foreign wine, strong beer, cyder, perry, spirituous liquors, or tobacco, without having taken out such licence as is by this Act required, every such person shall for every such offence incur and be liable to a penalty of ten pounds."

The Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8), enacts:—

Sec. 49 (1). "The licences specified in the First Schedule to this Act shall be in such form as the Commissioners direct. . . ." The First Schedule includes—"(D) Passenger vessel licences."

Sec. 50 (3). "If any person sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under this Act, without taking out such a licence, he shall be liable in respect of each offence, at the election of the Commissioners, either to an excise penalty of fifty pounds, or to an excise penalty equal to treble the amount of the full duty. (4) If any person holding any of the licences specified in the First Schedule to this Act contravenes the terms of the licence, or sells otherwise than as he is authorised by the licence, or contravenes any of the provisions applicable to the licence under that Schedule, he shall be liable in respect of each offence, if the offence is not an offence for which any specific penalty is imposed by any Act relating to excise duties or licences, to an excise penalty of fifty pounds."

Sec. 52. ". . . The expression 'passenger vessel' means a vessel of any description employed for the carriage and conveyance of passengers which goes from any place in the United Kingdom to any other place in the United Kingdom, or goes from and returns to the same place in the United Kingdom on the same day."

Sec. 92. "All the powers, provisions, regulations, and directions contained in any Act relating to excise duties or licences, or to penalties or forfeitures under Excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the excise duties charged by, and the excise

he having paid for the licence the sum of £10. On the back, and dated 20th June 1912, are, *inter alia*, the words, 'This licence is granted on the condition that no intoxicating liquor shall be sold, retailed, bartered, or supplied on board the vessel named in this licence during any voyage commenced and terminated on the same Sunday from one part of Scotland to another or from and to the same place in Scotland.'" [The case then stated the terms of the complaint, and proceeded]—

"Counsel for the appellant stated objections to the competency and relevancy of the complaint. These objections were in substance as follows:—(1) The licence is headed as under the Finance Act, 1909-10, and does not bear whether it was granted under that Act or under the Passenger Vessels Licences Amendment Act, 1882, and it is a licence applicable to the United Kingdom which it is not competent to endorse restrictively; such a restriction could only be endorsed on a licence bearing to be limited to Scotland. The said Act of 1882 does not apply to this licence. (2) The second objection was: If the Act of 1882 applies, then the Act which creates the offence provides the penalty, and the prosecutor must go to the provisions of 9 George IV., chap. 47, in order to find the penalty. The penalty there is £10. Though the last-named Act has been repealed it is still competent to refer to it to get the amount of penalty, and the appellant could only be liable in a penalty of £10 there stated. It is at all events incompetent to claim a £50 penalty." [Certain other objections were stated in the case which were not maintained on appeal.]

"I was of opinion that the licence was granted under the Finance (1909-10) Act, 1910, and that it was competent in a licence granted for a Dundee steamer going to and from places in Scotland on the same day to endorse it with the condition which it bore. My opinion was that the Passenger Vessels Act, 1882, is not an Act for granting licences, but an Act making it lawful to endorse such licences as the appellant's. I was also of opinion that the Commissioners of Excise were entitled to issue the licence which the appellant held, and to do so in the form in which it was expressed. [The Sheriff-substitute stated his decision upon the other objections.] I therefore repelled the objections.

"The case then went to proof. I found it proved on the evidence that while the vessel was on the voyage libelled on Sunday, 4th May, as libelled, the appellant sold to the passenger as libelled the various liquors which are specified in the complaint. The said passenger was accompanied by another passenger who was at the time in the employment of the Commissioners of Excise, and who was residing in Dundee. The voyage of the said steamer was from Dundee to Perth, calling at Newburgh, and returning to Dundee on the same Sunday, 4th May, as the voyage began.

"I found the whole material statements of the complaint proved. . . . I imposed a penalty of twenty pounds."

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licences mentioned in this Act, so far as the same are applicable and are consistent with the provisions of this Act, as fully and effectually as if the same had been herein specially enacted with reference to the said duties and licences."

Sec. 96 (1). "The Acts specified in the Sixth Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule." The Sixth Schedule includes the Passage Vessel Licences Act, 1828 (9 Geo. IV. cap. 47), as repealed to the extent of the whole Act.

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The questions of law were:—"(1) Was the complaint competent and relevant? (2) On the facts proved, was it competent for me to convict the accused?"

The appeal was heard on 10th November 1913.

Argued for the appellant;—The complaint was incompetent (1) in respect that the Commissioners of Excise had no power to impose the condition contravention of which was charged. The Commissioners had power to issue two classes of passenger vessel licences, (*a*) licences applicable only to vessels carrying passengers from one part of Scotland to another, or going from and returning to the same place in Scotland on the same day, under the Passenger Vessels Licences Amendment (Scotland) Act, 1882, section 1, and (*b*) licences applicable to vessels going between any parts of the United Kingdom, under the Finance (1909-10) Act, 1910, section 49 (1), First Schedule, D. The Commissioners were empowered to endorse the Scottish licence by section 1 of the Act of 1882, but they had no warrant for endorsing the United Kingdom licence. The licence in question was a United Kingdom licence, and the endorsation was therefore *ultra vires* of the Commissioners. (2) In any event, it was incompetent to claim a penalty of £50 under section 50 (3) or (4) of the Finance Act, 1910. The offence charged was created by the Act of 1882, and that Act set up a specific penalty of £10 by reference to the Passage Vessel Licences Act, 1828. Although the Act of 1828 was repealed, it was still competent to refer to it to ascertain the amount of the penalty.[1]

Argued for the respondent;—(1) The licence was validly endorsed. It was admittedly a United Kingdom licence, granted under the Finance Act, 1910, but that was the only statute in force authorising the Commissioners to issue passenger vessel licences. The Act of 1882 was not a licensing Act, it gave no power to grant a particular class of licence applicable only to Scotland, but merely gave power to endorse the licence held by a particular class of passenger vessel, viz., those not sailing to ports outside Scotland. That power was expressly continued by section 92 of the Act of 1910, and had been properly exercised in the present instance. (2) The penalty was that provided by the Act of 1910. The Passage Vessel Licences Act, 1828, to which the Act of 1882 referred for the penalty, was repealed by the 1910 Act, section 96 (1), Sixth Schedule. It was therefore necessary to look to the Act of 1910 for the penalty, and section 50 (3) of that Act applied in terms to the offence as defined by the Act of 1882, section 2.

At advising on 21st November 1913,—

LORD JUSTICE-GENERAL.—The case for the Commissioners of Excise, so ably and clearly presented to us by Mr Robertson, appears to me to be water-tight in all its compartments.

The appellant is holder of a passenger vessel certificate empowering him to sell intoxicating liquors on board the steam vessel "Marchioness of Bute" to passengers for consumption on board. That licence was granted by the Commissioners, or by someone authorised by them, in virtue of the powers conferred by the Finance (1909-10) Act, 1910, section 49,

[1] Guthrie v. Wilson, (1910) 6 Adam 386, *per* Lord Ardwall, at p. 393.

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subsection 1, which at the date of this licence, 19th June 1912, was the only statutory enactment then in force empowering the Commissioners of Excise to grant such a licence; for by the 96th section, subsection 1, of the Act of 1910, and the Sixth Schedule, all other licensing Acts were repealed as from that date; and in the repealing clause was embraced the Passage Vessel Licences Act of 1828. When this is clearly apprehended the remainder of the case is plain sailing. The Commissioners of Excise, on the day following the date of the licence, endorsed upon it a condition in these terms:—"This licence is granted on the condition that no intoxicating liquor shall be sold, retailed, bartered, or supplied on board the vessel named in this licence during any voyage commenced and terminated on the same Sunday from one part of Scotland to another or from and to the same place in Scotland." It was contended to us that the Commissioners of Excise were acting *ultra vires* when they endorsed this condition on the licence. I cannot agree. They were expressly empowered to impose this condition by the terms of the Passenger Vessels Licences Amendment (Scotland) Act, 1882, section 1, which was in full force at the date of the Finance Act, and was not embraced in the repeal clause of that Act. The Act of 1882 is not a licensing Act in the proper sense of the term. Its provisions only come into force after a licence has been granted; when a licence is issued, then the power to impose this condition emerges.

It has been found by the Sheriff in this case, as matter of fact, that the offence which is libelled in the complaint has been committed. He finds it proved on the evidence that while the vessel was on the voyage libelled on Sunday, 4th May, as libelled, the appellant sold to the passenger as libelled the various liquors which are specified in the complaint. He further says:—"I found the whole material statements of the complaint proved."

Well, then, if the condition has been lawfully imposed, and if it has been violated, what is the consequence? The consequence is very clearly set out in the second section of the Passenger Vessels Licences Amendment (Scotland) Act of 1882, which provides that, if anybody holding a licence such as this shall sell or permit to be sold any intoxicating liquor on a Sunday on board any such vessel, in contravention of the condition which I have just read as endorsed upon the licence, then such contravention shall be deemed and taken to be a selling or retailing of intoxicating liquors without having taken out a licence, and such person shall be guilty of an offence and liable to the punishment prescribed by the 3rd section of 9 Geo. IV. cap. 47. But as I have said that Act was repealed by the 96th section and the Sixth Schedule of the Finance Act of 1910. To the Act of 1910 we are, therefore, thrown back when we come to search for the character of the offence and the nature of the penalty; and we there find them clearly set out in the 50th section, and 3rd subsection of the statute, which reads as follows:—"If any person sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under this Act, without taking out such licence, he shall be liable in respect of each offence, at the election of the Commissioners, either to an excise penalty of £50, or to an excise penalty equal to treble the amount

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of the full duty." He is here asked to pay, as I understand, an excise penalty of £50, and the Sheriff has imposed a penalty.

Now that is the whole case,—clear and simple when once it is realised, first, that the statute of 1910 was at the time this licence was granted the only statutory authority for the issue of such licences, and second, that the statute of 1882 was not repealed by the repealing clause of the statute of 1910, but, on the contrary, that the powers conferred by the statute of 1882 were expressly carried on by the 92nd section of the Finance Act of 1910. But it was urged on the part of the appellant here that inasmuch as the licence was headed "Finance (1909-10) Act, 1910. United Kingdom, Passenger Vessel Licence," it was incompetent to impose the condition, and that, therefore, the penalty could not have been incurred. I cannot see on what ground any such contention could legally arise, and we were referred to no clause of any Act of Parliament which so prescribed. I come, therefore, without any hesitation to the conclusion that the Sheriff was right in the finding at which he arrived, and that, accordingly, we should answer both questions put to us in the affirmative.

LORD MACKENZIE.—In this case I am of opinion that the Sheriff-substitute has come to a right conclusion. The argument for the appellant was based on the assumption that the Inland Revenue authorities had no authority under any of the statutes to endorse the licence held by him in the manner set out in the case. This endorsation bears—[His Lordship read the endorsation]. The foundation of this argument was that there are two classes of certificate—what the appellant's counsel termed United Kingdom licences, and limited certificates applicable to Scotland; that the latter might be endorsed under the Act of 1882; but that there was no warrant for putting the indorsation on the United Kingdom licence which he holds—a licence granted under the Finance Act of 1910.

An examination of the statutes shows that this argument is not well founded. The appellant holds a licence granted to him under the provisions of the Finance Act, 1910. The authority for granting this licence is section 49 (1) and the First Schedule. The First Schedule—D—deals with passenger vessel licences, and there is no room for making a distinction between one class of licence and another. The previous licensing statutes are repealed by the Finance Act of 1910, section 96 (1) (Sixth Schedule), and this repeals section 45 of the Inland Revenue Act of 1880—the previous licensing statute. The question whether the Inland Revenue authorities were entitled to endorse a licence granted under the Finance Act, 1910, depends upon section 92 of that Act. It provides—[His Lordship read the section]. It follows from this that the conditions contained in section 1 of the Passenger Vessels Licences Amendment Act, 1882, are carried forward and apply to licences granted under the 1910 Act. The fallacy underlying the argument for the appellant is to be found in the construction he puts upon section 1 of the 1882 Act. As I read it, it is a substantive provision dealing with one matter, and one matter only, viz., the endorsation of a particular condition upon licences issued for the retail of intoxicating liquors on board a certain class of vessels. These are "vessels employed for the

carriage of passengers from one part of Scotland to another, or going from and returning to the same place on the same day," and the condition is, that no intoxicating liquor shall be sold, retailed, bartered, or supplied on board such vessels during any voyage commenced and terminated on the same Sunday." This section does not confer any power to grant licences nor does it deal with the form of the certificate. It confers power upon two classes of persons to endorse licences, viz.—(1) the Commissioners of Inland Revenue; and (2) any officer duly authorised by them to grant licences for the retail of intoxicating liquors on board vessels. The section cannot be read as the appellant wishes to read it—that it shall be lawful for (1) the Commissioners of Inland Revenue and (2) any officer duly authorised by them—to grant licences. That is not the purpose of the section at all. Nor would it be possible, putting this construction on the opening part of the section, to make grammar out of the remainder.

I therefore hold that the licence in question in this case was validly endorsed. What then was the offence of which the appellant here was guilty? Reference must be made to section 2 of the 1882 Act which, read short, provides that if any person holding a licence having such a condition endorsed thereon shall sell intoxicating liquor on a Sunday on board any such vessel, then the selling shall be deemed to have been without a licence. It is to be noted that this section does not create the offence but explains what the quality of such an act is. This provision again is carried forward into the Act of 1910 by the provisions of section 92. It is necessary, however, to return to section 2 of the Act of 1882, the concluding words of which are, "and such persons shall be guilty of an offence within the meaning of the third section of the first recited Act, and shall be liable to the penalties therein provided." The first recited Act is 9 Geo. IV. cap. 47, section 3 of which would have applied to the present case. The whole of the Act 9 Geo. IV. cap. 47 is, however, repealed by section 96 (1), and Sixth Schedule of the Finance Act of 1910.

The result of all this is to bring into play for the purposes of the present case the provisions of section 50 (3) of the 1910 Act, which provides—[His Lordship read the section]. As explained above the selling libelled in this complaint must "be deemed to have been without a licence." It follows he is guilty of a contravention of section 50 (3) of the 1910 Act. The decision in the case of *Guthrie* v. *Wilson*[1] is not inconsistent with the foregoing. There the person charged was not the holder of a licence under the Act of 1910.

In answer to the questions of law I am of opinion that the complaint was competent and relevant, and that, on the facts proved, it was competent for the Sheriff-substitute to convict the accused.

The Lord Justice-General intimated that LORD DEWAR, who was absent at advising, concurred.

THE COURT answered both questions of law in the affirmative.

MAXWELL, GILL, & PRINGLE, W.S.—ROBERT PRINGLE, W.S.—Agents.

[1] 6 Adam, 386.

No. 8.
Nov. 21, 1913.

THE SOLICITOR-GENERAL FOR SCOTLAND.—*Sol.-Gen. Morison—W. Mitchell, A.-D.*
A B, Panel.—*G. Watt, K.C.—Brand.*

Solicitor-General v. A B.

Crime—Incest—Intercourse with wife's sister while wife alive—Act 1567, 1 *Jas. VI. cap.* 14.

Held by a full bench (*diss.* Lord Johnston) that sexual intercourse between a man and his wife's sister during his wife's lifetime is not a crime by the law of Scotland.

HIGH COURT. (Full Bench.) Lord Justice-General. Lord Dundas. Ld. Johnston. Lord Salvesen. Lord Mackenzie. Lord Guthrie. Lord Skerrington.

A B was charged in the Sheriff Court at Aberdeen on an indictment setting forth that "being the lawful husband of and residing with C you did, on several occasions, in November and December 1912 . . . have incestuous connection with D the lawful sister of the said C, your wife: contrary to the Act 1 James VI. cap. 14, and the 18th Chapter of Leviticus therein referred to." *

The panel pleaded guilty, and was remitted to the High Court for sentence.

The diet was called on 8th November 1913 before the Lord Justice-General, Lord Johnston, Lord Mackenzie, and Lord Skerrington, when, objections having been stated to the relevancy of the indictment, the Court ordered the case to be re-heard before a full bench. The case was re-heard before a full bench on 12th November 1913.

Argued for the panel;—No crime had been committed in the sense of the Act libelled.[1] Being a penal statute the Act had to be strictly interpreted,[2] especially when it was borne in mind that the subsequent Act 1649, cap. 16, designed to supplement its provisions, had been expressly repealed. Accordingly the crime of incest was limited to cases expressly dealt with in the 18th chapter of the Book of Leviticus.[3] Now the only portion of that chapter which dealt with incest were verses 6 to 17, and these verses made no reference to intercourse between a man and his wife's sister. The relations between such persons were dealt with in verse 18, and that verse merely contained a prohibition either against polygamy generally or against marriage with a wife's sister during the life of the wife, according as "sister" was interpreted in the broad sense of "sister woman" or in its narrower and more usual sense of daughter of the same parents.[4] It was significant that in each of the verses 6 to 17 the reason for the prohibition was stated to be nearness of kin, while in verse 18 that

* The Act of 1567, 1 Jas. VI. cap. 14:—"Statutes and Ordinaines, that quhatsumever person or persones, that committes the said abhominable cryme of incest—that is to say, quhatsumever person or persones they be, that abuses their bodie with sik persones in degrie as God in his Word hes expreslie forbidden, in ony tyme cumming, as is contained in the xviii. chapter of Leviticus, sall be punished to the death."

Verse 18 of the 18th chapter of Leviticus (according to the Authorised Version of the Scriptures) is as follows:—"Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, beside the other in her life time."

[1] Act 1567, 1 James VI. cap. 14.

[2] Fenton v. Livingstone, (1861) 23 D. 366, Lord Deas, at pp. 382; Hume, i. 446-7.

[3] Hume, i. 448.

[4] Fraser, Husband and Wife, i. 113-14, 122-24, ii. 1520. Reference was also made to the 5th verse of the 25th chapter of Deuteronomy.

reason was not given, but another, viz., the fear of "vexing" the first wife. It was to be noted that in England a sister-in-law was not one of the female persons enumerated in the Punishment of Incest Act, 1908,[1] carnal intercourse with whom was punishable.[2] The recorded convictions under the Act upon which the Crown founded were in no way binding upon the Court and should not be followed, as they proceeded upon a wrong interpretation of the Act and of the 18th chapter of Leviticus. Further the relevancy of the indictments in the earlier cases never seemed to have been challenged,[3] which was doubtless accounted for by the fact that the question of the relationship of the person with whom the adultery was committed was one in which the accused had no tangible interest, as adultery of any description was punishable with death. This omission also entirely destroyed the value of the later cases, which merely professed to follow the earlier ones on a question already settled by their authority; and it was worth noting that in the last case[4] the penalty imposed by the Court had been conditionally remitted by the Home Secretary. But even if the offence libelled in the present case was formerly criminal it could not be so regarded in the present state of the law. Since the passing of the Deceased Wife's Sister's Marriage Act, 1907,[5] the degree of affinity subsisting between a man and his wife's sister could not be regarded as a forbidden degree, and incest could be committed only by parties within the forbidden degrees.[6] Therefore connection between a married man and his wife's sister, however offensive, could not now be regarded as incestuous. There could be no incest between a man and one whom he might lawfully marry if he became a widower.

Argued for the Crown;—It was idle to suggest that the Scots Act of 1567 had been repealed, either expressly or by implication, by the Deceased Wife's Sister's Marriage Act, 1907, which was a British statute passed for no purpose connected with criminal law, but limited entirely to the sphere of civil contract, and containing in section 3 provisions which safeguarded existing enactments applicable to England on the subject of incestuous adultery.[7] The question accordingly depended entirely upon the Act 1567, cap. 14, and the 18th chapter of Leviticus. Under that Act and that chapter intercourse between a husband and the sister of his living wife was incest, and this view had been held and acted upon by the Court in Scotland consistently from early times,[8] and there was no reason for departing from previous decisions, especially in view of the fact that in the latest case, *Oman*,[9] the argument now submitted on behalf of the panel had virtually been before the Court. That the recorded cases had gone to a jury necessarily implied that the Court had held the indictments therein

[1] 8 Edw. VII. cap. 45.
[2] Russell on Crimes, i. 973.
[3] Hume, i. 449-50; Fraser, Husband and Wife, ii. 1522-3.
[4] H. M. Advocate v. Oman, (1855) 2 Irv. 146. See also H. M. Advocate v. Stewart and Wallace, (1845) 2 Broun, 544.
[5] 7 Edw. VII. cap. 47.
[6] Alison, i. 562.
[7] Divorce and Matrimonial Causes Act, 1857 (20 and 21 Vict. cap. 85), sec. 27.
[8] Cases cited in Hume on Crimes, vol. i. 450; Margaret Scott, Jan. 15, 1580, 1 Pitcairn, Part ii. 84; Stewart, June 16, 1613, 3 Pitcairn, 248; Fenton v. Livingstone, 23 D. 366, Lord Deas, at p. 382; H. M. Advocate v. Oman, 2 Irv. 146.
[9] 2 Irv. 146.

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to be relevant. The interpretation of the 18th chapter of Leviticus which had been adopted in these decisions was the correct one. Verse 6 contained a general prohibition against connection between persons "near of kin," and verses 7 to 18 provided a list of examples which clearly established that under "near of kin" were included not only kin by blood but kin by marriage. Verse 19 clearly started upon a totally different topic, but there was no reason whatever for excluding verse 18 from the list of examples of prohibited intercourse between persons near of kin, the phraseology of the verse being in all important respects analogous to the phraseology of the preceding verses. Intercourse between a husband and his sister-in-law was already impliedly prohibited by verse 9, which prohibited intercourse between a man and his sister, and verse 18 expressly repeated the prohibition, but for obvious reasons limited it to the lifetime of the wife. Verse 18 therefore struck at two separate things, on the one hand taking a wife's sister to wife, and on the other hand having sexual intercourse with a wife's sister during the life of the wife. There was no warrant for reading the word "sister" in any sense except the ordinary one. At the date of the Act bigamy and incest were both criminal offences, and the Act was passed to increase the severity of the law. It was significant that in none of the cases and by none of the writers had any distinction been drawn between consanguinity and affinity.[1] If any relaxation of the law was required it could only be carried out by means of legislation.

At advising on 21st November 1913,—

LORD JUSTICE-GENERAL.—In my judgment this indictment discloses no crime according to the law of Scotland. The question whether it does so or not depends, I consider, exclusively upon the just construction of the old Scots Act of 1567, chap. 14. That Act is entitled "Anent them that committis incest," and the offence is limited to those "that abuses their bodie with sik persones in degrie, as God in his Word hes expreslie forbidden, in ony tyme cumming, as is contained in the xviii. chapter of Leviticus."

Now, that statute for the first time raised a certain act to the rank of a capital offence, and that being so, I unreservedly number myself amongst the many (of whom Hume speaks) who think "that the one consideration in the decision of those high interests of life and death shall be, *What hath the statute said;* and that neither custom, analogy, nor inference of the purpose of the Legislature, has here any just claim to be regarded. How rigorous soever the enactment, so far as it is clear and positive, it must be obeyed: But, in any point that is ambiguous or equivocal, a strict and literal construction to the side of mercy seems to be the only right one."[2]

I proceed at once to consider "What hath the statute said?" Now,

[1] H. M. Advocate v. Stewart and Wallace, (1845) 2 Broun, 544, Lord Justice-Clerk Hope, at pp. 546 and 547-8, Lord Justice-General Boyle, at p. 549; Fenton v. Livingstone, 23 D., 366, at pp. 370 and 371, Lord President M'Neill, at pp. 373 and 374, Lord Curriehill, at pp. 376-7, Lord Deas, at pp. 381-2; Purves' Trustees v. Purves, (1895) 22 R. 513, Lord Kincairney, at p. 516, Lord Low, at p. 537; Alison, i. 562-564; Hume, i. 449-50.

[2] Hume, i. 447.

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the answer to that question seems to me to be this, that the statute condemns to death any who commits the act which is expressly prohibited in the 18th chapter of Leviticus. And, in construing that chapter, I consider that we are not entitled to proceed by way of inference or analogy, or by piecing together separate and independent passages and considering the context. It appears to me that "all that the statute does is to enact the punishment of death for the offences which the chapter expressly forbids. To whatever the chapter does not expressly forbid,—whether in itself an offence or not,—the statute, in its terms, is inapplicable." These are the words of Lord Deas with regard to this very statute, used in the case of *Fenton* v. *Livingstone*.[1] For the purposes of my present judgment, I am ready to accept the view that the Scots statute of 1567 does not proceed upon the original Hebrew but upon the translation in use in Scotland, which is not said to have been rendered as was contended in the case of *Fenton* v. *Livingstone*.[1]

That translation, I am convinced, was what is commonly known as the Geneva Version of the Bible. It was first published in the year 1560, the year in which the first Protestant General Assembly met at Edinburgh. It passed into immediate, widespread, and lasting use. It was printed in Roman letters. It was divided into chapters and verses. It was in a handy quarto and not in an unmanageable folio. It was the favourite of authors and preachers. It outlasted the publication of the Authorised Version by a period of about 30 years. It was, we are told, the cherished volume in Puritan and Covenanting households. But, what is more to the purpose, it was the Geneva Version that was, for the first time, so far as we know, published in Scotland. The first licence to print the Bible was granted in the year following the statute of 1567. In 1568, Robert Lekprevick, the King's printer, received a licence to print the Bible. The licence is extant. For some reason or another it was not carried into effect, but I cannot doubt, if it had been, it would have been the Geneva Bible which would have been taken, because, six years later, in March 1574, when the historical situation remained entirely unchanged, and when Arbuthnot and Bassandyne applied to the General Assembly for a licence to print the Bible, we read that the Kirk granted "this godly proposition" and "promised to deliver the authentic copy which they shall follow, to them betwixt and the last day of Aprile." Now, the authentic copy handed to Arbuthnot and Bassandyne in 1574 was none other than the second or folio edition of the Geneva Bible published in the year 1562. And Bassandyne's Bible, as it was called, was not merely, as Woodrow says, an approximation to the Geneva Bible but was an exact reprint of the Geneva Bible. And it is not immaterial to observe that the calendar and chronological notes which accompany it were prepared and subscribed by Mr Robert Pollock, who was not only minister of the West Port, but one of the Lords of Council and Session.

I turn, therefore, without hesitation to the Geneva Bible as the authentic copy, and most probably the translation which was before the Scots

[1] 23 D., at p. 382.

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Legislature in 1567, to find there which were the offences which were expressly prohibited. I find the whole list in the 18th chapter of Leviticus, from the 6th verse to the 17th verse inclusive, and it is significant that the sixth verse opens with the words, "None shall come near to any of the kindred of his flesh." Then follow a succession of prohibitions, and a fresh subject is opened, as I read the chapter, at verse 18, which is in the following terms:—"Also thou shalt not take a wife with her sister, during her life, to vex her." That is the verse which is founded upon by the Crown in support of this indictment. It is the only verse in the 18th chapter of Leviticus which has any relation to the act which is charged here as the crime of incest. Now, reading that verse, it appears to me not to be open to construction. It is not ambiguous. It is clear, plain, and explicit in its terms; while recognising,—not encouraging, not permitting, but recognising—polygamy, it prohibits the polygamist from taking two sisters to wife at the same time, and the reason given is the creation of jealousy or envy in the household—"to vex her." And I observe that the marginal note in the Geneva Edition makes that very plain in the following language, "By seing thine affection more bent to her sister then to her." More significant still is the marginal note to be found in Cranmer's or the Great Bible of 1539, and in Matthew's Bible published in 1551. The marginal note, without comment, in both these versions is "Genesis 29"; and, when you turn to the 29th chapter of Genesis, you find there the account of the unhappy matrimonial relations of Jacob with his two wives, the two sisters Leah and Rachel.

That seems to me to solve any doubt, if doubt ever existed, with regard to the interpretation of the 18th verse of the 18th chapter of Leviticus. I come therefore very clearly to the opinion that the offence which is charged in this indictment as incest is not forbidden by any verse, line, or word in the 18th chapter of Leviticus, either expressly or by implication. I may add here, in parenthesis, that I have fully availed myself of the researches of my brother Lord Johnston into the various readings or translations of the verses which we have to construe in all the editions of the Bible published then and even later, and if I had to construe any one of them I should have come to exactly the same conclusion as I have reached in construing the 18th verse of this chapter as it is found in the Geneva Bible.

But then it was urged on behalf of the Crown and the Public Prosecutor here that this particular statute may "have been so construed, in practice, as to fix upon it a construction, in this respect, different from what we would otherwise have given it." I am now reading the words of Lord Deas in the case of *Fenton* v. *Livingstone*.[1] I cannot assent to that proposition as applied to a highly penal and criminal statute, and especially to a statute which, in my judgment, is free from all ambiguity. For I hold it to be well-settled law that as against a plain statutory law no usage can prevail. These are the words used in the latest House of Lords judgment in which this topic was considered—the case of *The Walker Trustees* v. *Lord Advocate*.[2] And the limits and scope of the application of the doctrine of *contemporanea*

[1] 23 D., at p. 382.

[2] 1912 S. C. (H. L.) 12.

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expositio in relation to these old Acts of Parliament has never been better or more clearly stated than by Lord Watson in the case of *Clyde Navigation Trustees* v. *Laird & Sons*,[1] where he says that "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period." That I accept as strictly applicable only to the case of statutes regulating civil rights and statutes which contain ambiguous expressions. It is, in my judgment, wholly inapplicable to the case in hand, because, in the first place, we are dealing with a highly penal statute where no inference from usage or construction can, I think, be admitted, and, in the second place, with a statute which seems to me not to be open to or susceptible of bearing two meanings.

But it was further urged on the part of the Public Prosecutor that by a long series of decisions it has been settled that intercourse in a wife's lifetime with her sister infers a statutory penalty, and it is said that these judgments do not leave the question open. I am again reading from the opinion of Lord Deas in the case which I have mentioned. I have made diligent search, in common with the rest of your Lordships, for that long series of decisions and for these judgments which do not leave the question open, and my search has been fruitless. Over a period of three and a half centuries I find not a train of decisions, nor a judgment foreclosing this question, but four isolated instances—examples as Hume calls them—three in the seventeenth century and then, after the lapse of two centuries, one in the middle of the nineteenth century.

In the seventeenth century we have the cases mentioned by Hume.[2] The first of James Stewart, in July 1613, the second of Henry Dick, in August 1629, and the third of Donald Brymer, in July 1649. In not one of these cases or examples, so far as we have been able to ascertain, was the question which we are considering to-day raised and discussed, or considered and decided. In all these instances the case went to trial without discussion, and the prisoner was convicted and sentenced. But, even if the question had been then raised and then considered and then decided, I should have come to exactly the same conclusion as I come to to-day, for I should have considered that the judgment was probably to be accounted for, as Hume points out, by the manners and opinions of that time, and certainly not by the peculiar disposition of the Judges who then sat in this Court. But it is sufficient to observe that the question was never raised, probably because the prisoner had no interest to raise it in respect that adultery in cases such as this was, in these days, punishable by death. I say exactly the same thing of the case of *Oman*[3] in 1855. In that case Lords Ivory and Deas expressly declined to consider or to decide the question which was raised on the indictment. They regarded it as inexpedient to do so. They thought the door was closed. With great respect, I differ from these learned Judges. Sitting alone, I should have

[1] (1883) 8 App. Cas. 658, at p. 673.

[2] Hume, i. 450.

[3] 2 Irv. 146.

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taken a different course, because the statute is in my opinion so clear, so absolutely free from all ambiguity, and because the question had never before been considered; it was open and not closed. But sitting along with your Lordships—a full bench of this High Court—I would have no hesitation whatever in brushing aside any decision or even any series of decisions upon a question such as this where I entertain so clear a view with regard to the meaning of the statute. I can never assent to the proposition that if we think, sitting full bench, a decision, or even a series of decisions, to be clearly wrong, it is outwith our powers to right that wrong.

I have made no reference and expressly refrained from making any reference whatever to the recent statute (Deceased Wife's Sister's Marriage Act, 1907 [1]). I say nothing whatever as to the effect which the recent statute has and ought to have upon our judgment in relation to this indictment. I desire it to be made perfectly clear, so far as I am concerned, that the facts set forth in this indictment do not to-day constitute—and never did at any time constitute—a crime by the law of Scotland.

I therefore move your Lordships to hold this indictment irrelevant and, by necessary consequence, to release the prisoner.

Lord Dundas.—I agree in the conclusion at which your lordship in the chair has arrived; but, while I do not wish to indicate dissent from anything you have said, I prefer to reach my conclusion by a different path.

The accused admits having had carnal connection with his wife's sister, his wife being alive. We have to decide whether or not these facts are relevant to infer the crime of incest. The indictment libels, in common form, that what was done is "contrary to the Act 1 James VI. cap. 14, and the 18th chapter of Leviticus, therein referred to." It appears to me that the Deceased Wife's Sister's Marriage Act, 1907,[1] has a crucial bearing upon the question before us. Since the passing of that Act, it would undoubtedly be lawful for the accused to marry his wife's sister, after the death of his wife; and it is impossible to suppose that a marriage between them, under that condition, could be held by the Criminal Court to be an incestuous relation. One must consider, then, whether or not the accused and his sister-in-law now stand, while his wife is still alive, within such "degree" as God in His Word has expressly forbidden, as is contained in the 18th chapter of Leviticus. There is no degree of consanguinity between them; the degree is one of affinity. It seems to me that, once established, the degree of affinity must subsist whether the wife be alive or dead; in other words, that its subsistence does not depend upon the wife being alive. Thus, for example, in *Purves' Trustees*,[2] the wife was dead before the man went through a ceremony of marriage with her niece; yet the Court held that there was no marriage, owing to the subsistence of the affinity. Now, I do not, as already observed, suppose that, since the passing of the Act of 1907, an indict-

[1] 7 Edw. VII. cap. 47.

[2] 22 R. 513.

ment for incest could possibly be held relevant on account of intercourse between the accused and his sister-in-law, if they should marry, the wife being dead, notwithstanding the degree of affinity subsisting between them. I do not, then, see how that degree of affinity can, since the passing of the recent Act, afford a relevant basis of indictment for incest on the ground of their intercourse, however wrong and censurable, during the lifetime of the wife. I may add that I do not think that section 3 of the Act of 1907, which reserves to an injured wife in England a special remedy, which she has by common law in this country, has any material bearing on this question as to the relevancy of a Scots indictment.

If these views are sound, I am not concerned to consider the difficult problems which might arise as to the exact scope and meaning of the 18th chapter of Leviticus; nor whether in prior cases—the ancient ones in 1613, 1629, and 1649, and the modern one in 1855—an indictment based on facts similar to those before us was, or was not, rightly held to be relevant.

I agree in thinking that this indictment is not relevant to infer the crime of incest.

Lord Johnston.—I understand that I am alone among your Lordships in holding that the intercourse of a husband with the sister of his wife, during the latter's life, is deemed incest and is punishable as a crime by the law of Scotland. With this knowledge, I need not assure your Lordships that I have anxiously reconsidered the question. But I feel myself unable to arrive at any other result.

Shortly after the Reformation incest was made a criminal offence by the Act 1567, c. 14. That Act stands unrepealed. The gist of that statute is to declare that whoever in time coming commits the crime of incest, that is to say, "abuses their bodie with sik persones in degrie" as God in the 18th chapter of Leviticus has expressly forbidden, shall be punished to the death. The penalty is restricted by the general provision of the Criminal Procedure Act, 1887, section 56.

The Act of 1567 thus incorporates by reference the 6th verse of Leviticus, chapter 18, and the *catena* of verses which follow. Verse 6 says, "None of you shall approach to any that is near of kin to him, to uncover their nakedness: I am the Lord." The verses which follow are, it is generally received, examples merely, and not exhaustive of the cases covered by verse 6. But they are examples of consanguinity and of affinity in almost equal numbers, thus showing that when verse 6 speaks of "near of kin to him" it includes kin by marriage as well as kin by blood. Moreover it is commonly understood that, when a relationship by consanguinity is expressly mentioned, the same relationship by affinity is impliedly included.

The question in the present case is primarily this—Does the *catena* of instances following verse 6 stop with verse 17, or include also verse 18? The latter verse says in the Authorised Version of 1611, "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, beside the other, in her life time." The turn of phrase is similar, almost to identity, in each of verses 7 to 17 and in verse 18, with the exception

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that verse 18 gives the special reason, "to vex her." Verse 19 and those that follow enter on new subjects and are admittedly not dependent on verse 6. But it is maintained that verse 18 is not one of the instances of prohibited intercourse of near kindred, but is, like verse 19 and those which follow, an incursion into a totally new region, and is a prohibition standing by itself, viz., a prohibition against polygamy. This is supported by reference to a criticism of the Hebrew text, and comparison with other passages of the Scriptures by Mr (afterwards Lord) Fraser in a learned disquisition in his work upon Husband and Wife.

I think that we have to interpret a Scots statute of the sixteenth century, and not to busy ourselves with the Biblical criticism of the nineteenth or twentieth centuries. We have to read the statute of 1567 in the light of the circumstances in which the Legislature of that date passed it. They owed their knowledge of the Scriptures to Coverdale's English version of 1539, Matthew's (incorporating Tyndale's Pentateuch) of 1537, the Great Bible of 1539, and the Geneva Bible of 1560. But I do not think that there is any substantial doubt that the last mentioned was their common text. I have examined all these versions, and while there are verbal differences among them, and between them and the Authorised Version, no one can read them without being satisfied that every one of them makes clear that what is presented to the reader as prohibited is the commerce of a man with his wife's sister during his wife's lifetime. It is not improbable that that generation of Scotsmen was influenced also by the Septuagint, and still more by the Vulgate. If so, these are even more clearly to the same effect.

The suggestion that the verse is merely a prohibition against polygamy is differently put. Mr Fraser has the courage of his convictions, and, accepting the rendering, "Thou shalt not take one woman to another," maintains an out-and-out prohibition against polygamy. The suggestion finds little support from the rest of Scripture or from the history of the Hebrew race, as we find it in the Bible and otherwise. But the idea was certainly not before the Scottish mind, or the mind of the Scottish Legislature, in the sixteenth century. Others, however, content themselves with maintaining that the prohibition is only against the limited polygamy of taking two sisters as wives at the same time. It is impossible to accept this limited prohibition of polygamy. The whole chapter, from verse 6 onwards, is dealing with sexual intercourse merely, and not with marriage. There is no more reason for saying that verse 18 is a prohibition of polygamy and not of incest, than for saying that the immediately preceding verse 17, which prohibits intercourse with both a woman and her daughter, is merely a prohibition of polygamy and not of incest.

At the outset I said that the question arose mainly upon the interpretation of verse 18 of the 18th chapter of Leviticus. But it is not to be forgotten that there is another reason why such intercourse as we are concerned with here may be held to be prohibited as incestuous. We have in verse 9 the prohibition of such intercourse between a man and his sister, and, if the *catena* of verses following verse 6 are merely examples and intended to include cases of affinity, where the corresponding case of consanguinity is expressly mentioned, then there is in the sections unquestionably depen-

dent on verse 6 an implied prohibition against such intercourse where the relation of brother and sister is by affinity.

If, then, it was prohibited either expressly or impliedly, how comes it, it may be asked, that it is expressly prohibited, but prohibited, not during the whole continuance of the relationship of affinity, but only during the lifetime of the wife. I think the answer is that the position of sister and of sister-in-law is different, and that while in the case of the sister the need of the prohibition continues for life, in the case of the sister-in-law it may be held to cease with the life of the wife. The Jewish law was based upon practical considerations, and these practical considerations appear to me to have been (first) the eugenic view of the situation; and (second) the social or family life view of the situation. The Jewish law had not developed the refinement of schoolmen or churchmen, which regards the marriage tie as making of the spouses one flesh, with the logical result that the relationship by affinity once constituted must, with all its consequences, continue until death. As I have said, the relation between a man and his sister-in-law differs from other relations by affinity, and I see no reason to doubt that verse 18 was specially inserted to meet the case; that is to say, while declaring carnal intercourse between a man and his sister-in-law to be incestuous, to relieve such intercourse from that stigma where, there being no blood relationship and therefore no eugenic cause, there has ceased also to be any social or family cause, that is on the wife's death. This cannot be said to be an impossible view, looking to any general conception of relationship by affinity and of its effect, for the law of England seems to be capable of taking it. I do not see it is any more difficult to assume that the Mosaic law, and the Scots statute which followed upon it, conceived that the intercourse of a man with his wife's sister during his wife's life might and ought to be deemed incestuous, but that it was not necessary that such intercourse should be deemed incest after the wife's death, when I find that the English Legislature, in the beginning of this century, was capable of taking the same view.

I ask leave to refer to two statutes. In the first place, there was passed the English Divorce and Matrimonial Causes Act of 1857.[1] Prior to that Act—and even since that Act—the difficulties in the way of a wife in England obtaining divorce, as we regard it, that is dissolution of the marriage tie, were very great. By this statute some slight relief was given to the injured wife, but in this limited way. Section 27 of the statute says: "It shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery." That leaves it to be ascertained what is meant by "incestuous adultery"? Incest was not at that date, and never had been, a crime by the law of England. It only inferred ecclesiastical censure. We know nothing judicially of the ecclesiastical law of England, or how far it affects the common law. But the same section of the Act of 1857 goes on to give a definition of "incestuous adultery." It provides "that for the purposes of this Act incestuous adultery shall be taken to mean adultery

[1] 20 and 21 Vict. cap. 85.

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committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of his being within the prohibited degrees of consanguinity or affinity." When we come to the Deceased Wife's Sister's Marriage Act, 1907, we find, first of all, that marriage with the sister of a deceased wife is recognised and permitted for the future, from which it is to be inferred, what really everybody knows, that prior to the Act marriage with a deceased wife's sister was prohibited. And then we find this provision, section 3 (1): "Nothing in this Act shall remove wives' sisters from the class of persons adultery with whom constitutes a right, on the part of wives, to sue for divorce under the Matrimonial Causes Act, 1857." Therefore, adultery of a man with his sister-in-law was, prior to 1907, incestuous by the law of England, and it is henceforth still to be deemed by the law of England incestuous during his wife's life, notwithstanding that he may marry his sister-in-law after his wife's death. I have only referred to the law of England as showing it is not impossible to conceive that that may be regarded by the law as incest during a certain period, and during the continuance of a certain relation, which may not be so regarded after that relation has ceased. But the reference appears to me to be very germane to the present question.

For these reasons, I have come to the conclusion that there is no ground for disturbing the judgment of our two learned predecessors in the considered case of *Oman*.[1]

Lord Salvesen.—The indictment in this case is laid entirely upon the Act of the old Scots Parliament 1 James VI. chapter 14; and it illustrates the conservatism of Scottish jurisprudence in matters of crime that this statute after an interval of nearly 350 years still regulates our law of incest. The forbidden degrees to which it applies are to be ascertained by reference to the 18th chapter of Leviticus; but as other offences against the moral law (as it was understood in Jewish times) are enumerated in the chapter the whole of it is not incorporated in the statute which is directed only against criminal intercourse between "sik persones in degrie as God in his word hes expreslie forbidden" in the chapter referred to. The penalty enacted in every case of transgression is the same, namely, the penalty of death. So far as our statute book is concerned this remained the penalty until, by the Criminal Procedure (Scotland) Act, 1887, section 56, it was enacted that a capital sentence shall no longer be competent, except on conviction for murder or of offences against the Act 10 Geo. IV. chapter 38. Previous to that time it had been the practice of the public prosecutor to restrict the pains of law, in which case the penalty usually inflicted was penal servitude for life.

A penal statute according to our law must always be strictly construed; and in the general case cannot be extended by implication to offences of a similar nature, with which it does not in terms deal; but the rule of construction to be applied to the Act of 1567, chapter 14, is *in gremio* of the Act itself. It is only offences, of the kind described, which are

[1] 2 Irv. 146.

expressly forbidden by the 18th chapter of Leviticus that fall under it. We are thus referred to that chapter, which so far as incorporated by the Act forms part of the law of Scotland and to which we must apply the ordinary rules of construction.

We are left in some doubt as to where we are to find the text of the chapter which the Legislature had in view in 1567. It is plain, however, to my mind, that it was not the Hebrew original which was thus incorporated in the Scots Act. Hebrew was no more understood by the mass of the population in 1567 than it is now, although there were no doubt in those times as at present a few Hebrew scholars. There did, however, exist various translations of the Bible, of which the Genevan was the most widely used in Scotland at the time of the Reformation. It was the first version to be printed in Roman type, and was also the first to be divided into verses. A few months after the passing of the Act a Scottish printer was licensed to print this Bible—no previous licence having been granted. If, therefore, the Scots Parliament had any particular translation in view —which cannot be positively affirmed, as they had probably not adverted to the fact that the existing translations differed both in language and in substance—it is reasonably certain that they would have tied themselves to the Geneva Bible. The point, however, is not of great practical importance, as the various versions of the Bible existing in 1567 are capable of being reconciled so far as the 18th chapter of Leviticus is concerned.

The 18th verse of that chapter, under which the present case is said to fall, is thus translated in the Geneva Bible: "Also thou shalt not take a wife with her sister during her life to vex her in uncovering her shame upon her." It is unnecessary to consider whether this is an accurate translation of the Hebrew text, for it is this one alone which has received statutory sanction, and which must therefore be interpreted according to the natural meaning of the words. It is probable that a better translation would have been the one inserted on the margin of the authorised version of the Bible, "one wife to another." In that case the prohibition would be clearly against polygamy only, without reference to the relationship between the wives. In order to harmonise these two translations the word "sister" in the Genevan version must be read as equivalent to "sister-woman." This is, however, not the natural meaning which laymen would take out of the word. On the other hand, it would be a complete inversion of the text to hold that it contained a prohibition against intercourse with a wife's sister. The true meaning, I think, is that the verse contains an express prohibition against marriage with two sisters, from which it may be implied, although this is not a necessary implication, that polygamy was permitted except in the one case expressly forbidden.

This construction is supported by a comparison between the offences enumerated in verses 7 to 17 inclusive. In none of these cases is any reason given for the prohibition except that of propinquity. In no case where the relationship is one of affinity is the prohibition limited to the lifetime of the person through whom the affinity is traced. The reason expressly assigned for the prohibition in verse 18 is that the earlier wife should not be vexed, or, as the revised version expresses it, should not have

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a rival in her sister. It is, further, not without significance that even in the 17th century the guardians of public morals were not satisfied that the provisions of the Act 1567, chapter 14, were sufficiently explicit. Accordingly in 1649 an Act was passed (chapter 16 of that year) enumerating in a schedule all the prohibited degrees. Amongst these occurs intercourse betwixt a man and his wife's sister, along with a number of others which are not expressly mentioned in the 18th chapter of Leviticus. This Act cannot be founded on as a contemporaneous exposition of the Act 1567, chapter 14, from which it is separated by a period of over eighty years, but it shows clearly enough that in a time when the same theological views prevailed, perhaps in an aggravated form, it was not thought safe to rest the penalty of what was then regarded as incestuous relationship on implication from a statute which dealt only with what was expressly forbidden. For the reasons above stated I have accordingly no difficulty in holding, if the question be still open, that verse 18 of the 18th chapter of Leviticus does not form part of the Act 1567, chapter 14.

Since 1567 there appear to have been only five instances of the Act being applied to facts such as those libelled in the present indictment. One of these only is of comparatively recent date, the other four happened in 1613, 1629, 1649, and 1705. In all four sentence of death was pronounced. In the last of the four, the case of *Barbara Tannahill*,[1] the facts went beyond those in the present case, for the irregular intercourse alleged was with the sister of the accused's deceased wife. Apart from the recent statute, however, the authority is just as good as that of the earlier instances.

There is no record of any argument having been submitted on the question of relevancy in the three earliest cases. In the last of all, that of *Oman*,[2] a full argument was presented to a Circuit Court at Inverness, at which Lord Ivory and Lord Deas were the presiding Judges. Their decision proceeded entirely on the earlier cases to which I have referred. Lord Deas said: "We cannot take upon ourselves, sitting here, to depart from these precedents." Probably many single Judges would have followed the same course. Had this case come before a Circuit Court it may reasonably be inferred, especially as no plea to the relevancy was proponed on the part of the accused, that sentence would have been passed as matter of course, and in the absence of a Court of Criminal Appeal without the means of legal redress. A full bench, however, can review any decisions of the Court of Justiciary however ancient and however much they have been sanctioned by usage. There has, however, been no usage so far as can be gathered following upon the decisions in question. A diligent search by the Clerk of Justiciary has not disclosed any other similar cases in the records of the Justiciary Court. It is difficult to assume that cases of the same nature have not actually occurred from time to time; and the inference I draw is either that no complaint was made to the Public Prosecutor or that in his discretion he declined to take action. In either view, it may be inferred that public opinion has entirely changed with regard to the criminal character of the facts here libelled.

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[1] Hume, i. 449-50.

[2] 2 Irv. 146.

It is open to grave doubt whether the decisions of single Judges in the Justiciary Court can be at any time regarded as authorities. I have known of cases where they have been deliberately disregarded by subsequent Judges at Circuit Courts; but, whatever importance may be attached to a recent judgment of a single Judge which will mainly depend on the reasons assigned, I attach none to the three instances in 1613, 1629, and 1649 which were so strongly founded on by the Crown. In the case of *Stewart* [1] Lord Justice-Clerk Hope said that in a question of constitutional government the Court of Justiciary in the seventeenth century "was no better than the Star Chamber or the Scotch Privy Council; and no one would ever think of quoting their decisions thereon, as binding precedents to guide us now." I differ from his view when he says that a similar condemnation does not apply to their decisions on the subject of incest. The penal statutes enacted with regard to irregular sexual relations of all kinds during these morose times (as Alison calls them) are just as alien to modern conceptions as their views on constitutional questions. They were tainted with false theological beliefs as to what the word of God enjoined, of which we can find no better example than the trials for witchcraft that form so foul a blot on the annals of the time. So far as the question before us is concerned no person accused of having had intercourse with a living wife's sister had any interest to plead that the 18th verse of the 18th chapter of Leviticus was not part of the law of Scotland. He had at all events been guilty of an aggravated form of adultery, and by the statute of 1563, chapter 74, the penalty of this crime as well for the woman as the man was death. The soundness of the later judgment of 1705 was doubted from the first and has never since been repeated, although it was the logical result of the earlier decisions. Incest according to the general views of Scotch lawyers consisted in carnal intercourse between persons within the forbidden degrees. The propinquity, once established, persisted, when the relationship was one of affinity, after the death of the person through whose marriage it arose, and I know of no case where it was held that a connection which was incestuous and criminal at one time could at a later date become permissible or at least not punishable. Since the Act of 1907 the relationship which was formerly considered incestuous may now merge in a legal marriage. I therefore concur with your Lordship in the chair in holding that the libel here is irrelevant as it discloses no crime known to the law of Scotland.

Lord Mackenzie.—The indictment here libels the Act 1 James VI. cap. 14 and the 18th chapter of Leviticus therein referred to. The crime charged is that the panel being the lawful husband of and residing with his wife did have incestuous connection with her lawful sister. The Act in question, 1567, c. 14, defines the crime of incest thus—"That is to say, quhatsumever person or persones they be, that abuses their bodie with sik persones in degrie, as God in his Word hes expreslie forbidden, in ony tyme cumming, as is contained in the xviii. chapter of Leviticus, sall be punished

[1] 2 Broun, 544, at p. 547.

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to the death." Neither the statute nor the indictment specifies any particular verse of the 18th chapter. The chapter having been incorporated with the statute, must be construed in the same manner as any Act of Parliament. It is contended that the 18th verse applies to the case in hand. I am of opinion that it does not.

The Act deals with degrees which are forbidden. It is no longer contended that the old view of the statute was correct, which made such intercourse punishable with death, though the wife were dead. Yet if the 18th verse deals with forbidden degrees, it is difficult to see how, when once the marriage had established the degree and the wife's sister therefore became near of kin in the sense of verse 6, she ceased to be so owing to the wife's death. In my view verse 18 does not deal with incest. The verses which precede it are those which deal with this matter. Whether the illustrations they give are exhaustive or not does not affect the present point. The cases dealt with in these verses, viz.: 6 to 17, are cases both of consanguinity and of affinity. In the latter, as in the former case, the degree is forbidden, not for a time, but for all time. In the case dealt with by verse 18, whatever version of the Bible be taken, the prohibition is not for all time, but is, or may be, merely temporary. The reason for this prohibition is distinctly given. It is not necessary, for the purpose of the point I am at present dealing with, to consider what rendering of the 18th verse is the most correct. The reason is the same in each: and the duration of the prohibition the same in each; according to the Geneva Bible of 1560, the version which preceded the statute, the verse runs, "Also thou shalt not take a wife with her sister, during her life, to vexe (her) in uncovering her shame upon her." According to the Authorised Version of 1611, "Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, beside the other in her life time." The prohibition is of an act that will vex the wife, and there is therefore a limitation in point of time. What is forbidden by verse 18 is not an act which it is said will transgress the cardinal prohibition in verse 6, "None of you shall approach to any that is near of kin to him." On this ground alone the indictment is in my opinion irrelevant.

But further, the statute makes it necessary to show that the persons are within the degree that God's Word has "expressly" forbidden. Before the Crown could discharge this onus it would be necessary to establish what version it is of God's word that was meant by the Act 1567, cap. 14. If not the original Hebrew was it not the original according to the most accurate translation? If the earlier translations could be shown to be inaccurate, was the panel to suffer death in spite of the error? The Revised Version of 1885 makes it doubtful whether the earlier translations were correct, for in it verse 18 is thus rendered, "And thou shalt not take a woman to her sister, to be a rival to her, to uncover her nakedness, beside the other in her life time." It is not necessary to decide what the purpose of verse 18 was, but the rendering in the Authorised Version is in favour of the view expressed by Lord Fraser—Husband and Wife, i. 114, that it contains God's law against polygamy. The mere fact that a lengthy argument was addressed to us

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on the subject, which is treated at length in Fraser on Husband and Wife, is to my mind enough to show that it cannot be successfully established that what is here charged was "expressly" forbidden by the Word of God. Nor do I regard this view as necessarily inconsistent with the decision in *Stewart*,[1] which was a case of blood relationship.

The statute is a highly penal one. The same rules do not apply in construing it as in interpreting the Act 1567, cap. 15, which regulates purely civil interests. The provisions of the latter, as is pointed out in Hume on Crimes, i. 447, admit of a broad and liberal construction; as regards the former, "in any point that is ambiguous or equivocal, a strict and literal construction to the side of mercy seems to be the only right one." Accordingly it is not surprising that when Baron Hume comes to deal with the cases which were tried under the penal statute he expresses doubts, shared in by Lord Royston, of the sentence in the case of *James Drysdale and Barbara Tannahill*[2] in 1705, where the intercourse was with the sister after the wife's death. The woman had sentence of death. Nor does he approve of the sentence of drowning passed in 1628 on George Sinclair, who gave the use of his body to "twa young damosells, baith being sisters."

I refer to these cases because in the present case a difficulty has been felt in regarding the question of the relevancy of the indictment as an open one. It is said to be concluded by authority. It was argued for the Crown that the point was settled by decision in the case of *Oman*.[3] When this case is looked at, however, it is seen that it was decided solely on the authority of the three instances recorded in Hume, i. 450. The dates of these cases were 1613, 1629, and 1649. The case in 1613 was that of *James Stewart*, also reported in a note to 2 Broun, p. 549. In each of these sentence of death was pronounced. So far as can be ascertained, there is no instance of such a prosecution during the two hundred years which intervened between the last of them and the case of *Oman*.[3] As regards the three cases upon which *Oman*[3] proceeded, there is no trace of objection having been taken to the relevancy, nor of the present point having been decided. Therefore, I do not consider these cases are binding on us. It must be borne in mind that, when these sentences were imposed, notour adultery was punishable with death. By the Act 1581, cap. 105, adultery was notour if attended with the procreation of a child. In each of the three cases mentioned by Hume he records that a child had been procreated. Therefore, if the panels had not been indicted for incest, they might have been indicted for notour adultery, in which case the sentence might have been the same.

The decision in *Fenton* v. *Livingstone*[4] was upon the civil statute of 1567, cap. 15, and the Court disclaimed any intention of deciding what was the correct construction of the criminal Act of 1567, cap. 14. It is discussed by Lord Deas, who had six years before been a party to the judgment in *Oman*.[3] *Purves' Trustees*[5] followed *Fenton* v. *Livingstone*.[4]

In construing this penal statute I think there are certain considera-

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[1] 2 Broun, 544. [2] Hume, i. 449-50. [3] 2 Irv. 146.
[4] 23 D. 366. [5] 22 R. 513.

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tions which cannot be left out of view. In his chapter upon Incest Baron Hume thus describes the crime: "A sort of intercourse, which has been forbidden, in a greater or less extent, by the general custom of all communities, and even in times very little advanced in civilisation. Thus the source of this law seems to lie in the native feelings of the human constitution, and not merely in those views of policy and discipline, though obvious and strong, which recommend the enforcing of such a restraint." That it is not the general custom of all communities to punish as a crime the offence here charged is well known. That the native feelings of the human constitution will be outraged if it is not dealt with as a crime seems to me impossible to hold in view of recent legislation of the British Parliament. As Baron Hume prefaces his chapter on Incest by a quotation from Blackstone in regard to offences which are against "the due regulation and domestic order of the kingdom," I may be permitted to call attention to the fact that in 1908 a statute was passed (8 Edw. VII. cap. 45) for England to provide for the punishment of incest. The offence here charged is not a crime in that country. Yet, if the source of the law be, as Hume says, "the native feelings of the human constitution," it is difficult to resist the conclusion that it would have been included in the Act. In 1907 an Act was passed for the United Kingdom (7 Edw. VII. cap. 47) which declares that marriage with a deceased wife's sister should not be deemed void as a civil contract except in certain cases. This does not appear to me directly to affect the present question, though it follows from it, if the view I take is not sound, that marriageable persons could be tried for incest.

I am of opinion that the objection to the relevancy should be sustained.

Lord Guthrie.—It is said by the prosecutor that the question of relevancy raised by the accused is closed by decisions which have been quoted by the recognised institutional writers on the criminal law of Scotland as closing the question. He also argued, although with less confidence, that these cases were rightly decided. The accused denies that the question is foreclosed; he disputes the soundness of the previous decisions; and he also maintains that, in any view, the charge is no longer relevant, owing to the operation of the Deceased Wife's Sister's Marriage Act of 1907.

It is true that connection between a husband and his living wife's sister has been held to be incest in four reported cases which went to judgment; and that these cases have been treated in Hume's Commentaries on the Law of Scotland respecting Crimes, published in 1819, and in Alison's Practice of the Criminal Law of Scotland, published in 1833, as well as in the current volume of practice (Macdonald's Criminal Law) as expressing the law of Scotland. In view of the expressions used in reference to the first three of the four reported cases by Hume (i. 450, "all of distant dates"), and by Lord Deas in the last of these cases (2 Irvine, at p. 150, "I know of no case precisely of the kind in modern times") we are entitled to take it that no other cases have occurred, during the period of 346 years, since the passing of the statute of 1567 in question in this case. These four cases were *Stewart* in 1613, *Dick* in 1629,

Brymer in 1649,[1] and *Oman* in 1855.[2] Pitcairn in his Criminal Trials mentions, in addition, the case of *Gilbert Young* in 1573; but that case did not come to an issue, because Young fled and was outlawed. Reference was also made to the extraordinary case of *Drysdale*[3] in 1705, in which, although the jury had found nothing proved against Drysdale except what could not be evidence against him, namely, the woman's judicial confession, the Court of Justiciary yet adjudged him to be banished for life. That case is reported at p. 307 of Hugo Arnot's Collection and Abridgment of Celebrated Criminal Trials in Scotland from 1536 to 1784, published in 1785, which contains a vigorous argument by the editor against the relevancy of the indictment; and Lord Royston, commenting on that case in his Notes, says: "*Sed dubito an jure*, for, since King James's Act has an express reference to the Judaical law, Leviticus xviii., it ought not to be extended to other cases not there expressly mentioned." The case of *Drysdale*,[3] however, whether well or ill decided, dealt with connection between a man and his wife's sister after the death of the wife, which involves different considerations from those applicable during the wife's lifetime. Therefore, the cases directly in point, in the question of a well-settled and obligatory practice fixing the law of Scotland until altered by statute, are reduced to four, three of which occurred in the first half of the 17th century, and the fourth in 1855. Thus there was nothing in the shape of contemporaneous exposition of the statute, because the first case, the case of *Stewart*,[1] did not occur till forty-six years after the Act was passed; there was, further, an interval of 206 years between the last of the first three cases, decided in 1649, and the fourth case in 1855, and, until the present proceedings, there has been no case since *Oman's*,[2] fifty-eight years ago. In my opinion, this is too meagre and interrupted a course of practice to form any barrier to the question being reconsidered.

But suppose the practice to hold the offence here in question as incest had been fairly large and fairly continuous, in my opinion, this full bench would be entitled to disregard it; and that for two reasons, first, because the question has never been considered on its merits, and, second, because, even if it had been so considered, it has never been decided by a full bench. In the three cases in the 17th century it does not appear that the relevancy of the charge was disputed; and in the case of *Oman*[2] in 1855 Lord Ivory and Lord Deas refused to consider the relevancy, because they thought the 17th century cases binding on them. It is unnecessary to determine whether, looking to the terms of the statute of 1567 and the circumstances in which it was passed, the long period of more than 200 years during which no similar case had come before the Courts, and the changed conditions under which the question arose in 1855, these distinguished criminal Judges were right in the view they took. I respectfully think they might have followed the view indicated in Alison's Practice of the Criminal Law of Scotland, page 564, in which, referring among other cases to those of *Stewart*, *Dick*, *Brymer*, and *Drysdale*[1] above mentioned, he says: "These are precedents drawn from morose times,

[1] Hume, i. 449-50. [2] 2 Irv. 146. [3] Hume, i. 449.

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on which no reliance can be placed in modern practice. There are numerous instances [three] of a capital conviction in the case of connection with a sister by affinity, during the lifetime of the wife of the man, and that too on libels laid for incest only; but here again it is very doubtful whether such extreme severity would be followed, on a matter admitted by theologians to be involved in so much doubt." Lord Ivory and Lord Deas might have taken the view that the same regard to 17th century precedents as was shown by them would have involved the relevancy of charges of incest in cases which are thus referred to by Mr Alison at p. 564: "So strong did the current of the times run against these connexions, that the pains of incest were applied in a great variety of cases for which the text of Leviticus makes no sort of provision . . . It is difficult to see on what ground these judgments were founded, as they are neither supported by Leviticus nor by the statute."

On the other hand, these learned Judges may have rightly considered themselves bound to treat the cases of *Stewart*, *Dick*, and *Brymer* as precedents, which they, as contrasted with a full bench, were not entitled to reconsider, and, if so minded, to disregard. This view is suggested by Lord Deas's words in the case of *Oman*[1]:—"We cannot take upon ourselves sitting here to depart from these precedents." That case might be binding upon any similarly constituted tribunal; it cannot foreclose the question before a full bench of Judges, one of whose functions it is to reconsider alleged precedents, whether of practice or of construction of statutes, especially if, as here, these precedents are of old date, few in number, and decided on grounds which do not apply to modern conditions, knowledge, and opinion.

The powerful passage on page 447 of Hume's Commentaries seems to me to be applicable in terms to the present case:—"How rigorous soever the enactment, so far as it is clear and positive, it must be obeyed; but in any point that is ambiguous or equivocal, a strict and literal construction to the side of mercy seems to be the only right one. And as to any blunder or defect of the statute whereby the offender's life may be saved; this, as it may be esteemed, not unfortunate omission must not be corrected or supplied out of deference even to erroneous precedents, and far less to popular inclination or belief, or from any regard to the consistency or harmony of the law. At furthest, if any exception is to be admitted to this rule, it can only be of those cases in which the connection is forbidden by the law of nature and the universal custom of all nations."

I, therefore, think that the question can be reconsidered, first, because there is no sufficient practice to close it; second, because in none of the cases which have occurred in practice has the question now raised been considered and decided, and in only one of them, the last in 1855, was it even raised in argument; and third, because, in any event, the question is now raised for the first time before a full bench. I am not overlooking the fact that a full Justiciary bench has appeared to hold a question foreclosed, although it had never been previously raised before a full bench. That occurred in the case of *Witherington* in 1881, reported in 4 Couper,

[1] 2 Irv. 146, at p. 150.

475. But the precise question in that case had been deliberately raised and carefully considered in at least two previous cases, which, according to the Lord Justice-Clerk's opinion, at p. 493, had been "followed in numberless cases since"; and it is to be observed that the Judges composing the full bench did, in point of fact, reconsider these previous cases, and they thought them rightly decided on the merits. Nor am I overlooking the dictum of Lord Deas in *Fenton* v. *Livingstone*,[1] where he says:—"By a long series of decisions, it has been settled that intercourse, in a wife's lifetime, with her sister, infers the statutory penalty. . . . These judgments do not leave the question open." This dictum was *obiter*, and if it means that the question was closed against reconsideration by a full bench I very respectfully think it unsound.

If then the question be open for reconsideration by this tribunal, I am clearly of opinion that the present charge, although involving adultery of a heinous kind, should be held irrelevant as a charge of incest. The question depends on the sound construction of 1 James VI., chapter 14, which incorporates an undefined portion of the 18th chapter of the Book of Leviticus.

A question was raised which it does not seem to me necessary to decide, even if we had, as we have not, the necessary materials for its decision. We have frequent occasion to criticise the draughtsmanship of modern statutes, but I do not think this ancient Scots Act can be considered as a model, or indeed as anything but a warning. The Act appears to incorporate the whole of a chapter in Leviticus, a considerable part of which is admittedly irrelevant. It does not state whether the words of the chapter to which it appeals are to be found, for the purposes of the Act, in the Hebrew version or in the Greek version (the Septuagint, the version used by Christ and the Apostles), and, if in either of these versions, which of the numerous and varying manuscripts and printed editions available to scholars in 1567 is to rule; nor, if an English translation is to prevail, does it say whether appeal is to be had to the translations of Tyndale, published in 1530, Miles Coverdale, published in 1535, Thomas Matthew, published in 1537, the version known as the Great Bible, published in 1539, or, as is most probable although by no means certain, to the Geneva Bible, popularly nicknamed the "Breeches Bible," published in 1560. The Crown and the accused both declined to state any view on this matter. But this question does not arise for decision, because, as I read the different English translations available in 1567, they are all substantially identical in expression and in meaning; and we have not been informed that, supposing either the original Hebrew or the Septuagint is to be looked at, any of the Hebrew or Greek MSS. or printed editions available in 1567, properly translated, convey any other meaning.

Two considerations were urged which seem to me irrelevant. It was said that we must assume from the well-known views of the Scots Parliament of 1567, as shown by their Acts 13, 14, and 15, that they must have intended to stamp the illicit connection at present in question as incest. I do not think this necessarily follows when it is remembered

[1] 23 D., at p. 382.

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that, even if this offence was not branded as incest, the offenders were liable to the penalties for adultery contained in the previous Acts of 1551 and 1563, and would probably have been held liable to the penalties contained in 1 James VI., chapter 13, of 1567, including, in an aggravated case, in addition to heavy penalties, thrice dowking in the "deepest and foulest pool or water of the town or parish" and banishment for ever from the said town or parish. But assume, what is perhaps probable, that they did intend to make connection between a husband and his living wife's sister incestuous, the question remains,—have they done so effectually? The Act of 1649, to which reference has been made, although it fell under the Rescissory Act of 1661, may be fairly referred to as showing how it was realised at that date, when the views of Parliament on questions of this kind were similar to those entertained in 1567, that the full intention of the Legislators in 1567 had not been given effect to by the statute of that year.

There is another consideration which I think equally irrelevant. It is said that, on a sound construction of the 18th chapter of Leviticus, verses 6 to 18 inclusive taking these verses as a whole, it is clear that the connection now in question must be deemed incestuous. That may or may not be. Such a result may perhaps be held reasonably to follow from the wide scope of the verses, or by analogy from the case of connection with a brother's wife dealt with in verse 16 (although that case presents the important difference of uncertainty as to the paternity of the issue), or by analogy from the case of qualified polygamy dealt with in the 18th verse, although, in the latter case, the precise reasons do not apply. But the statute, as I read it, excludes all such reasoning by analogy, or inference, or implication. The words are "Whatsomever person or persons that commits the said abominable crime of incest, that is to say whatsomever person or persons they be, that abuses their body with such persons in degree, as God in his Word has expressly forbidden, in any time coming, as is contained in the XVIII. chapter of Leviticus, shall be punished to the death."

Had the expression been "forbidden," or (on the analogy of the succeeding Act titled "Anent lawful marriage of the own blood in degrees not forbidden by God his Word") had the words been "not repugnant to the word of the Eternal God," the result might have been different. But I cannot refuse the ordinary effect to the unambiguous word "expressly." In the case of trusts, the distinction is familiar between express trusts on the one hand and implied trusts or constructive trusts on the other. In statutes and deeds the comprehensive expression "whether express or implied" is often employed. Reading the 18th chapter of Leviticus, and in particular the 18th verse, in any of the English versions available in 1567, I am unable to find that the connection in question is "expressly forbidden." I do not think that necessary or irresistible inference would satisfy the language of the statute. But, even if it did, I cannot derive any such inference from a verse in regard to which there are as many eminent lawyers and divines who think, as I do, that its only object was, for obviously good reasons, to prevent a certain form of polygamy, as there are who think that its primary, if not its only, object was to prevent a

particular form of incest, or who think that, if it had in view the prevention of a certain form of polygamy, it was also intended to cover, and by necessary inference did cover, the case of incest, whether during the wife's life or after her death.

As to the Deceased Wife's Sister's Marriage Act, 1907, I am unable to give any effect to that statute in the present question, because the Act seems to me limited, in express terms, to the sphere of civil contract. I grant that, if I am wrong in thinking the present charge irrelevant, and if I am right in refusing effect to the 1907 Act, the result will be anomalous, if not absurd. In that case, it will be possible to commit incest with a person whom the offender may, in a certain event, marry, whereas the very essence of incest has always been that it consisted in connection between persons who could never marry. But such a result would not be more anomalous, if not absurd, than the present undoubted state of the law of this civilised country, that a man may marry his deceased wife's sister, but a woman may not marry her deceased husband's brother.

Lord Skerrington.—I concur in the result at which the majority of your Lordships have arrived.

There is authority for the opinion that both incest and the attempt to commit it are indictable offences according to the common law of Scotland, *Lord Advocate* v. *M'Coll*,[1] and it receives support from the form of indictment usual in such cases prior to 1887. I do not differ from this view as regards persons who are so closely akin by blood or affinity that connection between them is at the present day generally regarded as unnatural, or again where there has been a long-continued series of decisions recognising that connection between persons so related is an offence against God and against nature. At one period of our history I have no doubt that connection between a man and his wife's sister would have been regarded as falling within this category. Thus, in the case of *Alison Beatson*,[2] this Court decided that incest which was charged as having been committed between a man and the daughter of his wife's sister, was relevant to infer only an arbitrary punishment—in other words was a crime at common law but not a contravention of the Act 1567, cap. 14, and so punishable by death. But there has been no such course of decisions as entitles me to decide the present question upon authority merely and without regard to modern opinion as to the degree of propinquity in which a man stands in relation to the sister of his wife. These persons are no longer within the forbidden degrees, and they may now intermarry if they are otherwise free to do so. I cannot therefore hold that the act to which the prisoner has pleaded guilty was so different in character from an ordinary act of adultery that it ought to be punished as a crime at common law.

In construing the Act 1567, cap. 14, a difficulty is created by certain decisions of the Justiciary Court which do not in terms apply to the case upon which we have to adjudicate, but which sanction a wide extension

[1] (1874) 1 R. (J.) 22, 2 Coup. 538.
[2] (1692) Hume, vol. i., p. 450.

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of the statute by departing from the sound rule to the effect that in construing a highly penal statute more regard should be had to its language than to considerations of supposed policy and analogy. As regards, however, the question whether the 18th chapter of Leviticus expressly forbids upon the ground of nearness of kin carnal connection between a man and his wife's sister, there is only one case in which a decision was pronounced after objection to the relevancy, viz., that of *Oman*.[1] The two Judges who pronounced that decision proceeded principally upon the authority of certain ancient convictions for incest, but it does not appear that in any of these cases the question was argued. It is therefore entirely open, especially to a full bench of this Court. In my opinion there is so much doubt as to the meaning of the 18th verse of the 18th chapter of Leviticus as to make it impossible to affirm that the immoral conduct to which the prisoner has confessed was until 1887 a capital offence according to the law of Scotland.

THE COURT discharged the panel.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—ALEX. MORISON & Co., W.S.—Agents.

No. 9.

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Di Carlo v. M'Intyre.

PIETRO DI CARLO, Appellant.—*Cooper, K.C.—A. Crawford.*
JOHN J. M'INTYRE (Procurator-Fiscal, Glasgow), Respondent.—*Sandeman, K.C.—Duffes.*

Statutory Offences—Gaming—Lottery—Implement for practising game of hazard—Element of skill in game—Glasgow Police (Further Powers) Act, 1892 (55 *and* 56 *Vict. cap. clxv.*) *sec.* 22.

In a prosecution under section 22 of the Glasgow Police (Further Powers) Act, 1892, for exposing in a shop "a lottery" consisting of a machine, it was proved that the machine was actuated by placing a penny in a slot, that this enabled a spring to be worked which projected a ball to the top of the machine, whence it descended through a number of irregularly placed pins, and emerged at any one of five openings, where it might be intercepted by a sliding cup operated by the manipulator, whose object was to catch the ball in the cup. There was no part of the machine where the ball could emerge that was not within reach of the sliding cup. The manipulator, if successful, received a metal disc entitling him to twopence worth of goods in the shop; if unsuccessful, he forfeited his penny.

Held by a full bench (*diss.* Lord Johnston) that although, in the hands of an ordinary member of the public, success depended largely on chance, yet, as the desired result might be attained on every occasion by the exercise of skill, the machine was not a "lottery."

Forte v. *Dewar*, (1905) 7 F. (J.) 82, 4 Adam, 575 *overruled.*

HIGH COURT. Lord Justice-General. Lord Dundas. Ld. Johnston. Lord Salvesen. Lord Mackenzie. Lord Guthrie. Lord Skerrington.

PIETRO DI CARLO, the keeper of an ice-cream shop in Glasgow, was prosecuted in the Police Court there at the instance of John James M'Intyre, Procurator-fiscal, upon a charge which set forth, "that you did on the 11th day of November 1912, in your shop at 115 Duke Street, Glasgow, keep, show and expose a lottery consisting of a box enclosing a mechanical contrivance put in action by the operator inserting a penny in the slot and then pulling a handle or spring

[1] 2 Irv. 146.

whereby a ball is thrown upward by the person desiring to try for the prize offered in said lottery, namely, a check which entitles the winner to goods to the value of twopence, said prize being determined by lot or chance, and did, date above libelled, suffer James Lauder, 203 Hunter Street, Glasgow, to exercise said lottery twice by the insertion of one penny each time, and Aubrey Cordiner, 116 Duke Street, and Alexander Mack, 28 Scotland Street, both in Glasgow, to exercise said lottery once by the insertion of one penny each, in which lottery goods to the value as aforesaid were offered as prizes determinable by lot or chance as above libelled, contrary to the Glasgow Police (Further Powers) Act, 1892, section 22." *

The accused pleaded not guilty.

On 8th February 1913 the magistrate found the accused guilty. The accused appealed upon a stated case, which set forth the following facts as proved:—

"The appellant is the keeper of an ice-cream shop at 115 Duke Street, Glasgow. On 11th November 1912 two police-officers called at appellant's shop, and in a room in said shop they found the three persons named in the charge, who are youths about sixteen or seventeen years of age and ordinary customers of the shop, manipulating the machine in question (No. 1 of the productions), which is available for the use of customers. The machine, which is known as the 'Pickwick,' is put into action by the insertion of a penny into a slot and the pressure of a lever which releases two balls. By pressing another lever one of the balls is made to roll down to the right-hand side of the machine under which there is a spring, which when drawn down and released throws the ball to the top of the machine whence it descends and passes through between a number of irregularly placed pins or studs emerging at one of five passages under which the manipulator attempts to catch it in a sliding cup near the bottom of the machine. If the ball is not caught in the cup it falls to the bottom of the machine where it is retained. Should the manipulator catch the ball, it then passes through a hole whereby a metal disc or check is ejected entitling the manipulator to goods to the value of twopence.

"The manipulator has two chances for his penny as it gives him two balls to throw. The penny is retained by the machine. The ball may descend through any one of five openings at the bottom of the pins, but the sliding cup which is under the control and direction of the manipulator can be moved so as to intercept the ball below any one of the five openings. There is no part of the machine at the level of the cup at which the manipulator cannot intercept the ball with the sliding cup. The machine tallies very closely with the

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* The Glasgow Police (Further Powers) Act, 1892 (55 and 56 Vict. cap. clxv.) sec. 22, enacts:—"No person shall keep or be concerned in the keeping management or conduct of any place or exercise keep open show or expose to be played drawn or thrown at or in either by dice lots cards balls or by numbers or figures or by any other way contrivance or device whatsoever any lottery and no person shall suffer to be exercised kept open shown or exposed to be played drawn or thrown at or in either by dice lots cards balls or by numbers or figures or by any other way contrivance or device whatsoever any such lottery in any place and any person contravening the provisions of this section shall for every offence be liable to a penalty not exceeding ten pounds."

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description of the machine which formed the subject of the conviction in the case of *Forte* v. *Dewar*, 12th July 1905, 4 Adam, page 575.

"An English decision was put before me for the defence, that of *Pessers, Moody, Wraith, & Curr, Limited*, v. *Catt*, in the King's Bench Division. In that case a judgment was pronounced by Mr Justice Scrutton on 5th June 1912 regarding this actual 'Pickwick' machine, and finding that it was not a game of hazard but a game of skill. In the conflict of precedents thus raised between two judgments each closely in point, I had regard not only to the paramount direct authority of a Court of Justiciary decision for a Scottish case, but also to the fact that the High Court in the case of *Forte* appears to have allowed as an element in the determination of the question of hazard the consideration whether the game was for the purpose of play by experienced players or for ordinary members of the public. While I considered that the element of hazard in the game scarcely exceeded that of many games of skill, I considered myself bound to hold that, in view of the machine being set up for ordinary members of the public in absolutely analogous conditions to those existing in the case of *Forte*, it was my duty to find that the game was a game of hazard and a lottery. Accordingly, I convicted, but as the prosecution was represented to be a test case, I imposed a modified penalty of 5s. or one day."

The question submitted for the opinion of the Court was—"Was the machine a lottery in the sense of the section founded upon."

The case was called on 31st May 1913, when the Court ordered it to be heard before a full bench.

The case was heard on 9th November 1913.

Argued for the appellant;—The only thing prohibited by the Act was a machine for playing a game of chance, but the machine here in question was not of that description, and so did not fall under the prohibition. It was an implement for the exercise of skill in catching a ball in a cup, and a prize was offered for successful manipulation of the machine. The governing element in the game was skill, which increased with practice, and there was no occasion upon which the skilful player might not prove successful. The case of a machine which afforded a chance only of exercising skill [1] was distinguishable from the present, and ought to have been distinguished in the case of *Forte* v. *Dewar*,[2] the decision in which should be overruled. A game of skill did not become a game of chance merely because it was played by a beginner who could not play with any approach to certainty. A precisely similar machine had been held by the English Courts not to be a gambling machine but a game of skill, and that case should be followed.[3]

Argued for the respondent;—The machine in question was a "lottery" which had been well defined by Hawkins, J., as a "distribution of prizes by lot or chance."[4] In the case of the ordinary member of the public who used the machine success or the reverse

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[1] Santongeli v. Neilson, (1900) 3 F. (J.) 10, 3 Adam, 234; Ogilvie v. Benigno, (1905) 7 F. (J.) 82, at p. 83, 4 Adam, 575, at p. 578; Feilding v. Turner, [1903] 1 K. B. 867.

[2] (1905) 7 F. (J.) 82, 4 Adam, 575.

[3] Pessers, Moody, Wraith, & Curr, Limited, v. Catt, (1913) 29 T. L. R. 381.

[4] Taylor v. Smetten, (1883) 11 Q. B. D. 207.

was a pure matter of chance, and the element of skill was to all intents and purposes absent. The machine was therefore a lottery in the sense of the statute. The fact that by practice a certain amount of skill might in some cases be attained was really immaterial, because the number of such cases was necessarily limited and even in such cases chance was still one of the main features in the game. The case was ruled by *Forte* v. *Dewar*,[1] which was a sound decision. *Pessers, Moody, Wraith, & Curr, Limited*, v. *Catt*[2] was an English decision, and was not binding on the Court, especially as the question there did not arise in criminal proceedings such as the present, but in a civil case where a defendant refused to pay the hire of the machine because it was a gambling machine, a defence which would not commend itself to the sympathy of any Court of law.

At advising on 21st November 1913,—

LORD JUSTICE-GENERAL.—We are not here asked to construe the clause of the Glasgow Police (Further Powers) Act of 1892. If that had been our task we should never, I think, have reached the question upon which our judgment is sought by both parties to this case, namely, whether this machine is, in the sense of the statute founded on, a lottery, meaning thereby a game of chance. It is called "The Pickwick" machine. It is actuated thus: A spring, drawn down and released, projects a ball to the top of the machine whence, by the force of the impact aided by gravity, the ball commences to descend. In its descent it passes among a number of irregularly placed studs, ultimately emerging by any one of five different passages where there is a cup in the hands of the manipulator who endeavours in it to catch the ball.

It is quite obvious that an unskilful performer will usually miss. It is equally obvious that a person of deft hand, with adequate practice and a quick eye, will usually succeed. It is equally clear that a person of superlative skill, with prolonged practice, will almost invariably succeed. Is that a game of hazard or a game of skill? In my opinion, it is a game of skill with an element of hazard, varying in extent in inverse ratio to the skill of the performer. If an unskilled tyro operates the machine, it will be a game of hazard. If a highly skilled and practised operator uses the machine, it will be a game of skill; and between those two extremes there will be a mingling of skill and hazard in infinitely varying degrees. But the same thing, it seems to me, must be said of all games of skill, because in all games of skill the unskilled will only succeed by a fluke, and the highly practised player will only miss by a fluke. A game of hazard, on the other hand, is one in which the tyro and the expert meet on substantially even terms.

This machine seems to fall within the category of games of skill, for it is found in the stated case that "The ball may descend through any one of five openings at the bottom of the pins, but the sliding cup which is under the control and direction of the manipulator, can be moved so as to intercept the ball below any one of the five openings. There is no part of the machine at the level of the cup at which the manipulator

[1] 7 F. (J.) 82, 4 Adam, 575.

[2] 29 T. L. R. 381.

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Lord Justice-General.

cannot intercept the ball with the sliding cup." In other words, a skilled expert may conceivably succeed on every occasion although a clumsy performer will probably fail.

Now, it is very satisfactory to find that we come—for I understand the majority of your Lordships are of the same opinion as I am now expressing—to the same conclusion as the Court of King's Bench, and are about to pronounce the same judgment with regard to the character of this machine as was pronounced by Mr Justice Scrutton and was confirmed by the Court of Appeal.[1] There is only one expression of opinion in some of the learned Judges' opinions from which I respectfully dissent. They speak of "a scintilla of skill" being present in the use of the machine. I do not think that accurately describes this machine. "A scintilla of skill" and a large element of hazard there certainly are in the hands of the unskilful performer. Indeed the greater the proficiency the less the hazard, and the less the proficiency the greater the hazard. But it would never, it seems to me, be a satisfactory way to determine the nature and character of the machine according to the skill or lack of skill on the part of those who seek to manipulate it.

That appears to me to be the ground upon which the whole reasoning advanced by the respondent here was rested. That also appears to me, so far as I can judge from the opinions expressed, to have been the basis upon which the judgment of this Court proceeded in the case of *Forte* v. *Dewar*,[2] for I find Lord Stormonth-Darling in that case said: "The only question is whether the machines which were found on the premises of the accused were for the purpose of practising games of hazard in order to induce or entice any person to play at such a game. Now, the finding of the magistrate . . . is, that to an ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance, and he held that the machine was for practising a game of hazard." That appears to me to be an unsound and an insufficient ground of judgment, because, I repeat, it would involve the determination of the character of the machine, whether of skill or hazard, by the efficiency or inefficiency of the player. I offer no opinion, for we heard no argument, upon the question whether the case would be different if one or two or three or four of the channels were closed. The case I am dealing with, and the case the High Court was dealing with in *Forte* v. *Dewar*,[2] were cases in which all the openings were open, and where the skilled manipulator might conceivably succeed on every occasion.

The judgment we are about to pronounce will undeniably overrule the judgment of this Court pronounced in the case of *Forte* v. *Dewar*.[2] I think that the decision in that case cannot be supported. I have, therefore, to move your Lordships to answer the question put to us—as indeed the experienced Magistrate who tried the case would probably have done, had he felt himself free—in the negative.

Lord Dundas.—I am of the same opinion. The appellant is charged

[1] Peeters, Moody, Wraith, & Curr, Limited, v. Catt, 29 T. L. R. 381.
[2] 7 F. (J.) 82, 4 Adam, 575.

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that he did, in his shop in Glasgow, keep, show, and expose a lottery, contrary to the Glasgow Police (Further Powers) Act, 1892, section 22. That section is printed in the case. It is obscurely expressed; but I suppose its gist is to prohibit under penalty the keeping of a game of chance in a place to which the public are admitted. The alleged "lottery" is a machine, which is very well described in the case, and which we saw in Court. It is, I understand, the same machine (or practically the same) as was before this Court in *Forte* v. *Dewar*,[1] and before the English Court of Appeal in the recent case of *Pessers, Moody, Wraith, & Curr* v. *Catt*.[2] It is important to note that the case states that "there is no part of the machine at the level of the cup at which the manipulator cannot intercept the ball with the cup." The English Judges held that the game is not one of hazard but of skill. They distinguished the case before them from those of *Fielding* v. *Turner*[3] and *Dyson* v. *Mason*.[4] Kennedy, L.J., was of opinion that in the machine here in question "there is what I may call a governing element of skill in the use of the cup which can, wherever the ball falls, if skilfully used catch that ball." His lordship went on to say,—"the test as to success or failure seems to me in this case to be one of skill and not of chance. That is the dominant element." I agree with the learned Judge's observations, and with the decision of the Court of Appeal. I take it that this machine is a game of skill. The skill involved seems to me to be akin in kind, though probably not in degree, to that of an agile fieldsman in the slips at cricket. But then it is said that, to a beginner, it would really be a matter of pure chance whether or not the ball was intercepted by the cup. That may well be; but it would, I apprehend, arise from the beginner's lack of skill, and not from the nature of the game for which the machine is designed and adapted. I have difficulty in seeing how a game of skill should be reduced to the category of a game of chance because the player is inexperienced. On this argument, such games as golf, cricket, billiards, and the like, might be regarded as mere games of chance or hazard. In *Forte's* case,[1] this Court condemned the machine in question as being a game of hazard within the meaning of section 406 of the Burgh Police (Scotland) Act, 1892. The Lord Justice-Clerk said,[5]—"The intention of the Legislature was to put down the use of such machines as are to be used for playing games of hazard. The amount of hazard may be modified; nevertheless the games here have been found to be games of hazard, which, the Act says, it shall be punishable to entice people to play at. I think the magistrates had materials on which they could so find." Lord Kyllachy, construing the statute, and having regard to the findings in fact by which the Court was bound, was unable to hold that the games in question were substantially games of skill, or were other than substantially games of chance. Lord Stormonth-Darling referred specially to a finding in fact by the magistrate that although a certain amount of success in working the machine could be acquired by practice, yet that "to an

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[1] 7 F. (J.) 82, 4 Adam, 575.
[2] 29 T. L. R. 381.
[3] [1903] 1 K. B. 867.
[4] (1904) 20 T. L. R. 298.
[5] 7 F. (J.), at p. 85.

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Lord Dundas.

ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance."[1] We are sitting here as a full bench. I am bound to say that I do not find the reasons assigned for the judgment in *Forte's* case[2] satisfactory or conclusive. As already stated, I do not see why a game of skill, such as I hold (agreeing with the English Judges) this particular game to be, should be condemned as being a game of chance or hazard, or a lottery, because its working, in the hands of an ordinary person having no experience or skill in the game, may be a matter more or less of mere chance. It appears that the magistrate would have declined to convict, but that he (quite rightly) considered himself bound by the case of *Forte*.[2] In my opinion, we ought to answer the question put to us in the negative.

LORD JOHNSTON.—The provision of section 22 of the Glasgow Police Act, 1892, is undoubtedly unskilfully worded, and is defective for want of any definition of the word "lottery." This word is not very clearly descriptive of the article in question, whether viewed objectively as a mechanical apparatus, or subjectively as the game or trial, whether of skill or of chance, for which it is intended to be used. But I think that it is our duty to look at the section reasonably and to make it effectual, provided the idea it conveys is sufficiently clearly set forth to leave no reasonable doubt as to its meaning. Whether your Lordships or I am right, I have no doubt that it ought, in the interest of the juvenile community, to be amended.

The section in question was intended, I think, to put a stop to a class of gambling carried on through the medium of something mechanical. The question to be determined is, I think, whether the use of this machine demands for success merely skill, or whether that success depends on chance wholly or in part. I think that the machine must be regarded not in the abstract, but in relation to the circumstances under which it is offered for use and is used. I am very far from saying that if in the quiet of an isolated room the machine were put experimentally into the hands even of men of the highest skill and training in the use of hand and eye, as, for instance, noted billiard players, they could make any certainty of continued success. But suppose that they could, that would not affect my view of the machine as intended to be used, and as used by the appellant. The object of the owner in exposing it for use in his saloon is gain. The object and result of what I may call his commercial use of it is I think a certainty of gain. The odds are in favour of the individual owner and his machine, else it would not be exposed for the use referred to. The odds must be against the average individual user, though each, believing his own deftness to be above the average, or sanguine of his luck, hopes to falsify the odds in his own particular case. His object is the chance of gain. Now, money is staked, and whether loss or gain results depends on a combination of skill and chance, both present in every case, though which predominates depends on the individual. I cannot hold that this machine is not a lottery when operated by an indi-

[1] 7 F. (J.), at p. 86. [2] 7 F. (J.) 82, 4 Adam, 575.

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Ld. Johnston.

vidual in whose hands skill predominates, though chance is present, and a lottery when operated by another in whose hands chance predominates.

Therefore I think the result is that, when it is regarded not as a machine to be experimented on by experts in games of skill, but as in fact exposed for general use in the saloon of an ice-cream vendor or similar place to induce the hazard of money by all and sundry, skilled and unskilled, this article is a machine the use of which involves, and the result of the use of which depends and is intended to depend on, chance to such intent and effect that it must be reasonably regarded as a lottery in the sense of the statute. Accordingly, I am of opinion that the question put in this stated case should be answered in the affirmative.

Lord Salvesen.—The sole question argued in this case was whether the machine found on the accused's premises was a machine for the purpose of practising a game of hazard. The stipendiary magistrate was of opinion that the element of hazard in the game scarcely exceeded that in many games of skill; but he felt himself bound to convict because of the judgment of the Court of Justiciary in the case of *Forte* v. *Dewar*.[1] In that case he holds, and as I think rightly, that the Court allowed as an element in determining the question of hazard the consideration whether the game was for the purpose of play by experienced players or for ordinary members of the public. In my opinion that is not a legitimate element in considering whether a particular machine constitutes a lottery. It may be affirmed of all games of skill that a beginner will not practice the game successfully; and it does not appear to me to make the game any the less one of skill that there is in it a substantial element of chance. The game of golf is generally regarded as a typical game of skill; but no player has yet reached that degree of skill that he can calculate the exact spot at which the ball will lie after his stroke is played. Yet the difference of a few inches may make the next shot a relatively easy or a difficult one. The carry of the ball and its direction will also depend upon the strength of the wind while the ball is in the air, which in the case of a gusty day cannot even be approximately calculated. If this is true of the experienced player it is very much more true of the beginner; yet no one would describe the game of golf as a game of hazard, still less as a lottery coming under the penal statutes. In the present case we are not embarrassed by any adverse findings of fact such as seem to have affected the minds of the Judges who decided *Forte's* case.[1] Had the magistrate been left to reach a decision independently of authority it is obvious that he would not have convicted. We have had an opportunity of seeing the machine which is correctly described in the case before us; and I have no doubt that a qualified and practised player would be able to catch the falling ball in the cup with a reasonable degree of regularity. Indeed, I think that such proficiency might be acquired in this game (unlike many games of skill) as that the result aimed at might be achieved on every occasion. Such proficiency, however, can only be acquired as the result of natural qualities of quickness combined with a long course

[1] 7 F. (J.) 82, 4 Adam, 575.

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of practice such as is not likely to be possessed by the ordinary members of the public who play it for their amusement. The legal distinction between a game of hazard and a game of skill seems to me to be this, that in the former the experienced player and the beginner are on a footing of equality, while in the latter they are not. There has been a tendency in previous cases to take a very rigid view with regard to machines of this kind; but I am prepared to hold that a game does not come within the scope of the statute when it involves a substantial degree of skill to play it successfully. I may add that I think the Glasgow Police might be better employed than in interfering with such harmless amusement as may be derived from the operation of a machine such as the present.

I should have reached the above conclusion independently of the decision in the English case to which we were referred, but it is satisfactory to know that the decision of the Court of Appeal in England is to the same effect as our own; and that the use of a machine which has been held lawful in that country should not be treated as a criminal offence in Scotland.

LORD MACKENZIE.—I agree that the question put should be answered in the negative, and the grounds of my opinion may be stated in two sentences. I think that where the player, as here, may attain the desired result on each occasion by the exercise of skill the game cannot be considered a lottery. The fact that a player is unskilled does not make a difference.

LORD GUTHRIE.—I agree. It seems to me that, on the admitted facts of this case taken along with an examination of the machine itself, the game in question involves a substantial, although varying, amount of skill for all performers, whether beginners if possessed of reasonable quickness of eye and hand, or those with a moderate amount of practice, or experts. The first would catch the ball occasionally, the second often, and the latter with reasonable regularity.

LORD SKERRINGTON concurred with the majority.

THE COURT answered the question in the case in the negative, and sustained the appeal.

JAMES G. BRYSON, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

No. 10.

Jan. 16, 1914.

Paul v. H. M. Advocate.

Knox v. H. M. Advocate.

WILLIAM PAUL, Appellant.—*Haldane.*
ALEXANDER KNOX, Appellant.—*Haldane.*
HIS MAJESTY'S ADVOCATE, Respondent.—*Lord-Adv. Munro—Mitchell, A.-D.*

Procedure—Withdrawal of plea of guilty—Crime—Habitual criminality—Withdrawal of plea on appeal after sentence—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 31 *and* 41—*Prevention of Crime Act*, 1908 (8 *Edw. VII. cap.* 59), *secs.* 10, 17 (3) (5).

Two persons, who were charged with theft by housebreaking and with being habitual criminals within the meaning of the Prevention of Crime Act, 1908, sec. 10, having, under sec. 31 of the Criminal Procedure (Scotland) Act, 1887, and sec. 17 (3) of the Prevention of Crime Act, 1908, pleaded guilty to the charge of theft and admitted that they were habitual criminals, were remitted by the Sheriff for sentence to the High Court of Justiciary. Both were sentenced by the presiding Judge to terms of penal servitude and preventive detention, one having asked, and been refused, leave to withdraw his admission that he was a habitual criminal.

The accused then appealed to the Court of Appeal and asked leave to withdraw their pleas to the charge of habitual criminality, alleging that in pleading guilty they believed that they were merely admitting that the list of previous convictions annexed to the indictment was correct, and did not understand the nature of the charge and the penal consequences that it involved.

The Court *held* that, as the procedure had been regular throughout and the accused had been advised by law-agents, their allegations as to their misunderstanding of the charge could not be accepted as grounds for allowing the plea to be withdrawn; and *refused* the appeals.

Observations as to the circumstances in which the Court of Appeal will allow such pleas to be withdrawn.

Observed that it was the duty of a Sheriff, before taking a plea to a charge of being a habitual criminal, to explain to the accused the nature of the charge and the consequences of an admission of guilt.

COURT OF CRIMINAL APPEAL. Lord Justice-General. Ld. Johnston. Lord Skerrington.

WILLIAM PAUL and ALEXANDER KNOX were each charged on indictments in the Sheriff Court at Aberdeen with theft by housebreaking aggravated by previous convictions, and with being habitual criminals within the meaning of the Prevention of Crime Act, 1908, section 10.

Under section 31 of the Criminal Procedure (Scotland) Act, 1887,*

* The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. cap. 35), enacts:—

Sec. 31. "Where a person accused shall give written notice to the Crown Agent through his own procurator that he desires to have his case at once disposed of, and declares his intention to plead guilty, it shall be lawful to serve such person with an indictment and a notice . . . to appear at a diet not less than four clear days after such notice before the Sheriff before whom under this Act he would be cited to a first diet . . . and at such diet the Sheriff, if any plea of guilty is tendered which shall be accepted by the procurator-fiscal, shall deal with the case in like manner as cases are required to be dealt with under this Act where a person accused pleads guilty at a first diet. . . ."

Sec. 41. "Where a person accused is cited to the High Court of Justiciary for the second diet the said Court shall have power to review the proceedings at the first diet, and where the person accused has pleaded guilty to the whole

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they gave notice that they desired to have their cases at once disposed of and declared their intention to plead guilty, and at diets held for Paul on 11th November 1913 and for Knox on 29th November 1913 they pleaded guilty to the charges of theft by housebreaking and to the previous convictions, and also, after special interrogation, admitted that they were habitual criminals, and were thereupon remitted by the Sheriff-substitute (Laing) to the High Court of Justiciary for sentence.

On 19th November 1913 Paul was sentenced by the Lord Justice-Clerk to periods of penal servitude and preventive detention. On 12th December 1913 Knox came up for sentence, when his counsel moved the Court to allow his plea to the charge of habitual criminality to be withdrawn. The Lord Justice-Clerk refused the motion, and sentenced him also to periods of penal servitude and preventive detention.

Both panels appealed to the Court of Appeal.

The following grounds of appeal were stated by Paul:—

"That neither at the pleading diet nor at any previous time was the appellant made acquainted of the sense in which the phrase 'habitual criminal' was used in the indictment, and accordingly did not understand that, in addition to a sentence for the crime he was charged with, he would be given a further sentence of preventive detention. At the pleading diet he was specially interrogated as to whether or not he was a 'habitual criminal,' but he understood when pleading guilty that he was merely admitting as correct the list of previous convictions annexed to the indictment. That had he been made aware of the consequences of a plea of guilty he would have pled 'not guilty' to the charge of being a 'habitual criminal.'

"That the appellant was liberated from Peterhead on or about 27th September 1912. That he worked steadily for more than a year with various employers, being seven months in the employment of one, and up to the time of committing the crime which caused his arrest he was leading an honest life. That the articles stolen were of small value, and the crime was committed on a sudden impulse when under the influence of drink. That had he been tried by a jury there was not sufficient evidence to convict him of being a habitual criminal.

"That in these circumstances a miscarriage of justice has taken place."

The following grounds of appeal were stated by Knox:—

"Because at the diet in the High Court the appellant asked leave

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or any part of the charge at the first diet, the Court at such second diet if it shall be shown that such plea was taken to an irrelevant or incompetent charge, or has been taken under substantial error or misconception, or under circumstances which tended to prejudice the person accused, may allow such plea to be withdrawn or modified. . . ."

The Prevention of Crime Act, 1908 (8 Edw. VII. cap. 59), enacts:—Sec. 17 (3). ". . . where a person is indicted [for a crime and with being a habitual criminal] the provisions of sec. 31 of the Criminal Procedure (Scotland) Act, 1887, shall not apply unless the accused intimates his intention to plead guilty of the crime in terms of that section and to admit that he is a habitual criminal, and where the accused intimates his intention as aforesaid the Sheriff shall remit him to the High Court of Justiciary for sentence. (5) . . . A person sentenced in Scotland to preventive detention may appeal against the sentence to a Court of Appeal which shall consist of not less than three Judges of the High Court of Justiciary. . . ."

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to withdraw his plea of guilty on the ground that, for the reasons after stated, it had been taken under substantial error or misconception, and under circumstances which tended to prejudice the appellant, and such leave was refused.

"The appellant respectfully submits that he should be allowed to withdraw his plea of guilty to the said charge of being a habitual criminal, for the following reasons which he stated at the said diet in the High Court:—(1) He offered to plead guilty, and subsequently did so, under the provisions of section 31 of the Criminal Procedure Act, under the misconception that in pleading guilty to being 'a habitual criminal' he was merely admitting the accuracy of the previous convictions founded upon in the charge against him, and he did not understand that, by section 10 (2) (*a*) of the Prevention of Crime Act, 1908, he was not 'a habitual criminal' within the meaning of that Act, unless he was also 'leading persistently a criminal or dishonest life.' He was advised by a law-agent to offer to plead guilty under section 31, before he did so, and said agent explained to him that the practical effect of that plea would be an addition to his sentence, but did not explain to him the technical meaning and statutory requisites of a charge of being 'a habitual criminal.' The appellant, prior to the acts of theft charged in said indictment, had been earning his livelihood by honest occupations, and was not persistently leading a criminal or dishonest life. (2) The appellant was apprehended at Aberdeen on 26th October 1913, and has been in prison since that date. Prior to a pleading diet on 30th October the appellant was advised by an agent in regard to said diet. The said indictment was served upon him on 24th November 1913. On 3rd November, while in the prison at Aberdeen, appellant requested the prison authorities to be allowed to consult a law-agent, but no law-agent was admitted to him until after he had again made the request on 17th November 1913.

"Under these circumstances the appellant was seriously prejudiced in tendering a plea of guilty under the provisions of section 31 of the Criminal Procedure Act."

The cases were heard together on 14th January 1914.

Argued for the appellants;—It was competent for the Court of Appeal to allow the panels to withdraw their admissions, if satisfied that they had been made under substantial error or misconception. The fact that the pleas had been tendered under section 31 of the Act of 1887 and not at a "first diet" under section 28 of that Act did not detract from the power of the Court,[1] the cases[2] which seemed to indicate that section 41 of the Act of 1887 only applied to pleas tendered under section 28 being wrongly decided and logically unjustifiable, and being in any event inapplicable to an application to the Court of Criminal Appeal under the Act of 1908. Here there had been substantial error and misconception, the charge being a highly technical one with regard to which mistake was easy, and neither panel having ever intended to plead guilty to the technical offence of being a habitual criminal. Accordingly the Lord Justice-Clerk should, under section 41 of the Act of 1887, have allowed the panel Knox to withdraw his admission when he came up for sentence,

[1] H. M. Advocate v. Robertson, (1899) 1 F. (J.) 74, 3 Adam, 1.

[2] H. M. Advocate v. Lyon, (1887) 15 R. (J.) 66, 1 White, 538; H. M. Advocate v. Black, (1894) 1 Adam, 312.

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and the Court of Appeal should now allow both panels to make their withdrawals, in order that an inquiry might be made into the facts on which the charge was based,[1] both panels having set forth in their appeals averments relevant to establish a *prima facie* defence to the charge. In the case of Knox the fact that he was denied the assistance of a law-agent between the 3rd and the 17th of November was an additional reason for reviewing his sentence. In the undernoted English cases[2] the Court had allowed a plea to be withdrawn in similar circumstances.

Argued for the Crown;—There was no ground in either case for allowing the panel to withdraw his plea. The procedure had throughout been regular, the panels had throughout had the advice of law-agents, and through their law-agents they had *ex proprio motu* signified their intention to plead guilty to both charges, and had initiated the procedure which followed under section 31 of the Act of 1887. Further, the minutes of procedure showed that the two separate charges were clearly discriminated by the Sheriff in taking the pleas. If the request of the panels were granted not only the sentences of preventive detention, but also those of penal servitude, would fall, seeing that the whole proceedings would be vitiated *ab initio;* and the Court of Criminal Appeal had no power to deal with the sentences of penal servitude. Further, leave to withdraw a plea tendered under section 31 of the Act of 1887 would be refused, except where the Crown gave its consent.[3] The English case of *Collins*,[4] in which leave had been refused, was closely analogous to the present cases.

At advising on 16th January 1914,—

Lord Justice-General.—In my opinion the appeal of William Paul must be refused.

The appellant, who admitted that he was a habitual criminal, was sentenced in the High Court on 19th November last to five years' preventive detention. He now brings this appeal under the 5th subsection of the 17th section of the Prevention of Crime Act, 1908, the ground of his appeal being that he did not, when he gave the admission that he was a habitual criminal, understand that the consequence might be that he would receive a sentence of preventive detention in addition to the sentence pronounced for the crime of theft by housebreaking, aggravated by previous convictions, with which he had been charged. Taken by itself that is obviously an insufficient ground on which to give the prisoner any remedy. The procedure in this case was characterised by perfect regularity throughout. The prisoner intimated, through his own procurator, that he desired his case to be at once disposed of, and declared his intention not only to plead guilty to the crime with which he was charged, but to admit that he was a habitual criminal. I assume that, in so doing, he was advised by a competent legal adviser, the contrary not being stated

[1] H. M. Advocate v. Gillan, 1910 S. C. (J.) 84, 6 Adam, 256.

[2] Verney, (1909) 2 Crim. App. 107; Alexander, (1912) 7 Crim. App. 110.

[3] H. M. Advocate v. Lyon, 15 R. (J.) 66, 1 White, 538; H. M. Advocate v. Black, 1 Adam, 312; H. M. Advocate v. Robertson, 1 F. (J.) 74, 3 Adam, 1.

[4] (1910) 4 Crim. App. 81.

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in the note of appeal or stated to us at the bar. And we have the assurance of the Lord Advocate, on his responsibility as public prosecutor, that this assumption is correct. Thereafter the prisoner appeared before the Sheriff at Aberdeen, and after having been repeatedly interrogated, as the record bears, he pleaded guilty to the crime charged, and admitted that he was a habitual criminal. I assume that the Sheriff, before taking his plea, carefully and fully explained to him the nature of the charge preferred against him and the consequences of the admission. In my opinion it was the duty of the Sheriff so to do. I assume, the contrary not being stated, that the Sheriff discharged his duty, and again we have the assurance of the Lord Advocate that he did. Finally, the prisoner appeared in the High Court on 19th November and adhered to his plea of guilty and to his admission that he was a habitual criminal.

In these circumstances, the procedure being perfectly regular, it appears to me that it would require very strong and very special grounds for us to interfere with this sentence. No such grounds are stated here. The only ground on which we are asked to give redress is that the prisoner says that he did not understand that he might receive a sentence of preventive detention in addition to the sentence for the crime with which he was charged.

Now that appears to me to be a ground of challenge of the sentence which could not be established except by the prisoner's own assertion on oath—the examination of the prisoner himself—the procedure, I repeat, having been perfectly regular. I am very far from saying that we have not the power under the statute of 1908 to give a remedy if we should be convinced that any miscarriage of justice had taken place; for example, if it should be shown to us that a prisoner had given an admission while labouring under some substantial error or misconception or in circumstances which tended to prejudice his case. I entertain no doubt that this Court has the power and, in the cases which I have indicated, would exercise it to give a prisoner redress. But where it is admitted that the procedure was perfectly regular and that the prisoner was not denied the assistance, to which every accused person in Scotland is entitled, of a competent law-agent, then it appears to me that having admitted that he was a habitual criminal and having been sentenced, it is impossible for the prisoner to impugn the sentence or for the Court to permit the admission to be withdrawn on the bare allegation that he laboured under any misconception with regard either to the nature of the offence with which he was charged or the consequence which would follow from his admission of the offence. In these circumstances I move your Lordships to refuse this appeal.

In the case of Alexander Knox the facts are substantially the same as in the case of William Paul. The procedure there was perfectly regular. The only difference is that when the prisoner was brought before the High Court he moved, by his counsel, that his admission that he was a habitual criminal should be permitted to be withdrawn on the ground, not that he did not understand the consequence which would follow from his admission, but that he did not understand the nature of the offence with which he was charged. The Lord Justice-Clerk, who presided in the High Court at the time, refused that motion, and, for the reasons which I

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have already given, I think his Lordship did right, and that accordingly the appeal here also must be refused.

I should mention—merely to show that we have not overlooked the fact—that the prisoner here alleges in addition that he was denied the assistance of a law-agent from the 3rd to the 17th of November, in other words, that he only had the assistance of a competent legal adviser, and availed himself, as I understand, of his assistance, for one week instead of three weeks before the indictment was served on him. That seems to me to be nothing short of a ridiculous ground upon which to ask that the sentence should be reviewed. I am of opinion, and move your Lordships, that the appeal should be refused.

LORD JOHNSTON.—Under the Criminal Procedure Act, 1887, two innovations were introduced. First, it was provided by section 25 that an accused person should be cited on indictment to two diets, one a diet at which he should be called on to plead to the indictment before a Sheriff, and the other a diet at which, if his plea was "not guilty," he should be tried either before a Sheriff, or before the High Court of Justiciary, as the case might be. Second, it was provided by section 31 that, if the accused person intended to plead guilty, he should be enabled to expedite matters and have his case disposed of summarily without awaiting the second diet.

I shall for shortness confine attention to High Court cases.

In the normal case, at the first or pleading diet the Sheriff (section 29) is to dispose of any formal objections, and if he thinks that these are frivolous or touch matters where the panel is not truly prejudiced, he shall then take his plea. But if otherwise, or if any other preliminary objection is taken, he shall minute the objection, and leave it to be disposed of by the High Court. In such cases it is necessarily to be inferred that the panel would not be called on to plead at the first diet, and that at the second diet before the High Court his objections would be disposed of and the case would proceed in all respects as under the old procedure. But there is a provision of great importance in section 41. Power is given to the High Court at the second diet to review the proceedings before the Sheriff at the first or pleading diet, and, *inter alia*, if it shall be shown that a plea of guilty "has been taken under substantial error or misconception, or under circumstances which tended to prejudice the person accused" the Court may allow the plea to be withdrawn or modified, and in such cases provision is made for postponing the trial if necessary.

I turn now to the second innovation. By section 31 "where a person accused shall give written notice to the Crown Agent *through his own procurator* that he desires to have his case at once disposed of, and *declares his intention* to plead guilty," he shall be entitled to have his case disposed of at a special early sitting, and if at such diet "any plea of guilty is tendered which shall be accepted by the Procurator-fiscal" the Sheriff "shall deal with the case *in like manner as cases are required to be dealt with under this Act* where a person accused pleads guilty at a first diet." In a High Court case or one of an aggravated nature he remits it to the

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High Court for sentence. I think that, when a panel has pleaded under section 31, the High Court, when he comes up for sentence, has, if not inherently at least by implication, the power of review conferred by section 41 and already referred to, and may under the provisions of that section allow the plea to be withdrawn or modified.

The Prevention of Crime Act, 1908, introduced, in Part II., a new mode of dealing with habitual criminals. I do not need to refer to the definition of habitual criminal. I need only say that, where the panel is charged with being a habitual criminal, (1) the indictment must contain two separate charges, one of a specific crime, the other of being a habitual criminal; (2) the panel has not the right of resorting to the 31st section of the 1887 Act unless he "intimates his intention to plead guilty of the crime in terms of that section and to admit that he is a habitual criminal," and where he does plead under the 31st section, he is to be remitted to the High Court for sentence; and (3) where the panel pleads not guilty he is tried first for the crime and, if found guilty, the jury are re-sworn and inquire separately into the charge of habitual criminality. If what I have said above, as regards section 41 of the Act of 1887, is sound, it is open to the panel when brought up for sentence to show that he has pleaded to the double charge under substantial error or misconception, &c., as to either branch of it, and it is within the power of the Court to allow the plea to be withdrawn.

In the first case before us, that of Paul, the panel was indicted for housebreaking, and was charged as a habitual criminal. He took advantage of the 31st section of the Act of 1887 and pleaded guilty to the offence and, as the record of his plea bears, "being specially interrogated whether he admits that he is a habitual criminal, he answers that he is a habitual criminal." On coming up for sentence in the High Court, he asked no review and raised no objection, and was sentenced accordingly to undergo three years' penal servitude and five years' preventive detention. But he now appeals under section 17 (5) of the Act of 1908 against this sentence of preventive detention on the ground as stated in his note of appeal, "that neither at the pleading diet nor at any previous time was the appellant made acquainted of the sense in which the phrase 'habitual criminal' was used in the indictment and accordingly did not understand that, in addition to a sentence for the crime he was charged with, he would be given a further sentence of preventive detention. At the pleading diet he was specially interrogated as to whether or not he was a 'habitual criminal,' but he understood when pleading guilty that he was merely admitting as correct the list of previous convictions annexed to the indictment. That had he been made aware of the consequences of a plea of guilty he would have pled 'not guilty' to the charge of being a 'habitual criminal.'"

I am of opinion that we cannot entertain his appeal, and I have come to this conclusion for these reasons.

In the first place, the panel has been protected from the outset by advice. He could not move a step under the Act of 1887, section 31, without an agent, for his preliminary notice that he desired to have his case at once disposed of, and declared his intention to plead guilty, had

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to be given to the Crown Agent "through his *own* procurator." Again when brought up to plead under the 31st section, while there is no suggestion that he was not accompanied by his agent in accordance with invariable practice, the Sheriff pointedly discriminated between the two parts of the charge—the crime and the habitual criminality. And finally, when brought up for sentence before the High Court, he must again, according to practice, have been represented, and it is not suggested that he was not.

In the second place, his case has been disposed of by the Lord Justice-Clerk, sitting in the High Court, as that of a prisoner who had not only pleaded guilty of a crime but admitted that he was a habitual criminal, and accordingly with an appropriate sentence, viz., a short sentence of penal servitude and a corresponding, but longer period of five years' preventive detention. Now we cannot touch this sentence as a whole, we can only entertain an appeal against the sentence of preventive detention. It must be apparent that, if we were to go back upon that part of the sentence, we would leave a sentence for the crime which may, in all probability would, be inadequate for the crime, and not what the presiding Judge would have given had he been dealing with the case apart from any question of habitual criminality.

In the third place, while I do not say that, where the 31st section of the Act of 1887 has been appealed to, a case may never occur of substantial error, or misconception, or of circumstances tending to prejudice the person accused, which would require the Court to intervene under their limited appellate jurisdiction, even at the cost of dislocating a sentence already pronounced, yet for any such intervention there must be much more relevant and specific grounds averred than is the case here. The gravamen of the appellant's averment is that he had no explanation of the technical meaning and statutory requisites of a charge of being "a habitual criminal," and that, in admitting habitual criminality, he thought that he was merely admitting the long series of previous convictions libelled against him, and did not know that the practical result of his admission would be an addition to his sentence. That is merely to say "I admitted that I was a habitual criminal because I thought that that was the conclusion which the career of crime evidenced by my list of twenty-three previous convictions justified, but I did not understand the statutory technicalities or the effect of the admission on my sentence." But that is tantamount to admitting the central and essential fact required by the statute to be admitted or proved, and that on considerations which, I think, would commend themselves to most persons, as apparently they did to the panel as excellent reasons for the admission which he made. I cannot hold in these circumstances that the alleged ignorance of the results of the admission affects, in any way, the admission itself.

The second case before us is that of Alexander Knox. But it is, I think, *a fortiori* of the present, because Knox did state his desire to have the proceedings in the Court below reviewed by the presiding Judge, who held that he had presented no grounds for this being done, and sentenced him accordingly.

In conclusion I should add that I think it well the Court should warn

Sheriffs and Sheriff Court procurators that where there is an ancillary charge of habitual criminality, it is their duty to make it clear to the accused person, as I am satisfied was done here, that he is charged with two different things under the same indictment, that he can only plead guilty to both and not to one only if he desires to take advantage of the 31st section of the Act of 1887, and that the two separate charges involve different and separate sentences.

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LORD SKERRINGTON concurred.

THE COURT dismissed the appeals.

W. LESLIE CHRISTIE, W.S.—ALFRED J. F. MITCHELL, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

No. 11.

JOHN LENG & COMPANY, LIMITED, Appellants.—*Clyde, K.C.*—*Sandeman, K.C.*—*Boase.*

WILLIAM FYFE MACKINTOSH (Procurator-Fiscal, Dundee), Respondent.—*Sol.-Gen. Morison*—*Wark.*

Feb. 6, 1914.

John Leng & Co., Limited, v. Mackintosh.

Statutory Offences—Betting—Betting-house—Newspaper office—Newspaper offering prizes for forecasts of football matches—Betting Act, 1853 (16 *and* 17 *Vict. cap.* 119), *sec.* 1.

The Betting Act, 1853, by sec. 1, prohibits the keeping of any office for the receipt of money as the consideration for a promise to pay money on the contingency of any game or sport.

The proprietors of a weekly newspaper inserted in certain issues of their paper a notice offering a money prize to the person who, on a coupon cut from the paper and sent to their office, should give a correct forecast of the result of certain football matches. The papers were sold by the proprietors at 9d. a dozen to newsagents, who retailed them to members of the public at 1d. each. No papers were sold directly to the public by the proprietors, and no coupons were sold apart from the papers. A certain number of papers were bought by members of the public from the newsagents solely for the sake of the coupons.

Held that the proprietors of the paper used their premises solely for the selling of newspapers and not for the receipt of money on a promise to pay on a contingency, and, accordingly, that they had not contravened section 1 of the Act.

HIGH COURT. Lord Justice-General. Lord Dewar. Lord Hunter.

JOHN LENG & COMPANY, printers and publishers, Bank Street, Dundee, were charged in the Sheriff Court of Forfarshire at Dundee on a complaint at the instance of William Fyfe Mackintosh, Procurator-Fiscal, which set forth "that you being the occupiers of or persons using offices or rooms at numbers 7 to 25 (both inclusive), and at number 8 Bank Street, Dundee, did on and between 13th September 1913 and 6th November 1913, open, keep, or use said offices or rooms for the purpose of money or other valuable thing being received by you or on your behalf as the consideration for an undertaking, promise, or agreement to pay money thereafter on events or contingencies of or relating to games of football; contrary to the Betting Act, 1853, secs. 1 and 3, as extended to Scotland by the Betting Act, 1874." *

* The Betting Act, 1853 (16 and 17 Vict. cap. 119), enacts:—Sec. 1. "No house, office, room, or other place shall be opened, kept, or used for

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The accused were found guilty as libelled by the Sheriff (Ferguson) and were fined £10, and thereafter obtained a stated case on appeal to the High Court.

The case set forth, *inter alia*:—"The following facts were admitted by joint minute:—'(1) That the respondents are the occupiers of the offices at Numbers 7 to 25 and Number 8 Bank Street, Dundee, libelled in the complaint, and that they occupied and used the said offices during the period from 13th September 1913 to 6th November 1913, both dates inclusive. (2) That the respondents are the proprietors of the *People's Journal* newspaper, and that the said newspaper is published by them at the said offices Nos. 7 to 25 and No. 8 Bank Street, Dundee. (3) That the said newspaper was published weekly by the respondents on Saturdays from 13th September 1913 to 1st November 1913, both dates inclusive. (4) That in the issue of said newspaper published on 13th September 1913 the respondents published a notice in the following terms:—"£100 offered weekly for football skill. £100. Are you an expert in football form? If so, is your skill sufficient to win £100? Try it. On the entry form below we give a list of 15 matches to be played on Saturday, September 20th. Cross out in ink the teams you think will be defeated. If you think there will be a 'draw,' do not cross out either name. Fill up the entry form and post it addressed to 'Football, No. 1, *People's Journal* Office, 8 Bank Street, Dundee,' in time to reach us not later than midnight of Thursday, September 18th. No entry fee is required. £100 will be paid to the competitor who sends in the form, cut from this page, giving a correct forecast of all the matches. Should no competitor correctly forecast all the matches, a consolation prize of £10 will be awarded to the competitor whose forecast shows the greatest number of correct results. . . ."

"'And also a coupon in the following terms:—

"'"*P. J.* FORECAST No. 1.

"'" Cross out the name of the team you think will lose.

"'" In the case of a draw do not cross out either name.

"'" Matches to be played on September 20.

[Here followed a list of matches.]

"'" Name.....

"'" Address .....

"'"....."

"'(5) That a similar notice and a similar coupon were published by the respondents in each weekly issue of the said newspaper down to and including the issue of 1st November 1913. (6) That the circulation of the said newspaper has appreciably increased between the dates libelled in the complaint.'

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the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise. . . ."

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"Evidence was led, and the following further facts were proved:— (1) That the appellants sold copies of their paper, the *People's Journal*, each containing the information above set forth in regard to the football competition, with appropriate coupons, to newsagents, who paid them at the price of ninepence per dozen copies, and sold said newspapers to the public at the price of one penny per copy. (2) That so far as regards the papers purchased by newsagents in Dundee, these papers were purchased at the appellants' office in Bank Street, Dundee, at the said price of 9d. per dozen copies, the order with the money being handed across the counter on Fridays, and the papers delivered by van or messenger next day; that copies of papers so supplied and paid for were bought from the said newsagents by certain members of the public for the purpose merely of extracting the 'coupon' and taking part in the competition. (3) That the appellants have a warehouse, or newsagents' supply depot, in Stirling Street, Aberdeen, which is used as a means of distributing the *People's Journal*, that the papers are sent out from there to local newsagents by George Webster, a warehouseman in their employment, who each week collects payment from the newsagents for the papers supplied to them by him in the previous week, and pays the amounts received into the appellants' bank account with the Commercial Bank, Aberdeen. (4) That John Reed, fireman, 50 Skene Street, Aberdeen, frequently bought from said newsagents additional copies of the issues of the paper between the dates 13th September and 6th November, 'for no other purpose' than competition, filled up the coupons, in each case differently, posted them as directed in the the notice to the appellants' office in Dundee, and was successful on one occasion in securing a prize, which was paid to him by the appellants. (5) That there was no evidence of any member of the public (*i.e.* anyone not a newsagent) having bought papers directly from the appellants or from the said George Webster. (6) That in two instances, witnesses who had not previously to 13th September 1913 been purchasers of the paper, having seen their fathers' copies of the *People's Journal*, and used the coupons in them, purchased from said newsagents additional copies of each issue of the paper between the dates libelled at 1d. each, solely in order to secure additional chances of winning. One of these witnesses (Henry Donachie, Dundee) sent in at various times a considerable number of coupons all filled up differently and all signed in his own name, the number on one occasion being 27. In a third instance, a witness resident in Glasgow, who had not taken the paper before 13th September 1913, bought from newsagents there a number of copies of each issue of said paper during the period libelled at 1d. each, for the purpose of competing, did compete, and was paid the amount of £2 on the event of the matches referred to in the coupon of one of said issues. (7) That when 'prizes' were won, the amounts were paid by the appellants by cheques signed 'John Leng & Co.' or by postal order, forwarded to the successful competitors with a communication from 'The Proprietors of the *People's Journal*,' dated from *People's Journal* Office, Dundee. . . . (9) That after the first notice of these competitions appeared there was a large increase in the correspondence delivered at the appellants' offices in Bank Street, Dundee, mainly, if not wholly, consisting of letters addressed 'Football No. 1,' 'Football No. 2,' &c., that the postmen on duty after a time found that the letter-box belonging to the appellants at the premises would

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not contain the number of letters they had to deliver, that they subsequently delivered these letters to the appellants across the counter at No. 7 Bank Street, tied up in bundles of 100 or thereby, and that latterly the increase was such, that these letters were put up in sacks containing about 2000 each, and additional men sent down with them to the appellants' premises in Bank Street, where they were delivered to them."

The Sheriff stated the grounds of his decision as follows:—"The grounds of the decision were that, in my opinion, on the facts above admitted and held proved, the appellants had used their office for the receipt of money, being the sums paid by the witnesses to newsagents for copies of the paper bought for competitive purposes solely, and in effect transmitted to the appellants in advance less the commission of ¼th allowed to newsagents, which money was obtained as the consideration for their public undertaking to pay money prizes on the events or contingencies of the football matches detailed. I was of opinion that if the newspaper proprietor offered a public inducement, and issued a general invitation to purchase his paper and compete for a money reward, it was not necessary that the direct receipt of money by him from the individual competitor should be established or that there should be a separate payment for the 'coupon' apart from the price of the paper, if the Court was satisfied that the paper was really bought for the sake of the coupon. This appeared to me to be the literal and natural construction of the words of the statute, and to be the proper result of the application to the facts proved of the authority of *Hart* v. *Hay Nisbet & Company*, (1900) 2 F. (J.) 39, 3 Adam, 144; *Reg.* v. *Stoddart*, [1901] 1 K. B. 177; *Hawke* v. *Hulton*, (1905) 22 T. L. R. 169."

The questions of law for the opinion of the Court were, *inter alia*:—"(2) By selling to newsagents at their said offices newspapers containing the advertisements and coupons set forth, and receiving there coupons from persons who had purchased said newspapers from the said newsagents, for the purpose solely of obtaining said coupons and competing in said football competitions, were the appellants using said offices for the purpose of receiving money, contrary to section 1 of the Betting Act, 1853? (3) Was the money which was paid by members of the public to newsagents for newspapers containing the inducements and invitations set forth, received 'by or on behalf of' the appellants, within the meaning of section 1 of the Betting Act, 1853? (4) Was the money so paid received by or on behalf of the appellants 'as the consideration' within the meaning of section 1 of the Betting Act, 1853, for an undertaking or promise to pay money on an event or contingency of the game of football? (5) On the facts above set forth, were the appellants rightly convicted of the contravention of the Betting Act, 1853, sections 1 and 3, charged in the complaint?"

The case was heard before the High Court on 2nd February 1914.

Argued for the appellants;—Betting *per se* was not an offence,[1] and the only question in the case was whether the appellants had contravened section 1 of the Betting Act, 1853. On the facts admitted and proved they had not. The offence constituted by that section was using premises for the receipt of money as the consideration for a promise to pay money on contingencies relating to games. The appellants had not used their premises for that purpose, but solely for the purpose of selling newspapers and receiving the price of newspapers.

[1] Powell v. Kempton Park Racecourse Co., [1899] A. C. 143.

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The only money which came into the appellants' hands was the money paid to them by the newsagents for the newspapers before the papers were sold by the newsagents to the public. No money was paid by the public to the appellants, who had no connection with the public whatsoever, and no direct concern with the motives which prompted the public to buy from the newsagents. It was quite clear that the appellants received no consideration for the coupons from the newsagents, seeing that the price of the papers as sold to the newsagents was always the same, whether they contained coupons or whether they did not. The decision in *Caminada* v. *Hulton*[1] was exactly in point and should be followed. None of the cases were really adverse to the appellants' contention. *Hart* v. *Hay Nisbet & Company*[2] was quite a different case, in that the money was paid to the proprietors of the newspaper at their office, and that extra coupons could be purchased by the public apart from the newspaper. In *Stoddart* v. *Sagar*[3] and in *Regina* v. *Stoddart*[4] the same elements were present as in *Hart*,[2] and Lord Alverstone, C.J., in *Regina* v. *Stoddart*[5] distinguished that case from that of *Caminada*,[1] in respect that in *Caminada*[1] "*prima facie* the consideration for which the purchaser of the newspaper paid his money was the newspaper itself, and there was no finding that it was in fact paid for the purpose of getting the benefit of the coupon." In *Hawke* v. *Hulton & Company*[6] it was held that, although no money was received by the proprietor beyond the price of the newspaper, an offence might yet be committed if the money was in reality paid for the coupon and not for the paper; but Lord Alverstone, C.J., indicated that there must be a clear finding in fact to that effect, which obviously could not be made in the present case, where the purchasers were the newsagents. *Hodgson* v. *Macpherson*[7] did not really affect the question, it merely decided that it did not matter whether the owner of the premises received payment actually in his premises or elsewhere, provided that the prohibited payment was in fact made, whereas the appellants' contention here was that they had received no such payment.

Argued for the respondent;—The appellants had been rightly convicted, in respect that they had used their offices for the receipt of money as the consideration for a promise to pay money on contingencies relating to games of football. It was settled by *Hawke* v. *Hulton & Company*[6] that, if the proprietors of a newspaper sold and received payment for papers containing coupons, even though no extra price was paid for the coupons beyond the price of the newspapers, they had committed an offence against section 1 of the Act of 1853, provided it was established that the papers, or some of them, were bought by the buyers solely for the sake of the coupons. The Sheriff had found that this had occurred here, so that the appellants would undoubtedly have been guilty had they sold their papers directly to the public and received payment directly from the public. The only question, therefore, which remained in the case was whether the appellants were to escape because of the fact that the newsagents were interposed between them and the public. That fact was immaterial and did not affect the true nature of the transactions, as the newsagents were to all intents and purposes the agents

[1] (1891) 60 L. J., M. C. 116. [2] (1900) 2 F. (J.) 39, 3 Adam, 144.
[3] [1895] 2 Q. B. 474. [4] [1901] 1 K. B. 177. [5] *Ibid*, at p. 184.
[6] (1905) 22 T. L. R. 169. [7] 1913 S. C. (J.) 68, 7 Adam, 118.

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and representatives of the appellants. The money paid by the public was paid in part for the coupons, and the money paid by the newsagents to the appellants was the money received from the public, it being a merely technical objection to argue that the newsagents paid in advance for the papers. The appellants were the persons who promised to pay the prizes, and their papers would not have been bought in such numbers by the newsagents if they had contained no coupons, so that a certain proportion of the money received by the appellants was directly paid for the coupons. The fact that the money was not in the first instance actually received at the place libelled was immaterial so long as it was in the end received by the persons charged with committing the offence.[1] The case of *Caminada*[2] founded upon by the appellants was an unsatisfactory decision and did not help the appellants. In it only one sale was libelled, and there was nothing to show that the purchaser would not have purchased the paper even if it had contained no coupon; but in the present case the Sheriff had found that some papers were purchased solely for the sake of the coupons. The prosecutor had clearly established against the appellants the three factors necessary for a conviction under the section, viz., the use of the offices, the receipt of the money, and the promise to pay money on a sporting contingency.[3]

At advising on 6th February 1914,—

LORD JUSTICE-GENERAL.—In my judgment this prosecution fails, and the conviction cannot stand. The appellants are proprietors of a weekly newspaper called the *People's Journal*, and in the issue for the 13th September last there appeared what is called an "entry form" in one of the pages. In it was printed a list of fifteen football matches to be played on the following Saturday, and purchasers of the newspaper were invited to cross out in ink the names of the teams which they thought would be defeated, or in the case of a draw not to cross out either name, and having so filled up the entry form, to transmit it to the offices of the newspaper proprietors in Dundee. A reward of £100 was offered by the proprietors to the purchaser of the newspaper who made an accurate forecast of all the matches.

This, it is alleged, was in contravention of the first section of the Betting Act of 1853. That section strikes at those who open, occupy, or use offices for the purpose of money being received by them or on their behalf as the consideration for an undertaking to pay money thereafter on events or contingencies of or relating to any sport; and the question which we have to decide is whether or no the appellants kept open their offices in Dundee for the purpose of receiving money as a consideration for their undertaking to pay money on the contingency of football matches.

The appellants contend that they kept open their office in Dundee for the purpose of selling newspapers and receiving the price of the newspapers, and for no other purpose. I am of opinion that their contention

[1] Stoddart v. Hawke, [1902] 1 K. B. 353; Hodgson v. Macpherson, 1913 S. C. (J.) 68.

[2] 60 L. J., M. C. 116.

[3] Reference was also made to Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.

is well founded. It is no doubt true as found in the case that the appellants sold copies of their newspaper the *People's Journal*, each containing the information above set forth—the information regarding the competition in regard to the football competition—with appropriate coupons, to newsagents, who bought them at the price of 9d. per dozen copies, and sold the newspapers to the public at the price of one penny per copy. In other words, the appellants sold their newspapers at wholesale prices to newsvendors, who in turn sold them to the public at retail prices; but the appellants did not sell entry forms or coupons, and it is not alleged that they sold a single copy of a newspaper to any newsvendor who bought it for the purpose of engaging in the competition, in other words, for the mere sake of the coupon. It is therefore nothing to the purpose to say that John Reed, a fireman in Aberdeen, frequently bought from the newsagents additional copies of the issues of the paper between the dates 13th September and 6th November for no other purpose than the competition, so long as it is admitted that there was no evidence of any member of the public having bought papers direct from the appellants in Dundee or from George Webster, the warehouseman in the employment of the appellants at Aberdeen, who sends out the newspapers to the local agents there.

The Sheriff has found that the appellants had used their offices for the receipt of money, being the sums paid by the witnesses to newsagents for copies of the paper bought for competitive purposes solely, but the complete answer which the appellants make is this, that not one penny of that money was received by them from anybody who purchased the newspaper for competitive purposes solely. And in order to constitute an offence against the statute, I am very clearly of opinion that the person accused must have sold to somebody for the purpose of engaging in the competition, or, in other words, for the sake of the coupon merely.

It may be true, and probably is, on the authorities, that it is unnecessary that there should be a separate payment for the coupon apart from the price of the paper if the Court is satisfied that the paper was really bought for the sake of the coupon, but I forbear to speculate on what would be the fate of a prosecution brought against a newsagent who sold and received money not for the newspaper, but for the coupon, from somebody who bought for the purpose of engaging in the competition. The keynote of the Sheriff's judgment is to be found in the following sentence:—"I was of opinion that if the newspaper proprietor offered a public inducement and issued a general invitation to purchase his paper and compete for a money reward, it was not necessary that the direct receipt of money by him from the individual competitor should be established." I am of exactly the contrary opinion. It appears to me that the words of the statute are clear and free from all ambiguity, and that, unless the office is open for the purpose of receiving money from someone who in order to engage in the competition buys the paper solely for the sake of the coupon, no prosecution lies.

[His Lordship here referred to a separate ground of appeal with which this report is not concerned.]

Holding these views, I propose that we should answer all the questions put to us in the negative.

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LORD DEWAR.—I concur.

LORD HUNTER.—In this case the appellants, who are printers and publishers in Dundee, were charged with and convicted of keeping open or using their offices for the receipt of money by them as the consideration for an undertaking to pay money thereafter on events or contingencies relating to games of football contrary to section 1 of the Betting Act, 1853.

It appears that the appellants are proprietors of a newspaper called the *People's Journal*, and that in certain issues of that paper they inserted a notice offering a prize to the person who on a coupon attached to the paper should give a correct forecast of a certain number of football matches. In the event of no correct forecast being given a prize of smaller amount was to be given to the competitor whose forecast showed the greatest number of correct results. According to the findings of fact of the Sheriff, the appellants sold copies of their newspapers with the above notice and appropriate coupons to newsagents at the price of 9d. per dozen. The newsagents in turn sold the papers to the public at the price of 1d. per copy. Certain members of the public appear to have bought several copies of the newspaper for the purpose merely of extracting the coupon and taking part in the competition, and to have been successful in receiving prizes from the appellants. It is not found by the Sheriff that the sales by the appellants were other than *bona fide* sales of copies of their newspapers; that they sold or received money for coupons independent of copies of the newspapers; or that the newsagents in selling to the public and receiving the price of the newspapers were acting as agents for the appellants.

It has been held both in England and Scotland that publishers of newspapers by selling and receiving at their offices money for coupons in connection with coupon competitions relating to racing or games commit an offence against the Act. Further, it has been decided that in order to constitute the offence it is not necessary that the money should be received at the publisher's office, if that office is used for the purpose of money being received as the consideration for an undertaking to pay money thereafter on a contingency connected with racing or games. No case, however, was cited to us of the conviction of the publisher of a newspaper for the *bona fide* sale by him of newspapers to the public with competition coupons attached. I do not consider it necessary in this case to consider whether in such circumstances an offence would or might be committed. It appears to me sufficient for the decision in this case that upon the findings of fact of the Sheriff it would be an undue straining of the language of section 1 of the Betting Act of 1853 to hold that in any reasonable sense the appellants used their premises for the receipt of money as the consideration for an undertaking to pay money thereafter on events or contingencies relating to games of football. I accordingly agree that the questions in the case should be answered in the way which your Lordship proposes.

THE COURT answered the questions of law in the negative and sustained the appeal.

ALEX. MORISON & Co., W.S.—SIR WILLIAM S. HALDANE, W.S.—Agents.

JOHN TOWNSEND, Complainer.—*Garson.*
HIS MAJESTY'S ADVOCATE, Respondent.—*W. Mitchell, A.-D.*

No. 12.
Mar. 2, 1914.

Statutory Offences—Criminal Law Amendment Act, 1885 (48 *and* 49 *Vict. cap.* 69), *secs.* 5 *and* 9—*Charge of attempted rape—Conviction of a statutory offence—Competency—Statute not libelled—Original charge abandoned—Original charge only for attempt.*

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Conviction—General conviction—Alternative offences—General conviction of contravention of section creating more than one offence—Criminal Law Amendment Act, 1885 (48 *and* 49 *Vict. cap.* 69), *sec.* 5.

The Criminal Law Amendment Act, 1885, enacts, sec. 9:—"If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section three, four, or five of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault."

In the course of the trial of an accused on a complaint which only libelled a common law charge of attempt to ravish, the prosecutor withdrew the charge, and asked for, and obtained from the jury, a verdict of guilty "of a contravention of the Criminal Law Amendment Act, 1885, section 5."

In a suspension the Court *quashed* the conviction, *holding* that, while the power created by section 9 of the Act was available to a prosecutor although the Act had not been libelled in the complaint or indictment, it was not so available (1) where the accused was not charged with committing one of the specified crimes, but only with attempting to do so; (2) where the original charge had been withdrawn from the jury with the result that they could not, as required by section 9, acquit the accused of that charge before finding him guilty of the minor offence.

Held further that, in any event, the verdict could not stand, in respect that section 5 of the Criminal Law Amendment Act, 1885, created more than one offence, and that it was impossible to tell from the verdict of the jury of which of these offences the accused had been found guilty.

HIGH COURT. Lord Justice-General. Ld. Ormidale. Ld. Anderson.

JOHN TOWNSEND, Glasgow, was served with an indictment which set forth that he "did, on 30th November 1913, enter the house of James Gibson, then at 6 Union Street, Calton, Glasgow, and in a bed there did attempt to ravish Sarah Jane M'Cowan Gibson, aged 15 years, daughter of and residing with the said James Gibson, now at 48 Green Street, Calton aforesaid, she being then asleep in said bed: And you have been previously convicted of assault."

On 20th January 1914 the accused was tried before the Sheriff-substitute of Lanarkshire (Boyd) and a jury. At the close of his evidence the prosecutor, without amending his complaint and without having given any prior notice to the accused, withdrew the charge of attempt to ravish, and asked for a verdict of a contravention of the Criminal Law Amendment Act, 1885, section 5.*

* The Criminal Law Amendment Act, 1885 (48 and 49 Vict. cap. 69), enacts:—Sec. 5. "Any person who—(1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or

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The accused's agent objected to the prosecutor's motion on similar grounds to those set forth in the argument *infra*, but the Sheriff-substitute repelled the objection, and the jury unanimously found the panel "guilty of a contravention of the Criminal Law Amendment Act, 1885, section 5," and the Sheriff-substitute sentenced the accused to two years' imprisonment with hard labour.

The accused brought a bill of suspension and liberation in which he stated the following pleas:—(1) The complaint was not sufficiently specific to be relevant at common law or under statute. (2) The prosecutor having withdrawn the charge against the accused could not thereafter proceed with the prosecution against the accused. (3) The complainer having been indicted for an attempted crime at common law, the prosecutor was restricted to proving that charge, and conviction under said indictment for an offence under said statute was incompetent. (4) The conviction being in general terms, whilst the offence under said statute as submitted to the jury was alternatively charged, the conviction does not duly distinguish and determine what offence, if any, was found to be proved.

The case was heard before the High Court on 2nd March 1914.

Argued for the complainer;—(1) The introduction of the words "she being then asleep in said bed" into the complaint rendered it irrelevant,[1] in respect that, as it was not rape to obtain possession of a female's person while she was asleep,[2] to attempt so to obtain it could not be an attempt to commit rape. The complaint, accordingly, being irrelevant, it followed that the whole subsequent proceedings were null and void, it being impossible to obtain the statutory conviction introduced by section 9 of the Criminal Law Amendment Act, 1885, where the original common law charge was fundamentally bad. (2) The complaint was further irrelevant in respect that it did not libel section 5 of the Act of 1885, with the result that the accused had no notice whatever, until the prosecutor withdrew the common law charge, that a statutory charge was to be made against him.[3] [The LORD JUSTICE-GENERAL referred to *H. M. Advocate* v. *M'Laren*[4] as an authority directly negativing the complainer's contention.] (3) Further, the power conferred by section 9 to convict of certain minor offences was only conferred where the charge was one of rape; it was not conferred where the charge was one of a mere attempt to commit rape, and the section, being an innovation upon the common law, and one telling against an accused, fell

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above the age of thirteen years and under the age of sixteen years; or (2) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanour. . . ."

Sec. 9 is quoted in the rubric.

[1] *Cf.* Smith v. Sempill, 1911 S. C. (J.) 30, 6 Adam, 348.

[2] Macdonald's Criminal Law, (3rd ed.), p. 166; Anderson's Criminal Law, p. 161; H. M. Advocate v. Sweenie, (1858) 3 Irv. 109; H. M. Advocate v. M'Ewan or Palmer, (1862) 4 Irv. 227; H. M. Advocate v. Thomson, (1872) 2 Coup. 346.

[3] H. M. Advocate v. Henderson, (1888) 2 White, 157; Hastie v. Macdonald, (1894) 22 R. (J.) 18, 1 Adam, 505.

[4] (1897) 25 R. (J.) 25, 2 Adam, 395.

to be construed strictly and literally. (4) Moreover, the prosecutor by withdrawing the charge of attempt to ravish had by that step rendered it impossible for the jury to return a verdict of guilty of the statutory offence. In the first place, the charge of attempt to ravish being the only subsisting charge against the accused, and the only charge before the jury, its withdrawal automatically involved the abandonment of the whole proceedings, in respect that there was nothing left upon which any subsequent procedure could hang. In the second place, the words of section 9 contained a clear proviso that it was only after the jury had acquitted the accused upon the original charge that they could proceed to find him guilty of the statutory charge. Section 9 imposed upon the jury a clear duty of pronouncing a verdict upon the original charge, and the prosecutor, by withdrawing that charge, had rendered the performance of that duty impossible. Where a person desired to take advantage of statutory procedure he must do so exactly in the method prescribed by the statute.[1] (5) In any event, the conviction could not stand in respect that it found that the accused had contravened section 5 of the Act, but did not specify which of the offences constituted by that section the accused had committed.[2]

Argued for the respondent;—(1) The complaint was relevant at common law. The cases cited by the complainer undoubtedly established the proposition that the crime of rape could not be perpetrated upon a woman while asleep, and if this had been a charge of rape, the complaint would have been irrelevant. But the charge was one of attempt only, and although the crime could not be completed unless the woman was awake, the attempt might be initiated while she was asleep. (2) The words "or of an attempt to commit the same" occurring in section 9 were equivalent to a provision that an indictment for rape included and covered an indictment for attempted rape, and a similar provision with regard to all indictable crimes was subsequently introduced by section 61 of the Criminal Procedure (Scotland) Act, 1887.[3] That being so, it followed that the power to convict of minor offences on an indictment for rape was also available on an indictment for attempted rape. (3) The complainer had given too strict an interpretation to the statement that the prosecutor "withdrew" the charge. A charge could only be formally withdrawn by a signed minute, and there was nothing of that nature in the present proceedings. All that the prosecutor meant by the expression was that he did not propose to ask for a verdict upon the original charge. (4) The conviction was undoubtedly open to the objection as to its form stated by the complainer, and could not be defended.

Lord Justice-General.—I am of opinion that this conviction cannot stand. I shall state shortly the grounds on which I reach this conclusion. The complainer was charged with the crime of attempting to ravish a girl of fifteen years of age. I proceed no further with the complaint because I propose to offer no opinion whatever upon the relevancy of the indictment here. I assume for the purposes of this present judgment that the

[1] Johnston v. Pettigrew, (1865) 3 Macph. 954.
[2] De Banzie v. Peebles, (1875) 2 R. (J.) 22, 3 Coup. 89.
[3] 50 and 51 Vict. cap. 35.

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complainer was relevantly indicted on a charge of an attempt to commit rape. The course the case took was as follows: At the conclusion of the evidence for the prosecution, the prosecutor, we are told, intimated to the Court that he withdrew the common law charge of attempt to ravish, and he thereupon proceeded to take advantage of the procedure prescribed and powers conferred by the 9th section of the Criminal Law Amendment Act, 1885.

Three objections have been urged against the course which the public prosecutor thought fit to take. In the first place, it is said that in this complaint there is nothing but the common law charge of attempt to ravish, and no reference whatever is made to the Criminal Law Amendment Act, 1885, and no suggestion that any charge is to be preferred against the prisoner under that Act. I am of opinion that this objection is not well founded, and that the procedure,—novel and in some respects very foreign to the views of a Scottish criminal lawyer,—laid down under the section, is available where in the charge there is no reference whatever to the statute. If authority is needed for the proposition it is to be found in the judgment of Lord M'Laren in *H. M. Advocate* v. *M'Laren*,[1] in which I observe his Lordship says:—"Now, as a lawyer, I should have thought that where it was intended to charge an accused with this offence created by the statute, it would be a right thing to libel it expressly in the indictment, so as to give due notice to the accused that this statutory charge also was to be preferred against him. I say I should, as a lawyer, have expected this. But the question with which we have to deal is not what might have been or should have been, but what the Legislature has expressly enacted." And he then goes on to construe the terms of section 9, and comes to the conclusion—with which I entirely agree—that no construction of that section is possible other than the one his Lordship there put upon it, namely, that no reference to the section need be made in the libel. I am of opinion, therefore, that the first objection is not well founded.

The second objection is grave. It is that this is not an indictment charging the prisoner with the crime of rape, but with the crime of attempt to ravish, and, accordingly, that the procedure prescribed in the 9th section cannot be made available. I am of opinion that that objection is well founded for the reasons which Lord M'Laren has given in the opinion to which I have just referred. I think we must construe this clause strictly. I think we must follow closely the very words of the statute, and hold that the procedure therein prescribed is only available in the case where the prisoner is charged on an indictment for rape and not for some other offence, such as an attempt to ravish. It has been pointed out to us that, in 1885, it may have been, and probably was, possible to secure a conviction of an attempt to commit a crime where the crime alone was charged; but that could only be competent where the panel was charged on an indictment with the crime itself, *e.g.*, rape. It seems to me that, although you have in section 9 the words "or of an attempt to commit the same," it is not permissible—where you are constru-

[1] 25 R. (J.) 25.

ing a section like this which, in effect, involves a departure from the rule of our criminal Court, that a prisoner must be given due and ample notice of what he is charged with,—to do anything more than give a literal construction to the section. On an indictment charging the prisoner not with rape, but only with an attempt to ravish, we cannot allow to be introduced a charge of a misdemeanour or of committing an offence against section 5 of the Criminal Law Amendment Act.

But a third objection was urged against the procedure followed. It was this—that at the close of the evidence the prosecutor withdrew the charge, and that, having withdrawn the charge, it was impossible for him then to invoke the procedure under the clause to which I have referred. I am of opinion that that objection is well founded, for it appears to me that, under the plain terms of section 9, it is for the jury alone to decide whether the prisoner is guilty of the crime charged in the complaint or is only guilty of an offence under sections 3, 4, or 5 of the statute of 1885; and if the jury come to the conclusion, in considering the whole evidence in the case,—the charge being still before them,—that the prisoner is not guilty of the crime charged, but is guilty of an offence under other sections of the Criminal Law Amendment Act, they are entitled so to find. But in so finding the statute expressly provides that they are to acquit the prisoner of the charge against him and find him guilty of the offence of which they think him guilty under the statute of 1885. Now, that is the province of the jury and the jury only, and in this case they seem to have had no opportunity afforded them of acquitting the prisoner of the charge preferred against him, but were simply told that they could, if they wished, find that he had committed an offence against one or other of these sections, although the charge against him was withdrawn. In this respect I think the prosecutor erred, and that the procedure under the clause in question could not, after the charge was withdrawn, be made available.

On these two grounds, separate and distinct, I come to the conclusion that this conviction cannot stand. But there is a further ground on which, I think, it cannot be disputed that the conviction is bad. It bears to be a conviction of the offence of having contravened the provisions of section 5 of the Criminal Law Amendment Act, 1885. Now, when we turn to that section, we find, as was very clearly pointed out by Mr Garson, that there are several offences described in the section of which he might have been guilty, and we are left entirely in the dark as to which of them the jury thought he had been guilty of. That, it seems to me, is a fatal defect and sufficient in itself to warrant us in suspending the conviction.

Lord Ormidale.—I entirely concur in the opinion which your Lordship has delivered.

With regard to the objection which your Lordship dealt with in the second place, I agree with all that your Lordship has said. The power conferred by section 9 of the Criminal Law Amendment Act, 1885, to convict of an offence under sections 3, 4, or 5 of that Act, or of an indecent assault, is conferred only where the panel is charged on an indictment for rape or any offences made felony by section 4. An attempt to ravish is

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not made felony by section 4. Now, it is true that the section contains the words "or of an attempt to commit the same," which indicate that the accused may be found guilty of an attempt to commit a rape under an indictment which charges him with the completed crime. But the presence of these words where they occur in the section does not in my opinion justify us in reading the section as though it had commenced,—"If upon the trial of any indictment for rape or *attempted rape* or any offence or *attempted offence*," and unless the section is so read it appears to me that the contention of the Crown must fail. The section, it must be remembered, has a novel and far-reaching effect, and involves a departure, a grave departure, from a salutary rule of our criminal law that a prisoner must have the amplest notice of the particular offence and of all the offences with which he is charged. That being so, the section must be construed strictly, and so construed it seems to me that, where an indictment charges the prisoner not with rape, but only with an attempt to ravish, it is not permissible to substitute a charge or a right to convict of an offence under section 5 of the Act, or of an indecent assault.

On the last point dealt with by your Lordship I also agree. According to the record of the proceedings the prosecutor asked for a verdict of a contravention of section 5 of the Criminal Law Amendment Act, 1885, and the jury found "the panel guilty of a contravention of the Criminal Law Amendment Act, 1885, section 5." But section 5 deals with two separate crimes, one by subsection 1, and the other by subsection 2, and we accordingly are left in complete ignorance of what was the crime of which the prosecutor asked a conviction, and what was the crime of which the jury found the prisoner guilty.

Lord Anderson.—I agree. It is regrettable that the result of our judgment will be that the complainer will be liberated, because, undoubtedly, he has committed a serious offence; but it seems to me that, in view of the argument that has been submitted to us on his behalf, we have no option save to grant the prayer of the bill.

The first point the complainer took had reference to the form of the charge as it is laid at common law. I agree with your Lordship that it is not necessary for us to determine whether or not that is a relevant charge at common law. But, when we come to the points which were made on the 9th section of the Criminal Law Amendment Act, 1885, it seems to me that the complainer presented a formidable case, and raised an important question for our decision under that section.

It must be kept in mind that it is a fundamental and salutary rule of our criminal procedure that fair notice should be given by the prosecutor to the accused of the offence or offences which are to be proved against him. The 9th section of the Act of 1885 sanctions a deviation from or exception to that general and fundamental rule, and when we are dealing with a deviation from well-established practice it is our duty to construe strictly the statutory provision which authorises that deviation. When I look at section 9, I find that the only condition under which the Crown is authorised to crave a verdict under the provisions of the section is where the Crown is conducting a prosecution under an indictment for

rape, or for any offences made felonies by section 4 of the Act, among which attempt to ravish does not appear.

The two points which the complainer took under this section were these: he said, first of all, this is not an indictment for rape but an indictment for an attempt to ravish, and, therefore, it cannot form the foundation for a conviction of an offence under sections 3, 4, or 5 of the Act of 1885, in respect that, firstly, no notice was given in the indictment that such an offence was charged, and secondly, the statutory provision in section 9 which allows a conviction of a minor offence is only applicable on an indictment for rape or an offence made felony by section 4 and not on an indictment libelling merely an attempt to ravish. I am of opinion that the latter proposition is well founded. If the section is looked at, it will be seen that the jury may take the alternative course if they "are not satisfied that the defendant is guilty of the felony charged in such indictment." Accordingly, the exception is allowed where an indictment has been presented charging a felony. Now, undoubtedly, rape is a felony at common law, although we do not use that term in Scotland. In the first part of section 4 of the 1885 Act it is declared to be a felony. An attempt is made in the application clause to reduce the expressions "felony" and "misdemeanour" to terms of Scots law because, when that application clause is looked at, I find that in Scotland "The expression misdemeanour shall mean a crime and offence," and "The expression felony shall mean a high crime and offence." Well, there is no warrant under the common law of Scotland for such a division of crimes as is suggested in that interpretation clause. But I find in section 9 that indecent assault is described as a misdemeanour, and my view is that attempt to ravish is just a species of crime which may be brought under that heading of indecent assault. Accordingly, if I am right in that view, this is not an indictment for a felony but for a misdemeanour; and that seems to confirm the view I expressed that section 9 meant to limit this power of deviating from the general rule, viz., that a prisoner must obtain full notice of the crimes with which he is charged, to cases where the prosecution is one for rape or for one of the felonies referred to in section 4 of the Act.

The second point upon this section which the complainer took was that the prosecutor had not followed the procedure figured by the section. What the section contemplates is that the accused is to be acquitted of the common law charge, and that thereafter the jury may convict of an offence under one of the sections. But, according to the record which is before us, there was no charge before the jury upon which they could convict, because, before they were asked by the prosecutor to return a verdict under the Act of 1885, he had withdrawn from them altogether the charge as laid at common law. Accordingly, it seems to me that, on the second point also, the complainer's argument is well founded.

The other matter to which we were referred—and on which I agree with your Lordship that the complainer should also succeed—is on the verdict the jury were asked to return under the statute of 1885. One finds from the record of the proceedings that the prosecutor asked them to return a verdict of a contravention of section 5 of the Act of 1885, and it is recorded that they unanimously did so, and, accordingly, the

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accused was found by the jury to have contravened section 5 of the Act of 1885. Now, as has been pointed out, that section consists of two subsections, and each subsection deals with a different offence. It is a fundamental rule that a man whose liberty is at stake should know both what he is being tried for and of what he is being convicted, and it seems to me that, as the accused was given no definite information on either of these points, he is entitled to succeed on this ground also.

Therefore, on the whole matter, I agree with your Lordships.

THE COURT quashed the conviction.

W. A. FARQUHARSON, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

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THE RIGHT HON. RANDOLPH HENRY STEWART, EARL OF GALLOWAY, Appellant.—*Constable, K.C.—Burns.*
ADAM BIRRELL, Respondent.—*J. G. Jameson.*

Statutory Offences—Salmon-fishing—Weekly close time—Failure to open stake-nets—Net out of water at ebb tide—Salmon Fisheries (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 97), *secs.* 6 *and* 7—*Salmon Fisheries (Scotland) Act*, 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 24, *and Schedule D, Bye-law* 1.

Held (*diss.* Lord Ormidale) that the bye-law of the Commissioners under the Salmon Fisheries (Scotland) Acts, 1862 and 1868, made "with respect to the due observance of the weekly close time," and enacting that a clear opening shall be made "and kept free from obstruction" in the pouches of every stake-net, had not been contravened by the owner of a stake-net placed *in situ* for fishing in a tidal river, who had closed the pouches of his net during the last 3½ hours of the weekly close time, in respect that during the whole of these 3½ hours the net had been on dry land owing to the ebb of the tide.

HIGH COURT. Lord Justice-General. Ld. Ormidale. Ld. Anderson.

ADAM BIRRELL, salmon fisher, Carsluith, Kirkmabreck, was charged in the Sheriff Court of Dumfries and Galloway at Kirkcudbright on a complaint at the instance of the Right Honourable Randolph Henry Stewart, Earl of Galloway and Baron Stewart of Garlies, which set forth "that you did during the time from 6 P.M. of Saturday 12th July 1913, to 6 A.M. of Monday 14th July 1913, or during a part of the said time, being, during, or within the weekly close time for the district of the River Cree, at the stake-net fishings in the River Cree near to where the Money Pool Burn enters the said river opposite the lands of Cassencary, in the parish of Kirkmabreck, and stewartry of Kirkcudbright, the property of James Alexander Henryson Caird, and within the said district of the River Cree, of which fishings you are occupier, omit to have a clear opening of at least 4 feet in width from top to bottom, made and kept free from obstruction in each and every pouch, trap, or chamber of the stake-net placed at the locus before libelled, contrary to the Salmon Fisheries (Scotland) Act, 1862, section 7; the Salmon Fisheries (Scotland) Act, 1868, section 24; and Bye-law, Schedule D, section 1, annexed to the said last-mentioned Act,* whereby you

* The Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. cap. 97), enacts:—

Sec. 6. "The Commissioners shall have the powers and perform the

are liable to the forfeiture and penalties set forth in said section 24 of said Salmon Fisheries (Scotland) Act, 1868, to pay the expenses of prosecution, and failing payment of said penalty and expenses to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, section 48."

The Sheriff-substitute (Napier) having found the accused not guilty, the complainer obtained a stated case on appeal to the High Court of Justiciary.

The case set forth, *inter alia*:—

"I found the following facts proved:—

"The appellant is the proprietor of certain fishing rights in the upper part of the River Cree. The respondent is tacksman and occupier of certain fishings, including the one referred to in the complaint, in the lower reaches of the Cree.

"Early on the morning of Monday 14th July, at least several hours before 6 o'clock A.M., but after the visit of Alexander Heron hereinafter referred to, certain persons in the employment of the appellant visited the stake-net in question. It has three pouches, and the doors or traps of these pouches were all found to be closed. The pouches of the net had thus not a clear opening of at least four feet in width from top to bottom made and kept free from obstruction as prescribed by Bye-law, Schedule D, of the Salmon Fisheries (Scotland) Act, 1868. The Cree for several miles above where the Money Pool Burn enters it is tidal. When the visit just mentioned was made it was low tide and the foreshore on which the net rested was in consequence not covered by water. On the evening of Sunday, 13th July, it was high tide at Newton-Stewart about 8.31 P.M. The net in question at Money Pool Burn is on dry ground

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duties hereinafter specified, that is to say . . . (6) to make general regulations with respect to the following matters, viz., The due observance of the weekly close time."

Sec. 7. ". . . the weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning."

The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), enacts:—

Sec. 24. "The proprietor, or when let, the occupier, of every fishery at which . . . stake-nets . . . are used, shall in regard to such nets do all acts required by any bye-law in force within the district in which such fishery is situated for the due observance of the weekly close time," and if he omits to do any such act "(1) He shall forfeit the net. . . . (2) He shall for each weekly close time during any part of which such omission has occurred," pay a fine for each offending net, and a further sum for each salmon taken.

The bye-law relating to the weekly close time in Schedule D to the Salmon Fisheries (Scotland) Act, 1868, which bye-law is made applicable to the River Cree, enacts:—

"We, the Commissioners appointed under the said Acts and empowered thereby 'to make general regulations with respect to the due observance of the weekly close time,' do hereby make the following regulations with respect to the due observance of the weekly close time in the said district, namely:—

1. That in each and every stake weir or stake net a clear opening of at least 4 feet in width from top to bottom shall be made and kept free from obstruction in each and every pouch, trap, or chamber of same."

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after 6 hours ebb. It was thus on dry ground about 2.30 A.M. on Monday, 14th July. The ebb continues for about three hours more, and when the flow tide begins it takes about 1½ hours before it reaches Money Pool Burn. That is the locus in question would be covered with water about 4½ hours after the net became dry, namely, about 7 A.M. on the Monday morning. The locus was thus dry at 6 A.M. on that morning.

"The respondent, who has been a salmon fisherman in the Cree for fully twenty years, acts on the view that the bye-law only applies to nets which are in water and can catch fish. Accordingly what he did was this—his servant, Alexander Heron, on Saturday, 12th July, opened the doors or traps of the pouches for the statutory four feet in width from top to bottom for his own convenience, several hours before 6 P.M. on that day. They remained open until about 2.30 A.M. on Monday the 14th, when Heron shut them. He did this also for his own convenience in order that he might attend to other nets lower down the river. At this time, as just mentioned, they were lying on the foreshore uncovered with water. . . .

"I held that the weekly close time applies to water only and not to land. And as the pouches of the net were open during the whole of the weekly close time during which the ground on which it rested was covered with water, I found the respondent not guilty."

The questions submitted for the opinion of the Court were:—"(1) Is it an offence against the Salmon Fisheries Acts to close the traps or doors of pouches in stake-nets in a tidal river during that part of the weekly close time when, owing to the tide being out, the nets are resting on dry ground which will not be covered with water until after the close time has ceased? (2) Ought the respondent to have been convicted?"

The case was heard before the High Court on 12th February 1914.

Argued for the appellant;—The Sheriff-substitute ought to have convicted. The decisions relating to the weekly close time under the Salmon Fisheries Acts showed that the Acts were to be strictly construed, and that nothing short of *damnum fatale* or *vis major* would excuse a failure to comply literally with their provisions where these were unambiguous, even although in individual instances such compliance might be productive of hardship.[1] The view of the Court had always been that anything short of a rigid compliance with the statutes and bye-laws would lead to an endless series of difficulties in the enforcement of the Acts. In the present case the language of the sections and of the bye-law libelled in the complaint were unambiguous, and prescribed that nets should be open during the whole close time. It was not to be forgotten that the bye-law was made by experts who knew the local conditions, and who could easily have introduced an exception in the case of nets which could not catch fish because they were on dry land. The Sheriff-substitute's decision, if sustained, would open the door to endless litigation, because the question would constantly arise

[1] Osborne v. Anderson, (1887) 15 R. (J.) 12, 1 White, 497; Irving v. Phyn, (1891) 19 R. (J.) 7, 3 White, 46; MacRorie v. Forman, (1905) 8 F. (J.) 23, 4 Adam, 682; Middleton v. Tough, 1908 S. C. (J.) 32, 5 Adam, 485, *overruling* Middleton v. Paterson, (1904) 6 F. (J.) 27, 4 Adam, 321.

whether the particular net under consideration was or was not capable of catching salmon owing to depth and condition of the water. For the simple question "Was the net open?" there would be substituted the difficult question, "Was the net, although shut, incapable of catching fish?" Had the case fallen to be dealt with under the earlier Acts there would certainly have been a contravention, the prohibition of fixed machinery having been held to extend to land uncovered at ebb tide.[1]

Argued for the respondent;—The Sheriff-substitute was right. The object of the statutes and bye-law was to secure for the fish a free run from 6 P.M. on Saturday until 6 A.M. on Monday, and the respondent had in no way interfered with that object. Mr Bell in his Principles[2] defined the close time as the time "fixed by statute within which no person shall take any salmon . . . from any river," and the statutory close time, as thus defined, could not be interfered with by shutting the pouches at a time when no fish could by any possibility be taken. The appellant read the bye-law as though it were an express and explicit enactment that the net was to be kept open during the whole thirty-six hours of close time. But in fact the bye-law made no reference to duration of time, and it was more natural and more reasonable to supply, instead of the words which were necessary for the appellant's reading, the words "during the time that the net is in the water." That interpretation was all that was required to secure the object of the Commissioners, as set forth in the preamble to the bye-laws, viz., "the due observance of the weekly close time." Moreover, the words in the bye-law "free from obstruction" were only appropriate to a net situated in the water. It was out of the question to find a person guilty of an offence of a criminal nature when he had done nothing which could injure anyone or could in any way be described as a wrong. The appellant's reading of the law led to the absurd result that a fisherman who set up his stake-nets on the beach to dry would have to go round and open the pouches if the nets happened to be drying during the hours of the weekly close time.

At advising on 2nd March 1914,—

LORD JUSTICE-GENERAL.—The respondent is the occupier of certain fishings on the lower reaches of the Cree, and he was charged before the Sheriff-substitute at Kirkcudbright with a contravention of section 7 of the Salmon Fisheries (Scotland) Act, 1862, section 24 of the Salmon Fisheries (Scotland) Act, 1868, and the bye-law enacted in section 1 of Schedule D to the last-mentioned Act. The offence charged against him was that, during the weekly close time in the district, he failed to keep an opening four feet wide from top to bottom in every pouch of the stake-net placed at the locus libelled.

Now, the weekly close time during which it is alleged the offence was committed extended from Saturday evening at 6 P.M. of 12th July to Monday morning, 14th July, at 6 A.M., and it is proved and found in the special case that, from half-past two on Monday morning, 14th July, until six the same morning, the pouches of the respondent's net were kept

[1] Bell's Prin., secs. 1113-1118. [2] Sec. 1114.

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closed; but that, during that time, the net was on dry land—the foreshore was uncovered by water.

Under those circumstances, the Sheriff-substitute found that the contravention charged had not been committed, and that the respondent was not guilty. I am of opinion that the Sheriff-substitute was right in so holding. The object of the weekly close time is to secure a free run for the fish during thirty-six continuous hours in each week; not during the thirty-six hours which may prove most convenient for the fisherman, but during the thirty-six hours prescribed by the statute. It is now well-settled law that literal and exact compliance with the statutory enactment is required, and that nothing save *vis major* will excuse the fisherman from strict compliance with the provisions of the statutes. But I cannot see—the object of the bye-law being to secure due observance of the weekly close time—that this object is secured by keeping the pouches open during the period when the net is lying on dry land, or that this object is defeated by keeping the pouches closed while the net is on dry land. It appears to me that, if the net is incapable of catching fish at the time, you do not secure the observance or make likely the defeat of the statutory provision by having the pouches either open or closed.

When I turn to the bye-law which is said to have been infringed, I find that it is silent with regard to the period during which the pouches are to be kept open and free from obstruction. The appellant in this case contends that the ellipsis should be supplied by adding the words "during the whole thirty-six hours." The respondent, on the other hand, maintains that the appropriate way to read the bye-law is to say that the pouches are to be kept open and free from obstruction during the time when the net is in water. I prefer, on the whole, the latter construction, because it is not necessary, to secure the observance of the bye-law, that the pouches should be kept open when the net is on dry land, and it will not defeat the purpose of the bye-law if the pouches of the net are kept closed while the net is upon the dry land.

I observe that Mr Bell[1] describes—I will not say defines—the close time as the time "fixed by statute within which no person shall take any salmon or fish of the salmon kind from any river, stream, estuary, or sea-coast in Scotland," and if that be, as I think it is, a correct description of the statutory close time, then it appears to me it cannot be defeated by closing the pouches of the net at a time when by no possibility could fish be taken. I am fortified in that construction of the bye-law by the words which I find therein to the effect that the net must be kept free from obstruction, and it appears to me that it would be very hard and unreasonable to say that a violation of the statute was committed by having the pouches of the net closed at a time when there could, by no possibility, be anything to obstruct.

For these reasons, I am of opinion that the Sheriff-substitute reached a sound conclusion, and that we ought to answer the two questions put to us in the negative.

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[1] Prin., sec. 1114.

LORD ORMIDALE.—[After quoting the sections of the statutes and the bye-law printed in the footnote, *supra*, pp. 92-3]—The respondent in the present appeal was charged on a complaint with having contravened the bye-law which I have recited by having omitted to have the required opening in one of the stake nets used by him at a fishing of which he was the occupier during the weekly close time between 6 P.M. on Saturday, 12th July, and 6 A.M. on Monday, 14th July, 1913. It appears from the facts stated in the case that the respondent is the occupier of certain stake-net fishings within the district of the River Cree; that about 2.30 A.M. on the morning of Monday, 14th July, he shut the doors or traps of a stake-net which he had opened several hours before 6 P.M. on the preceding Saturday; that the Cree is for several miles above the net in question tidal; that the water having ebbed, the net was at 2.30 A.M. on dry ground; that the ground did not become covered by the flowing tide until 7 A.M., and was therefore dry between 2.30 A.M. and 6 A.M.

The Sheriff-substitute found the accused not guilty, and the questions submitted for the opinion of this Court are—[His Lordship read the questions]. In my opinion both these questions should be answered in the affirmative.

It seems to me that it cannot be disputed that the letter of the bye-law was contravened. But it is said that, looking to the object which the weekly close time is intended to effect, viz., a free run for salmon, that object was to no possible extent defeated or interfered with by the traps of the net in question being closed at 2.30 A.M., for between that hour and 6 A.M. the net was on dry ground. It was immaterial therefore whether the traps were open or shut.

I admit that there is great force in that contention, and I make the admission all the more readily because your Lordship and Lord Anderson are prepared to give effect to it. But after all what we have to do is to construe the bye-law. It is expressed in perfectly clear and explicit language—and, in precise and definite terms as I read it, imposes upon the user of a stake-net the positive duty of making in such stake-net and keeping free from obstruction an opening of certain dimensions during a certain period of time ascertained by statute, viz., thirty-six hours. In the opinion of the Commissioners that was a regulation calculated and fitted to promote the due observance of the close time in the district of the River Cree, which of course they knew to be a tidal water. The propriety of introducing an exemption from the performance of the duty imposed by the bye-law in respect of the special circumstances affecting a stake-net in tidal waters was a perfectly relevant topic for the consideration of the Commissioners, and it is not to be assumed that they did not consider it. If they had been of the opinion that to do so would not be likely to interfere with the due observance of the close time, they might quite well have added to the bye-law some such words as these—"Excepting only when the ground on which the stake-net is situated is uncovered by water." But they have not done so. It is not said the bye-law is *ultra vires*. Accordingly, there being nothing in the language of the bye-law itself to suggest any limitation of time, it appears to me to follow that the period of its application

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or operation was intended to be concurrent and coincident with the duration of the statutory weekly close time, viz., from 6 P.M. on Saturday to 6 A.M. on Monday. The respondent therefore having closed the opening in his net at 2.30 A.M. on the Monday in question omitted to do an act required by the bye-law, viz., to make an opening and keep it free from obstruction until 6 A.M. If for a perfectly clear, albeit a hard and fast regulation that for thirty-six hours a stake-net was to be open, was substituted a rule whose application was to depend upon and to be tested only by the physical possibility of a fish running through the net—and that is in effect the construction which the respondent asks us to put upon the bye law—it appears to me that it would be practically unworkable.

I may add that in my judgment there is little force in the argument that it would be a hardship on fishermen to give literal effect to the bye-law. So far as is disclosed by the facts stated in the present case there would have been no difficulty at all in complying with its express terms.

On the whole matter, as I have already stated, the questions submitted to the Court should, in my opinion, be answered in the affirmative.

LORD ANDERSON.—I agree with your Lordship in the chair. It is to be noted that this is a private prosecution, the appellant having a statutory title to prosecute in virtue of section 28 of the Salmon Fisheries (Scotland) Act, 1862, and section 30 of the Salmon Fisheries (Scotland) Act, 1868. Apart from this statutory title, it seems to me that, in the circumstances stated by the Sheriff-substitute, the appellant could not have instructed an interest to institute a private prosecution against the respondent, inasmuch as he could not have averred or proved that the respondent had done anything whereby the appellant had been damnified. The bearing of this observation on the questions we have to answer is this: that there is no substance in the charge made against the respondent. He has done nothing which, in the ordinary acceptation of the term, may be said to be a wrong. He has been guilty of no act involving the essential criminal element of dole, and the necessary basis of a prosecution seems therefore to be lacking.

It is maintained that the respondent has been guilty of a technical infraction of the bye-law—literally construed. But if the consequence of a literal interpretation of the bye-law is to subject the respondent to prosecution for an act in which there is, in effect, no wrongdoing, I think the duty of the Court is to interpret the bye-law in such a way as to obviate this result. The bye-law ought to receive such a rational and reasonable construction as will avoid what appears to me to be the absurd consequence of making it applicable to the circumstances set forth in the Sheriff-substitute's findings. In order to arrive at this rational interpretation, it seems to me that the purpose for which the bye-law was passed must be kept in view. That purpose is distinctly set forth both in the statutes and in the bye-law. In the Act of 1862, section 6, the Commissioners are empowered (subsection 6) to make general regulations with respect to the due observance of the weekly close time. Reference was made by the appellant's counsel to section 24 of the Act of 1868, but it is to be noted that that section enjoins obedience to bye-laws

which are in force within the district "for the due observance of the weekly close time." The bye-law with which this case is concerned was passed by the Commissioners in 1868, and is to be found, with two other bye-laws relating to the weekly close time, in Schedule D to the Act of 1868. The preamble to these bye-laws bears that the Commissioners "make the following regulations with respect to the due observance of the weekly close time." The object of providing a weekly close time was to give fish a free run of thirty-six hours every week, and the purpose of the bye-laws was to ensure that no obstructions should be present to prevent the fish having this free run. On the facts found by the Sheriff-substitute it is obvious that nets on dry land could not affect the fish one way or the other, or have any influence on the due observance of the weekly close time. It is clear, therefore, that the bye-law in question, rationally read, applies to nets in water, and that this qualification of the exact terms of the bye-law must be read into it. This construction seems to obtain justification from a consideration of the terms of the two other bye-laws contained in Schedule D to the 1868 Act, which deal with other kinds of nets than stake-nets.

It was suggested that the present case was of the nature of a test case, but I think it should be clearly understood that we are deciding the present question on the special facts set forth in the stated case, and are determining nothing more than that the bye-law does not apply to nets on dry land.

I therefore agree that the questions should be answered in the manner suggested by your Lordship.

THE COURT answered the questions in the negative and dismissed the appeal.

COWAN & STEWART, W.S.—SCOTT & GLOVER, W.S.—Agents.

No. 14.

Mar. 9, 1914.

Hilson v. Easson.

SYDNEY HILSON (Procurator-Fiscal of Roxburghshire), Appellant. —*Gillon, A.-D.*

WILLIAM J. W. EASSON, Respondent.—*A. M. Mackay.*

Procedure—Pleas in bar of trial—Tholed assize—English sentence on plea of guilty to Scottish offence not yet the subject of complaint or indictment.

A person, charged in the Sheriff Court at Jedburgh with obtaining goods on false pretences from a merchant in Jedburgh by means of postal communications from Newcastle-on-Tyne, objected that he had already tholed an assize with respect to the charge. It was proved that he had been convicted of a similar offence by the Court of Quarter Sessions at Wakefield in Yorkshire, and had then pleaded guilty to the Jedburgh offence, in connection with which there was a warrant out for his apprehension but no formal charge had been made against him; and that the Court in passing sentence took the Jedburgh offence into consideration, in accordance, as alleged, with an English practice by which the Court, in sentencing a prisoner, can take into account all outstanding offences of a similar nature to which the prisoner pleads guilty.

Held that the objection fell to be repelled, in respect that the proceedings at Wakefield were lacking in all the essentials of a trial of the accused for the Jedburgh offence, there being neither formal charge nor prosecutor, and the Court having no jurisdiction to try the offence.

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Hilson v. Easson.

HIGH COURT. Lord Justice-General. Ld. Ormidale. Ld. Anderson.

WILLIAM J. W. EASSON was charged in the Sheriff Court at Jedburgh on a complaint at the instance of Sydney Hilson, Procurator-fiscal of Roxburghshire, which set forth "that, on 2nd July 1913, you did send by post from Newcastle-on-Tyne to Andrew Yellowlees, wood merchant, Jedburgh, a post-card, dated 30th June 1913, addressed to Andrew Yellowlees & Sons, wood merchants, Jedburgh, pretending that you were a firm of wood and general merchants carrying on business at 42a Clayton Street, Newcastle-on-Tyne, under the firm name of 'Mooney & Connick,' requesting them to quote you as Mooney & Connick a price for 2000 hard-wood chocks, 22″ × 5″ × 5″, which quotation when received was accepted by you, and you did thus induce said firm of Andrew Yellowlees to send you chocks value £31, 6s. 3d., which you received through the Ashington Coal Company, Limited, Ashington, and appropriated without paying or intending to pay therefor."

On the complaint being called in Court, on 5th January 1914, the accused's agent objected to the relevancy of the complaint on the ground that the accused had already tholed an assize, and the case was adjourned that evidence might be produced on this point.

On 8th January 1914 the Sheriff-substitute (Baillie), after a proof on this point, sustained the objection, and dismissed the complaint.

The Procurator-fiscal obtained a stated case for appeal to the High Court of Justiciary.

The case set forth, *inter alia*:—

"At the adjourned diet on that date [8th January 1914] the following witnesses were examined in support of said objection:—Edward Fletcher Maude, solicitor, Leeds, and Christina S. Graham Easson, 4 Bilton Grove, Harrogate, a sister of the accused. Edward Fletcher Maude acted as solicitor for the accused at his trial before the Quarter Sessions held at Wakefield for the West Riding of the county of York on 13th October 1913, with reference to a charge against him of having obtained 'by means of false pretences from one William Henry Featherstone, 2000 stakes and 1125 bundles of pea-sticks of the goods and chattels of Ralph Creyke with intent thereby to defraud,' and as such had instructed counsel to appear on his behalf and defend him in respect of said charge. He also gave evidence before me as to procedure in which by the law of England, after conviction, other crimes or offences of a like nature are dealt with, along with the principal charge then before the Court, where the accused signifies his intention to plead guilty to such further crimes or offences; also as to what actually occurred in the said Court at Wakefield, and the manner in which the offence charged in the complaint now under review was brought under the cognizance of that Court. He also gave evidence that according to the law of England the magistrates had jurisdiction to take cognizance of the said charge, in connection with which a warrant for the arrest of the respondent emanating from the Sheriff Court of Roxburghshire was produced. In support of both the above propositions he cited the authorities mentioned below. Further, he produced and spoke to an extract conviction against the respondent from said Court of Quarter Sessions at Wakefield, with note * annexed thereto, and a certified copy of part of the steno-

* The note was in the following terms:—"NOTE.—Before sentence prisoner admitted committing an offence at Jedburgh for which a war-

graphic report in said trial at Wakefield which narrates the circumstances under which, after the verdict had been pronounced, the Jedburgh warrant of apprehension was produced to the said Court, and read over to the accused, and the accused had pled guilty to it.* The said Christina S. Graham Easson gave evidence as to being present in said Court at Wakefield, and as to the production of and the manner in which the Jedburgh offence was brought under the cognizance of the Court.

"The evidence of these witnesses was objected to by the appellant on the ground that they were biased parties. This objection I

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rant had been issued, and the Court took this further offence into consideration in fixing his punishment."

* The following is an excerpt from the report:—

"*Mr Mellor* (counsel for defence).—I understand there are two charges or warrants for transactions arising out of this same matter that has now been before the jury—this offence of not carrying on a legitimate business. The jury, after listening patiently to the case, have found that in their opinion he did not carry on a legitimate business. I have advised him with reference to these matters outstanding to plead guilty in this sense; that he bows to the decision of the jury. The jury have found that he represented he carried on a legitimate business, when he did not. There is a beneficent rule that every matter should be taken into consideration. I believe there are two other matters, one amounting to £10 and another amounting to something of the same sort. Is there one warrant or two?

"*A Police Superintendent.*—One.

"*Mr Mellor.*—I have no doubt it is a similar transaction. He pleads guilty to that, and whatever punishment you inflict he will come out clear. (Mr Mellor then pleaded for leniency on account of prisoner's ill-health.)

"*Mr Hallett* (counsel for prosecution).—I have no instructions to oppose that, but I must point out that in order that any charge should be taken into account in the way my friend has referred to, it is necessary that both the parties to that charge should consent to its being so dealt with.

"*The Clerk.*—No. If the prisoner elects to plead guilty to this, we can deal with it.

"*Mr Hallett.*—I was merely saying we had no request. The warrant is from Scotland and not from England. I do not know whether it makes any difference.

"*The Clerk* (addressing prisoner).—It is charged against you or rather there is a warrant against you for an offence at Jedburgh for obtaining goods. Do you wish to plead guilty to that, and have it taken into account in this trial?

"*The Prisoner.*—Yes.

"*The Clerk.*—You plead guilty to it?

"*The Prisoner.*—Yes.

"*Mr Yarborough* (who had returned from first Court and taken charge of his brief).—I understand the charge comes from Scotland.

"*Mr Mellor.*—How much more do you want? We have had it twice. If the Scotch Courts do not follow, it is a matter for them.

"THE SENTENCE.

"*The Chairman.*—We have carefully considered all that has been placed before us, and considered the excuses you have made for one thing and another. We have taken into consideration—we shall deal with these other two cases in passing sentence upon you. The sentence of the Court is that you be imprisoned and kept to hard labour for three calendar months."

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repelled. I held, on the evidence of these witnesses, and the extract conviction, that after conviction for the offence at Wakefield, which may be called the Wakefield offence, and before sentence, it was brought to the notice of the magistrates that there was a warrant for the arrest of the accused emanating from the Roxburghshire Sheriff Court with reference to the offence for which the accused was brought before me for trial, and which may be called the Jedburgh offence; that accused pled guilty to this offence, and that there was no formal objection to this course on the part of the prosecuting counsel; that the magistrates thereupon took into consideration the Jedburgh offence in fixing his punishment, and passed sentence of three months' imprisonment.

"I held it proved that this Jedburgh offence was one which could have been tried on a formal complaint either by the Newcastle-on-Tyne magistrates or in the Sheriff Court of Roxburghshire—(*Ellis*, [1889] 1 Q. B. 230); and I held it further proved that in England it is the duty, if called upon, of the Judge when passing sentence to take into consideration all other offences of a similar nature for which warrants from other English Courts are in existence and to which the accused pleads guilty; and further, that after such sentence has been passed, such other offences having been duly taken into consideration, it is incompetent to bring the accused for trial on these other offences—(*Greig*, (1910) 4 Cr. App. R. 151; *Higson*, (1910) 5 Cr. App. R. 167; *Maclean*, (1910) 6 Cr. App. R. 26).

"I was of opinion that it would have been incompetent to have tried the accused in the Roxburghshire Court for the Jedburgh offence if he had been previously brought up on a formal complaint and tried in the Newcastle-on-Tyne Court for this offence, as the offence was one equally within the jurisdiction of the English Courts.

"I was further of opinion that in accordance with English procedure the course taken was equivalent to a formal trial for the Jedburgh offence, and that it must consequently be held that the accused had been duly tried for the offence, even though the warrant proceeded from a Court in Scotland instead of from an English Court. I therefore sustained the objection for the accused and dismissed the complaint."

The question of law was:—"Whether on the facts stated I was right in sustaining the objection and dismissing the complaint?"

The case was heard on 2nd March 1914.

Argued for the appellant;—The accused had not tholed an assize on the charge in respect of which he was brought before the Sheriff-substitute at Jedburgh. Tholing an assize only occurred when the accused had stood his trial, and where the case had been brought to proof,[1] or where he had pleaded guilty in Court to a formal charge. Here the accused had been served with neither indictment nor complaint, and, even if he had been formally charged with the Jedburgh offence, there was no one present at Wakefield to prosecute; and, further, the Court at Wakefield would have had no jurisdiction to entertain the case. The practice in England of taking into consideration all other offences when passing sentence was not compulsory in cases in which the offences had been committed in different counties, but was a matter for arrangement between the

[1] Hume on Crimes, vol. ii. 470; Macdonald's Criminal Law, 432.

parties, and required the consent of the prosecutor, which obviously could not have been given in the present case.[1]

Argued for the respondent;—The Sheriff-substitute was right. The respondent had already been sentenced for this offence, and it was not consistent with either the principles or the practice of the law that he should be again put upon his trial. The definitions of tholing an assize in Macdonald's Criminal Law and in Hume on Crimes cited by the appellant were obviously not exhaustive, *e.g.*, no mention was made of the case where the accused pleaded guilty. The true meaning of the doctrine was given in another passage by Hume,[2] where he said that a man was not to be twice put in jeopardy of his person on the same conclusion; and in England the doctrine had been described by a writer of authority as the general rule of the common law which forbids a man to be punished twice for the same offence.[3] There was no reason why the "tholing" should be confined to a "tholing" in Scotland; such an idea had been definitely negatived in *Macgregor and Inglis*.[4] The question, accordingly, came to be whether what had occurred at Wakefield would have rendered it impossible for the respondent to have been tried again in England for the same offence. The cases cited by the Sheriff clearly shewed that it would have been impossible; the theory of the English practice being that the prisoner was sentenced there and then for all the offences to which he pleaded guilty, and that when he came out of prison he started with a clean slate. The objection that the respondent had not been formally charged with the Jedburgh offence was merely technical, seeing that there was a formal warrant out against him for his apprehension. It was also to be noted that the accused might have been competently tried for this offence not only at Jedburgh, but also at Newcastle-on-Tyne.

At advising on 9th March 1914,—

Lord Justice-General.—The procedure in this case appears to me to be hopelessly deranged, and can only be put in gear again by a commencement being made *de novo*.

The accused was charged in the Sheriff Court at Jedburgh, at the instance of the procurator-fiscal of Roxburghshire, with the crime of obtaining goods of the value of some £31 by false pretences from a certain firm of wood merchants in Jedburgh. It is not disputed that the complaint is relevant and that the Sheriff Court at Jedburgh was a Court of competent jurisdiction; but, when the complaint was called in Court on 5th January 1914, as the minutes of procedure bear, the accused objected to the relevancy of the complaint in respect that he had already tholed an assize, and the Sheriff-substitute adjourned the case to the 8th of January for the production of evidence thereupon. That plea was palpable nonsense; but, nevertheless, the Sheriff-substitute heard evidence in support of it on 8th January. The sister of the accused and his solicitor from England were examined, and certain productions were given in. The

[1] Syres, (1908) 1 Cr. App. R. 172; M'Lean, (1910) 6 Cr. App. R. 26.
[2] Hume on Crimes, vol. ii. 465.
[3] Russell on Crimes and Misdemeanours, (7th ed.) vol. ii. 1981.
[4] (1848) Arkley, 49, at p. 60.

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evidence discloses that, on 13th October 1913, the accused had been charged before a Court of Quarter Sessions at Wakefield with the crime of obtaining goods under false pretences from English people on 5th April 1913. After trial he was found guilty by the jury, and was sentenced to three months' imprisonment with hard labour by the Court of Quarter Sessions. But a note appended to the extract conviction bears that, before sentence, the prisoner admitted committing an offence at Jedburgh for which a warrant had been issued, and the Court took this further offence into consideration in fixing his punishment. How all that came about is very clearly disclosed in a conversation which is set out in the appendix to the case, and of which I will read a portion :—[His Lordship read the extract from the shorthand-writer's report, printed in footnote, *supra*, p. 101].

It is difficult to take this procedure seriously. A more complete travesty of justice and orderly procedure I have never seen. But upon the evidence of what transpired at Wakefield the learned Sheriff-substitute expresses the opinion that the course taken was equivalent to a formal trial for the Jedburgh offence, and that it must consequently be held that the accused had been duly tried for the offence, even though the warrant proceeded from a Court in Scotland instead of from an English Court. I am exactly of the contrary opinion. How it could be said that what took place before the Court of Quarter Sessions at Wakefield is equivalent to a formal trial at Jedburgh for the offence charged in the complaint in the Sheriff Court at Jedburgh at the instance of the procurator-fiscal it is very difficult to see. There was no trial at Wakefield, and there could be no trial at Wakefield; for there was no prosecutor at Wakefield, there was no accused at Wakefield, there was no complaint at Wakefield, and there was no Court of competent jurisdiction at Wakefield. There could, therefore, be no plea either of guilty or of not guilty. The procedure might just as well have taken place before the Town-council or the Chamber of Commerce for that matter. And, therefore, to speak of this man having "tholed an assize" was nothing more nor less, in my opinion, than downright nonsense.

Accordingly, I am very clearly of opinion that all the interlocutors which have been pronounced in the Sheriff Court must be recalled, for it is nothing to the purpose to say that no objections could have been taken if this man had been properly charged with this offence, as he might have been, at Newcastle-on-Tyne, and if the complaint preferred against him at Newcastle-on-Tyne had been before the Court at Wakefield, and if the prosecutor at Newcastle-on-Tyne had given his consent to the prisoner's offence at Newcastle-on-Tyne being considered at Wakefield in pronouncing sentence there; for none of these things happened. Therefore, this case must go back to the Sheriff Court and be commenced anew. When the prisoner is brought before the Sheriff Court and, for the first time, pleads guilty to the complaint preferred against him, it will be for the Sheriff-substitute to hear both the accused and the procurator-fiscal upon the question of the appropriate punishment to be pronounced, and the Sheriff-substitute will then give such weight as he thinks proper to what happened before the Court of Quarter Sessions at Wakefield, and modify the punishment, or, possibly, inflict no punishment at all, according as he in his dis-

cretion thinks proper, for he is master, and he alone, of all procedure in his own Court.

I am of opinion, therefore, that we ought to answer the question put to us in the negative, and remit the case to the Sheriff Court.

LORD ORMIDALE.—The objection stated in the Sheriff Court, viz., that the accused had already tholed an assize is referred to in the proceedings as an objection to the relevancy of the complaint. That is an erroneous and misleading description of it. It is really a plea in bar of trial, and the question, and the only question, which we are asked to determine is whether the Sheriff-substitute was right in sustaining this objection of "tholed assize" and dismissing the complaint. In my opinion he was not.

One of the facts ascertained by the Sheriff is that according to the law and practice of England it is the duty, or at any rate it is within the competency, of a Judge, when passing sentence upon a prisoner who has been found guilty of a particular offence, to take into consideration all other offences of a similar nature for which warrants from other English Courts are in existence, and to which the prisoner pleads guilty. He has also found that, after such sentence has been pronounced, it is incompetent in England to bring the accused to trial for those other offences.

In the present case it appears that the accused was tried before the Quarter Sessions at Wakefield on 13th October 1913 for, and found guilty of, a particular offence, viz., obtaining goods under false pretences; that it was brought to the notice of the magistrates, before they passed sentence, that there was a warrant emanating from Jedburgh for the arrest of the accused in respect of an offence of a similar nature to that of which he had been found guilty; that the accused pleaded guilty of that offence; that the Magistrates thereupon took into consideration that offence in fixing his punishment, and passed sentence of three months' imprisoment.

I entirely differ from the learned Sheriff-substitute when he says "that the course so taken was equivalent to a formal trial for the offence to which the accused thus pleaded guilty." In my opinion, by pleading guilty of an offence merely referred to in a warrant to arrest, the accused did not thereby "thole an assize" in respect of that offence. He could not thole an assize in respect of an offence with the committal of which he had not yet been formally charged, for the essence of the plea is that the person tendering it has already been brought to trial by the prosecutor, and has then stood his trial for, or pleaded guilty of, a specific offence duly set out in an indictment or other competent form of complaint. In the present case the respondent could not possibly have been tried on the warrant to arrest, and certainly not by the magistrates at Wakefield. He chose to anticipate the probable course of justice, and to plead guilty of an offence indicated in the warrant of a Scots Court. But he could not have been found not guilty of it, and I cannot conceive an assize or trial in which the two alternatives of acquittal or conviction are not open. It is not indeed necessary that an accused person should have been actually sentenced in order to found the plea of tholed assize; it is enough that he has been found guilty, though owing to an error in subsequent procedure no sentence

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may have been passed upon him—*Fraser*.[1] But the accused must have been brought to trial. He must be able to show that he has been put by the prosecutor in jeopardy or peril of his life, liberty, or estate. Here, however, we are asked to sustain the plea of "tholed assize" when as a matter of fact it is tendered in the first and only trial to which the prisoner has been subjected.

No doubt a situation of some delicacy and perplexity has arisen because of a rule of procedure which is said to pertain in England but which is entirely foreign to the criminal practice in Scotland. We have not sufficient information before us to form a mature opinion as to its merits, but so far as its operation is disclosed in the present proceedings it appears to me to involve the risk, at least, of a miscarriage of justice. The rule was applied in the absence of the prosecutor, and without the magistrates being made fully aware of the nature of the offence as ultimately formulated in the complaint at Jedburgh. That clearly appears from the shorthand notes of what passed at Wakefield. At the same time it is certain that the admission of the prisoner that he had committed the offence for which a warrant for his arrest had been issued from Jedburgh was in fact taken into consideration by the magistrates in fixing the punishment, and I should not, for my part, consent to the case going back for trial in the Sheriff Court, if I thought that there was any risk of the respondent being truly twice punished for the same offence; but I am satisfied that there is no such risk. If and when it is ascertained by his own confession or after trial that the respondent is guilty of the offence set out in the complaint, the circumstances attending the prisoner's trial at Wakefield will fall to be considered by the Sheriff-substitute and he will in respect of them be quite entitled to find it unnecessary to pass any further sentence.

LORD ANDERSON.—I have had some difficulty in connection with this case. I have never had any real doubt that the Sheriff was wrong in sustaining the particular objection proponed, but at one stage of the discussion I was inclined to the view that the dismissal of the complaint might be justified on another ground. On consideration, however, I have reached the conclusion that the Sheriff was wrong in dismissing the complaint, and, accordingly, I agree with your Lordships that the question in its entirety should be answered in the negative.

The objection which the Sheriff sustained was that the complaint was irrelevant in respect that the accused had already tholed an assize, and the opinion formed by the Sheriff as to this point is expressed by him thus:—"I was further of opinion that in accordance with English procedure the course taken was equivalent to a formal trial for the Jedburgh offence, and that it must consequently be held that the accused had been duly tried for the offence, even though the warrant proceeded from a Court in Scotland instead of from an English Court." I am unable to agree with the views there stated.

In order that the plea of "tholed an assize" may be successfully maintained, there must have been a former trial, in the ordinary acceptation

[1] (1852) 1 Irv. 66.

of that term, for the same offence. This obviously includes the case where the accused, in the former proceedings, has pleaded guilty and been sentenced. It is essential that, in the earlier proceedings, the accused has been charged with an offence, and that the charge has been formulated in a complaint or an indictment. It is not in accordance with our procedure to take a plea on a warrant to arrest, although that warrant may set forth all the particulars of the offence which are ordinarily set forth in a complaint or indictment. In the present case there was neither complaint nor indictment, and the primary essential to a successful plea of "tholed assize" was therefore lacking. Further, there was neither prosecutor nor accused in connection with the English proceedings relating to the Jedburgh offence. No one appeared at Wakefield with a mandate to proceed against the respondent for that offence, and he was not charged with having committed that crime. Nor was he, at Wakefield, before a Court competent to try him for that offence. He could have been tried at Newcastle, but the Wakefield bench of Quarter Sessions had no jurisdiction to conduct a trial of the accused on that charge. Every essential requisite for a proper and competent trial of the respondent seems therefore to have been absent from the proceedings at Wakefield, and accordingly there was no previous trial on which he could found. The objection that he had "tholed an assize" was therefore bad, and ought to have been repelled.

There is, however, another principle of jurisprudence which seems to apply—a principle which is recognised by our law and probably by the law of every other civilised community—to wit, that an accused person ought not to be punished twice for the same offence. The Sheriff was obviously anxious to give effect to this principle, but, in my judgment, he went the wrong way about ensuring its observance. What he should have done was to try the accused on the Scotch complaint, and, if conviction followed, to have dismissed him from the bar without penalty, in respect that he had already been adequately punished by the English Court for the offence charged.

The appellant is entitled to have the respondent tried for the Jedburgh offence in order that a proper conviction may be obtained for purposes of record. The respondent appears to be a dangerous criminal of the swindler type, and it is proper that his criminal record should be correctly kept for possible future use. I doubt if there is any record in England of the Jedburgh offence, and I am more than doubtful if what occurred there, assuming it has been recorded, could be used as evidence of an aggravation of a crime inferring dishonesty. The 63rd section of the Criminal Procedure (Scotland) Act, 1887,[1] provides that what may be lawfully put in evidence as an aggravation of a crime inferring dishonesty is an extract of a previous conviction obtained in any part of the United Kingdom of such a crime. For the reasons I have mentioned I am of opinion that there has been no "conviction" of the Jedburgh offence, and the appellant is, in my judgment, entitled to obtain this conviction, if he can do so, for the purpose to which I have referred.

The result of our judgment will probably be this: the appellant, if he

[1] 50 and 51 Vict. cap. 35.

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thinks it necessary, having saved the point of procedure, to do anything further, will proceed against the respondent with a view to having him convicted of the Jedburgh offence. If a conviction is obtained, the Sheriff, after hearing the Procurator-fiscal on the point, will, if he remains of opinion that the respondent has already been adequately punished in England, in all likelihood dismiss him from the bar without further penalty. This is, of course, a matter entirely for the Sheriff, and I merely set forth what I surmise will be the sequel of these proceedings, in order to show the unlikelihood of any injustice being sustained by the respondent by reason of a double punishment being inflicted upon him for the same offence.

THE COURT answered the question in the negative and sustained the appeal.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—WINCHESTER & NICOLSON, S.S.C.—Agents.

No. 15.

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H. M. Advocate v. Ryan.

HIS MAJESTY'S ADVOCATE.—*Sol.-Gen. Morison—Morton, A.-D.*
MARTIN RYAN, Panel.—*I. Forsyth Grant.*

Crime—Incest—Intercourse with brother's wife while brother alive—Act 1567, 1 *Jas. VI. cap.* 14.

Held, by a full bench, that sexual intercourse between a man and his brother's wife during his brother's lifetime is a crime by the law of Scotland.

HIGH COURT. (Full Bench.) Lord Justice-General. Lord Salvesen. Lord Skerrington. Lord Hunter. Ld. Anderson.

MARTIN RYAN was charged in the High Court at Glasgow on an indictment at the instance of the Lord Advocate, which set forth that on various dates in a house occupied by his brother, the accused had incestuous intercourse with his brother's wife, "contrary to the Act 1 James VI. cap. 14 and the 18th chapter of Leviticus therein referred to."*

The panel pleaded not guilty, and also objected to the relevancy of the indictment. At the second diet, at a Circuit Court at Glasgow held on 26th February 1914, Lord Skerrington, in respect of the importance and difficulty of the objections stated to the relevancy of the indictment, certified the case to the High Court of Justiciary at Edinburgh.

The case was heard in the High Court at Edinburgh, before a full bench, on 9th March 1914.

Argued for the panel;—The indictment was irrelevant, as it was not a crime by the law of Scotland for a man to have sexual intercourse with his brother's wife during his brother's lifetime. The question depended upon the 18th chapter of Leviticus, verse 16. That verse was merely a prohibition against polyandry,[1] just as

* The Act 1567, 1 Jas. VI. cap. 14, is quoted, *supra* (J.), p. 38.

Verse 16 of the 18th chapter of Leviticus (according to the authorised version of the Scriptures) is as follows:—"Thou shalt not uncover the nakedness of thy brother's wife; it is thy brother's nakedness."

[1] Reference was made to Westermarck's History of Human Marriage and to Robertson Smith's Kinship and Marriage, with the object of illustrating the prevalence of polyandry among the tribes surrounding the people of Israel.

verse 18, as had been recognised in the recent case of *Solicitor-General* v. *A B*,[1] was merely a prohibition against polygamy. Incest was impossible where the parties might at some future period be in a position to marry, and by the Jewish law a man was enjoined to marry his brother's widow,[2] so that it was clear that verse 16 could not refer to incest. Incest depended entirely upon propinquity, and the degree of propinquity in the present case was the same as that in *Solicitor-General* v. *A B*,[1] where it had been held that the parties had not committed incest. That case accordingly was an authority directly in favour of the panel, and he could not, consistently with that decision, be sent to trial. The old cases referred to in Hume[3] had been decided upon an erroneous view of the law.[4]

Argued for the Crown;—There was no ambiguity whatever about the 16th verse of the 18th chapter of Leviticus. It clearly prohibited sexual intercourse between persons in the relationship of those in the present case, and was obviously one of the series of verses referred to in the Act 1567, cap. 14. There was no room, with regard to verse 16, for the objections which had been successfully urged in the case of *Solicitor-General* v. *A B*[1] against the inclusion of verse 18 among the verses relating to incest. That case, therefore, did not in any way affect the present one. Hume, in dealing with the crime of incest, clearly included the relationship here in question.[5]

At advising, on 17th March 1914,—

Lord Justice-General.—In this case we are invited, not for the first time this session, to determine the true scope and meaning of the old Scots Act of Parliament of 1567, cap. 14. It is a highly penal statute and ought, we are all agreed, to receive the strictest interpretation. But, applying to it the most rigid canons of constructions, I am constrained to hold that this indictment is relevant, for the statute expressly provides that "Quhatsumeuer person or personis thay be that abusis thair body with sic personis in degre as Goddis Word hes expresslie forbiddin in ony tyme cuming, as is contenit in the xviij. cheptour of Leuiticus, salbe puneist to the death." To quote the words of Lord Deas, in the case of *Fenton* v. *Livingstone*[6]:—"All that the statute does is to enact the punishment of death for offences which the chapter expressly forbids. To whatever the chapter does not expressly forbid—whether it is an offence or not—the statute, in its terms, is inapplicable." I turn, therefore, to the 18th chapter of Leviticus to find what is therein expressly forbidden and I read, in the 16th verse—I am now reading from the Geneva version, not because it differs in any material respect from the authorised version, but for the reasons which I gave in the case of *The Solicitor-General* v. *A B*[1]—"Thou shalt not discover the shame of thy brother's wife [for] it is thy brother's

[1] *Supra* (J.), p. 38.
[2] Deut. xxv. 5.
[3] The cases of Nairne and Irvine, in Hume on Crimes, vol. i. 449.
[4] Reference was also made to Ersk. Inst., iv. 4, 56; Fraser on Husband and Wife, (2nd ed.) vol. i. pp. 104 *et seq.*; The Punishment of Incest Act, 1908 (8 Ed. VII. cap. 45).
[5] Hume on Crimes, vol. i. 449.
[6] (1861) 23 D. 366, at p. 382.

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shame." It will be observed that the reason assigned for the prohibition is the propinquity of the parties. It seems unnecessary to proceed any further, for these words which I have just read are not open to two meanings, they are free from all ambiguity and, applying to them the most rigid canons of construction, I, for my part, am constrained to hold that this indictment is quite clearly relevant.

It was argued to us by the prisoner's counsel that the effect of our decision in the case of *The Solicitor-General* v. *A B* [1] was to exclude from the category of crime expressed in the present indictment all acts between a man and his sister-in-law. I cannot think so, for verses 6 to 17 contain a list or series of examples or illustrations of what is meant by the expression near of kin; and, from an examination of these verses, it will appear that the general prohibition expressed in the sixth verse applies both to degrees of affinity and consanguinity. Eleven examples or illustrations in all are given, six of these applying to consanguinity and five to affinity. There is, therefore, no shadow of doubt that the expression "degree" in the ancient statute embraces both affinity and consanguinity.

Mr Forsyth Grant, however, submitted to us an ingenious argument, buttressed by much research and learning, to the effect that the verse in question (verse 16) has no relation to the crime charged in this indictment, and that it is exclusively confined to the custom of polyandry and forbids expressly any woman to have two brothers as husbands at the same time. I cannot think so, and my answer is this—that the words of this verse plainly will not bear that construction. To give effect to this argument would mean that we should trespass beyond our own proper functions into the domain of the legislative authority. We may all entertain our own views regarding the propriety and wisdom of retaining this ancient statute in the criminal code of Scotland. I am well aware that your Lordships do entertain strong views on that subject, views which I fully share; but, in the meantime, we can only give effective expression to them in the sentences which we think it our duty to pronounce, if we are to confine ourselves to our proper functions as interpreters and not makers of the law.

Lord Salvesen.—I am unable to resist the conclusion at which your Lordship in the chair has arrived; but I cannot refrain from pointing out the anomalous position in which our law of incest at present stands. It is entirely statutory in origin, and the anomalies are the result of the imperfection of the statute, which was passed so long ago as the year 1567, and which has been allowed to remain ever since without alteration. Even after all these years in which judicial construction has been brought to bear from time to time to elucidate the statute, it is still uncertain whether some forms of irregular connection are punishable as crimes. No better illustration of this is to be found than in the recent case of *A B*,[1] where a majority of this Court held that intercourse between a man and his wife's sister was not incest, although there were ancient decisions to the contrary. The relationship between the accused here and the woman with whom he had connection is precisely the same in degree; and yet, on the

[1] *Supra* (J.), p. 38.

language of the statute, we are forced to hold that intercourse between a man and his living brother's wife is a crime, although morally no more reprehensible than intercourse between a man and his living wife's sister.

The Act 1567, cap. 14, enacts that any person that abuses his body "with sic personis in degre as Goddis Word hes expresslie forbiddin in ony tyme cuming, as is contenit in the xviij. chaptour of Leuiticus," shall be guilty of the crime of incest and punishable with death. A penal statute of this kind ought always to be strictly construed, the more so because of the use of the term "expressly forbidden"; but this rule of construction has been from the first consistently disregarded. The reason may be gathered from a careful examination of the forbidden degrees which are enumerated in the chapter in question. Thus, while intercourse between a mother and son is expressly dealt with, nothing is said with regard to intercourse between a father and his daughter or granddaughter. A nephew is forbidden to marry his aunt, but there is no prohibition in the case of an uncle and niece. The Courts were therefore faced with this difficulty—that, if the statute only applied to the cases expressly mentioned in Leviticus, intercourse of the kind which most shocked the feelings of mankind fell to be treated as lawful. Accordingly verse 6, which in the Geneva Bible is thus expressed: "None shall come nere to any of the kindred of his flesh to uncover her shame," has been treated as a general prohibition; and, to use the words of Lord Fraser,[1] "the whole of the following verses, down to and including verse 17, are just *examples and illustrations* of what is meant by "near of kin" in verse 6. Those verses are not *limitations* of the general law but *examples* of it." The result of this method of construction, while it has avoided the evil of allowing persons who have committed incest of the most revolting description to escape punishment, has been to apply the statutory penalty to many cases in which there was neither blood relationship between the parties nor such affinity as made intercourse inexpedient or immoral. According to the older decisions, not merely has a man been convicted for having intercourse with his living wife's sister but also with his deceased wife's sister. So also a man who married his brother's widow has been sentenced to death. Perhaps the most extreme case is one where a widower, who had intercourse with the daughter of his wife's half-brother, was held to have come within the purview of the statute. In this case the parties were in no way related by blood; and there was no reason, apart from the previous marriage of the man, why he should not marry the woman with whom he had connection; yet the logic of the decision, according to the peculiar canon of construction applied to this statute, is unanswerable. Degrees of affinity are to be treated exactly on the same footing as degrees of consanguinity, and the half-blood as equal to the whole. The woman in question was the deceased wife's niece, because she was the daughter of a half-brother; hence, for the purpose of this statute, she was to be treated as the husband's niece; and although marriage between an uncle and his niece is not expressly forbidden it is, forsooth, to be implied from the express prohibition of marriage between an aunt and her nephew.

[1] Husband and Wife, (2nd ed.) vol. ii. p. 115.

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It is to the credit of those responsible for the administration of our law that there have been very few prosecutions in Scotland where the relationship was not one of consanguinity. There are only one or two reported cases of a prosecution such as we are now dealing with. As the law, however, stands, it is the duty of the prosecutor to indict, when a case of the kind, capable of proof, is made the subject of a formal complaint; and I make no reflection upon the present Lord Advocate for having directed this indictment to be served. I assume that, in the circumstances, he had no option; but such a case as the present, and that of *H. M. Advocate* v. *A B*,[1] bring into strong relief the anomalies of the law of incest, and make it imperative that there should be a new and clear definition of the crime by a statute that would command general assent. But for the rarity of the prosecutions in the past in cases of this description, I think public opinion would long ago have revolted against a statute which leaves to implication one-half of the crimes which are now held to be within its scope, and which includes relationships which are not merely not criminal, but entirely void of offence.

LORD SKERRINGTON.—I agree with your Lordships, and as the Judge who certified this case from the Glasgow Circuit, I wish to say that I do not regret that I took up the time of this High Court by following that course.

The immoral conduct with which the prisoner at the bar is charged is so similar to the immoral conduct which, in the recent case of *The Solicitor-General* v. *A B*,[1] we held not to be criminal that the public are entitled to know why it is that we draw a sharp distinction between the two. The opinions which your Lordships have just delivered afford that explanation.

If public opinion considers that we have been constrained by the terms of this ancient statute to draw a distinction where no real difference exists, an easy remedy can be provided by Parliament.

LORD HUNTER.—I agree with the views of your Lordship and also with the views of Lord Salvesen. Personally, I do not think that prosecutions for incest ought to proceed except in cases where the offending parties are related by blood. But I agree that we cannot possibly take that view here, looking to the terms of this ancient statute, which is binding upon us.

LORD ANDERSON.—This is an indictment at the instance of the Lord Advocate against the panel, Martin Ryan, charging him with having had incestuous intercourse with his brother's wife, contrary to the Act 1 James VI. cap. 14, and the 18th chapter of Leviticus, therein referred to. When the case came, last month, before Lord Skerrington at the Glasgow Circuit, the panel's counsel objected to the relevancy of the indictment, in respect that the fact libelled does not amount to a crime according to the law of Scotland. The importance of the point thus raised induced Lord Skerrington to certify the case for the opinion of this Court,

[1] *Supra* (J.), p. 38.

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and the question for our determination is whether the indictment against the panel is relevant. The answer to this question depends on a consideration of the terms of the Act of Parliament and of the chapter of the Scriptures which it incorporates.

A point was mooted at the debate as to whether incest is a crime under the common law of Scotland. It seems to me that there is no doubt that it was a common law crime before the statute of 1567 was passed. I entirely agree with what is said on this point by Lord Fraser in his work on Husband and Wife, vol. i., p. 113: "The Act 1567, cap. 14, did not declare the connections therein reprobated incestuous for the first time. The only object of that statute was to increase the punishment. The Act 1567, cap. 15, allowing parties to marry within certain degrees before prohibited, left all marriages outwith these permitted degrees in the same position as they formerly were by the common law of Scotland, *i.e.*, incestuous and null. But the punishment under the common law was merely *ecclesiastical penance*, which was altered by the Act 1567, cap. 14, into *death*. It is a mistake to suppose that the Act 1567, cap. 14, created the law which denounces as incest all connections within the prohibited degrees." In the case of *Neil M'Coll*,[1] which decided that attempt to commit incest is an indictable offence at common law, Lord Neaves expresses himself thus: "It is a mistake to suppose that this crime rests on the Statute alone. The Statute itself sets forth that incest is a crime already; and the native vigour of the law of Scotland will enable us to punish an attempt to commit any such crime. . . . The common law defines the crime as a violation of the rules of propinquity, and the Statute lays down laws of propinquity: but that the crime of incest rests on the Statute alone is, to my mind, inadmissible." I find that in this case, where the indictment was in the old form, incest, and attempt to commit incest, are libelled, in the major proposition, as common law crimes. The indictments were in similar form in the cases of *Simpson*,[2] *Russell*,[3] *Robertson*,[4] *Irvine*,[5] and *Lloyd*.[6] In the case of *Oman*,[7] the crime of incest was libelled, in the major proposition, as a crime at common law.

This matter, however, is not really germane to the question we have to decide under the present indictment, which is laid solely on the Act of 1567. The one consideration here is, as Hume has pointed out (i. 447), What hath the statute said? Now, I have been unable to discover any ambiguity or dubiety as to the significance of the 16th verse of the 18th chapter of Leviticus, which is applicable to this case. The terms of the verse are these—"Thou shalt not uncover the nakedness of thy brother's wife." That prohibition is clear, express, and unambiguous, and we are bound to give effect to what is there so distinctly laid down. I am therefore of opinion, on the short ground that the scriptural language is clear and imperative, that the indictment is relevant.

The panel's counsel very properly pointed out the apparent anomaly or inconsistency between this case, if decided against the accused, and the

[1] (1874) 2 Coup. 538.
[2] (1870) 1 Coup. 437.
[3] (1869) 1 Coup. 441, note.
[4] (1877) 3 Coup. 496.
[5] (1875) 3 Coup. 496, note.
[6] (1875) 3 Coup. 497, note.
[7] (1855) 2 Irv. 146.

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recent case of *A B*.[1] The degree of relationship, to wit, that of a sister-in-law, is the same, but in the former case the Court held that no crime had been committed. That case, however, depended on an interpretation of a different verse, which the Court held did not instruct any crime. Our duty is to administer the law as we find it, and not to repeal existing enactments which may have got out of harmony with modern ideas. It is for the Legislature, and not the Court, to remove the alleged anomaly or inconsistency, if modern sentiment demands that this should be done. The only way in which the Court can recognise the existence of this modern sentiment, if it does exist, is in connection with the imposition of a penalty.

ON the motion of the Advocate-Depute, in view of the time that the panel had already been in custody, the Court deserted the diet *simpliciter*.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—FREDERICK HILL, Solicitor—Agents.

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DONALD AND FRANCIS D. DUNDAS, Appellants.—*Constable, K.C.*—*Ingram*.

CHARLES STEUART PHYN (Procurator-Fiscal, Dumfriesshire), Respondent.—*Gillon, A.-D.*

Statutory Offences—Protection of animals—Knackery—Prohibition against selling alive or permitting sale of animals delivered to knacker—Sale by knacker's assistant—"Permission" of knacker—"Delivery" of animal—Protection of Animals (Scotland) Act, 1912 (2 *and* 3 *Geo. V. cap.* 14), *sec.* 5 (2), *First Schedule, Regulation* 9.

The Protection of Animals (Scotland) Act, 1912, enacts, section 5 (2): "Every person who shall carry on, or assist in carrying on, the trade or business of a knacker shall observe and conform to the regulations set out in the First Schedule to this Act, . . ." and the First Schedule, Regulation 9, enacts: "The knacker shall not sell or part with alive, or cause or procure or permit any person to sell or part with alive, any animal which has been delivered to him."

A knacker's assistant, in the absence and without the knowledge of the knacker, purchased a horse at a market three miles from the knackery for the sum of £1, and tied it to the knackery cart. While the horse was standing there he sold it for the sum of £1, 10s. to a person who subsequently dispatched it for exportation to Antwerp. There was no evidence as to the purpose for which the knacker's assistant purchased the horse. The knacker's assistant and the knacker, having been convicted of a contravention of section 5 (2) of the Protection of Animals (Scotland) Act, 1912, by respectively selling and permitting the sale of the horse alive, appealed to the High Court.

The Court (*diss.* Lord Salvesen) *sustained* the conviction of the assistant, *holding* (1) that Regulation 9 of the First Schedule applied not only to knackers but also to their assistants; (2) that, although it would not be a contravention of the section to sell a horse that was proved to have been delivered for other than knackery purposes, yet, (*diss.* Lord Salvesen) in the absence of such proof, the horse must be presumed to have been delivered for knackery purposes.

[1] *Supra* (J.), p. 38.

Further, the Court *quashed* the conviction of the knacker, *holding* that, in the absence of proof that he knew of or authorised the sale, or had failed to exercise a reasonable supervision over his assistant, he could not be said to have "permitted" the sale.

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HIGH COURT. Lord Justice-General. Lord Salvesen. Ld. Anderson.

DONALD DUNDAS, knacker's assistant, and Francis D. Dundas, knacker, both residing at Oakland House, Noblehill, Dumfries, were charged in the Sheriff Court at Dumfries on a complaint at the instance of Charles Steuart Phyn, procurator-fiscal. The charge against the accused was:—"You are charged at the instance of the complainer, that on 19th November 1913, on Whitesands, Dumfries, you, the said Donald Dundas, being an assistant in carrying on the trade or business of a knacker, did sell alive to David Purdie, cattle dealer, 142 Cotton Street, Castle-Douglas, a chestnut horse which had been delivered to you the said Donald Dundas, and you the said Francis D. Dundas, carrying on the trade or business of a knacker, did permit the said Donald Dundas to sell alive said horse, contrary to section 5 (2) of the Protection of Animals (Scotland) Act, 1912,* whereby you are liable to a penalty not exceeding ten pounds, and in default of payment thereof, to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act, 1908."

The accused, having both been found guilty by the Sheriff-substitute (Campion), obtained a stated case on appeal to the High Court of Justiciary.

The case set forth:—"The cause was tried on 5th December 1913, when the agent for the appellants objected to the relevancy of the complaint against the said Donald Dundas in respect that Regulation 9 of the First Schedule to the Protection of Animals (Scotland) Act, 1912, only applied to a knacker and not to his assistant. I repelled said objection, and proof was then led both for the prosecution and in defence.

"The facts held proved in evidence were:—That Thomas Walls, a general dealer, who had bought the horse in question at a farm sale a few days previously, and had driven it yoked to a trap on the date libelled a distance of fourteen miles, sold it to the said Donald Dundas for £1. That Donald Dundas then took the horse and tied it to the cart belonging to the knackery conducted by his father the said Francis D. Dundas, a younger brother being in charge of the cart at the time. That this transaction took place at Whitesands, the market-place of Dumfries, three miles distant from the knackery, on a Wednesday, the Dumfries market day. That while the horse was standing at said cart, the said David Purdie came along and offered to purchase it from Donald Dundas. That after some bargaining, Donald Dundas sold the horse for £1, 10s. to Purdie, who despatched it to a Mr Mills, at Menston, near Leeds,

* The Protection of Animals (Scotland) Act, 1912 (2 and 3 Geo. V. cap. 14), enacts:—Section 5 (2). "Every person who shall carry on, or assist in carrying on, the trade or business of a knacker shall observe and conform to the regulations set out in the First Schedule to this Act, and if any person, carrying on or assisting in the carrying on of the said trade or business, contravenes or fails to comply with, or causes or procures or permits any contravention or non-compliance with, any such regulation, he shall be liable upon summary conviction to a fine not exceeding ten pounds."

Regulation 9 of the First Schedule to the Act is quoted in the rubric.

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for exportation to Antwerp. That the said Francis D. Dundas was not present at Whitesands at the time of the purchase and sale of the horse, and only afterwards came to know of the facts. That the said Donald Dundas assists his father the said Francis D. Dundas in carrying on the trade or business of a knacker. That the said Francis D. Dundas holds a licence as a manure manufacturer, besides carrying on the trade or business of a knacker. On the facts stated I found the appellants severally guilty as libelled, fined the said Francis D. Dundas £5, or in default of payment, sentenced him to ten days' imprisonment, and dismissed the said Donald Dundas with an admonition."

The questions of law were:—"(1) Was the relevancy of the complaint rightly sustained? and (2) Were the appellants rightly convicted, as libelled, on the facts stated?"

The case was heard before the High Court on 9th March 1914.

Argued for the appellants;—Both appellants had been wrongly convicted, no offence of any description having been committed by either of them against section 5, subsection (2), or the Schedule which related to the section. The offence alleged here was selling or permitting the sale of an animal which had been "delivered" to a knacker. The horse here had not been "delivered" in the sense of Regulation 9 of the First Schedule. It was obvious from the Act that delivery meant delivery either at the knackery, or to the knacker or his assistant for the purpose of destruction in the knackery. It did not cover every delivery to a knacker or his assistant, for in that case it would be impossible for a knacker to buy a horse to run in his trap, seeing that Regulation 3 of the First Schedule enacted that every animal must be slaughtered within two days from the time at which it had been "delivered." In the present case it was not found, and there was no evidence to show, that the assistant had bought the horse with the object of destroying it, and this fact could not be presumed against the accused. As regarded the assistant, the case against him failed on the further ground that Regulation 9 of the First Schedule clearly applied only to the knacker and not to his assistant, and the complaint, accordingly, as against the latter was irrelevant. It was true that section 5 (2) enacted that the assistant was to obey the Regulations set out in the First Schedule, but when the Schedule was examined it was obvious that certain of the Regulations, *e.g.*, Regulations 1 (providing that the knacker's name should be painted over the door), 6 (providing that proper books should be kept), and 9, could only apply to the principal. As regarded the knacker, it was further clear that the case against him, which was a charge of permitting the sale, had in no way been proved. He was not present when the sale was made; he knew nothing about it until after it had taken place; and it was not suggested that he could have prevented it in any way, or that he had failed generally to exercise reasonable supervision over the actions of his assistant. The cases under the Licensing Acts were distinguishable, because under the Licensing Acts there was no provision for punishing assistants,[1] whereas under the present Act the case of an assistant was expressly provided for, and further, a clear distinction was drawn between actual selling and merely permitting a sale.

[1] Commissioners of Police v. Cartman, [1896] 1 Q. B. 655.

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Argued for the respondent;—The horse had been "delivered" in the sense of the Act. There was nothing in the Act to indicate that delivery must be at the knackery, and the facts found by the Sheriff-substitute showed beyond doubt that the horse had been sold to and purchased by the assistant with the object of its being destroyed and not for service. As regarded the case against the assistant, Regulation 9 of the First Schedule applied to assistants as well as to principals. It was true that the knacker himself was the only person actually mentioned in the Regulation, but section 5 (2) was perfectly explicit in its statement that the Regulations were to apply not only to principals but also to assistants, and in cases of ambiguity a section of an Act must override a schedule.[1] As regarded the case against the knacker, he had "permitted" the sale in the sense of the Act even although he knew nothing about it. The sale had been effected by an employee in the course of his employment, and that was sufficient to make the employer responsible. There was no necessity for the presence of *mens rea* to constitute the offence, the prohibition being an absolute one. The same rule of law had been repeatedly applied in the case of offences against the Licensing Acts.[2] Section 7 of the Act was instructive by way of contrast, for in that section the word "knowingly" was expressly introduced.

At advising on 19th March 1914,—

Lord Justice-General.—The appellant Francis Dundas, who is a knacker in the neighbourhood of Dumfries, and the appellant Donald Dundas, who assists his father in carrying on the trade or business of a knacker, were charged before the Sheriff-substitute in the Sheriff Court at Dumfries, with a contravention of subsection 2 of the 5th section of the Act for the Protection of Animals, 1912. Both pleaded not guilty and, after evidence had been led, the Sheriff-substitute found both the appellants guilty as libelled. I am of opinion that the appellant Donald Dundas was rightly convicted and that the appellant Francis Dundas was not.

I take, first, the case of Donald Dundas. He was charged, being an assistant in carrying on the trade or business of a knacker, with selling to David Purdie, a cattle dealer, a chestnut horse which had been delivered to him, Donald Dundas, contrary to section 5 (2) of the statute I have mentioned. The facts proved and found in the stated case were as follows:—On the market day, Wednesday 19th November last, Donald Dundas was at the market-place in Dumfries and bought from a general dealer named Walls a chestnut horse for 20s. The horse was there and then delivered to Donald Dundas who tied it to the cart belonging to his father's knackery—a younger brother being in charge of the cart at the time. Subsequently, while the horse was thus tied up, a man named Purdie, a cattle dealer, came up and offered to purchase it. After some bargaining, Donald Dundas, to whom the horse had been delivered a

[1] Jacobs v. Hart, (1900) 2 F. (J.) 33, 3 Adam, 131.

[2] Bond v. Evans, (1888) 21 Q. B. D. 249; Sherras v. De Rutzen, [1895] 1 Q. B. 918; Parker v. Alder, [1899] 1 Q. B. 20; Toppin v. Marcus, [1908] 2 I. R. 423.

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short time before, sold it to Purdie for 30s., and by him it was exported to Antwerp.

Upon these facts, the Sheriff-substitute found Donald Dundas guilty of the contravention charged, and I think rightly so, for section 5 (2) runs as follows (I read it short):—Every person who shall assist in carrying on the trade of a knacker shall conform to the regulations set out in the First Schedule appended to the Act; and if any person assisting in that trade contravenes any such regulation he shall be liable, on summary conviction, to a fine not exceeding £10. And when I turn to the First Schedule, I find that the 9th Regulation runs as follows:—"A knacker shall not sell alive, or permit any person to sell alive, any animal which has been delivered to him."

An objection was taken to the relevancy of the indictment in respect that Regulation 9 of the First Schedule to the 1912 Act only applied to a knacker and not to his assistant. But the statute prescribes exactly the opposite, for the statute says every man who assists in carrying on the business of a knacker is to observe all the regulations, and Donald Dundas was confessedly assisting in carrying on the business of a knacker. Therefore, if he failed to observe any of the regulations he was bound to suffer the penalty. Accordingly, if this objection had been sustained, in my opinion the express words of the statute would have been violated, its aim and object would certainly have been defeated, and no amending Act could have cured the mischief because the words of the statute could not, I think, be made plainer than they at present are. Therefore, I think the Sheriff-substitute was right in repelling the objection to the relevancy.

Now, let it be observed that there was no other objection stated to the relevancy except the one I have just mentioned. It was not objected, for example, that the complainer had failed to charge Donald Dundas with having had delivered to him a horse for knackery purposes for or on behalf of his father and employer Francis Dundas. No such objection was taken, nor do I think that such an objection if it had been taken could have been sustained, because the public prosecutor here charged the offence in the very words of the statute. But it was contended to us that the conviction could not stand because the prosecutor had failed to prove, and the stated case had not found, that the horse was delivered to Donald Dundas for knackery purposes. The statute throws no such obligation upon the prosecutor. If he prove that the horse was delivered to the assistant knacker, then, if the assistant knacker sells the horse, he is liable to the penalties, because the statute presumes that, if a horse is sold to a man who assists in carrying on the business of a knackery, it is sold for knackery purposes, the transaction being one in the ordinary course of trade. Of course, if the knacker's assistant or, for that matter, the knacker himself were to prove to the satisfaction of the Sheriff that the horse had been delivered to ride or to drive or for re-sale, and a finding to that effect were pronounced, the accused would, in my judgment, be entitled to acquittal. But the prosecutor has, in my opinion, no onus here to discharge. He is not bound to prove—what the statute, of course, presumes—that, when a horse is delivered to a knacker or to an assistant knacker, it is delivered for knackery purposes. And in the absence, therefore, of

any finding that the horse was not delivered for knackery purposes, I am of opinion that the conviction against the appellant Donald Dundas was right.

I turn now to the case of Francis Dundas. The charge against him was that he "permitted" all that I have narrated to be done, and accordingly was guilty of an offence under subsection 2 of the 5th section. But all that is found in the stated case with regard to Francis Dundas is that he was not present at Whitesands—the market-place—at the time of the purchase and sale of the horse, and only afterwards came to know the facts. How a man could have "permitted" an offence to be committed of which he was in utter ignorance I am wholly at a loss to understand. It was argued to us that a man might, in the sense of the statute, permit an act to be done without actually knowing of it. That may be so; but the prosecutor would certainly be bound to prove facts and circumstances from which permission could be inferred. If I am asked to say what is the meaning of the word "permit" as used in this statute, I find a capital glossary in section 1 (2) of the Act, where it is provided that an owner shall be deemed to have permitted a certain act prohibited, to wit, cruelty within the meaning of this Act, if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal therefrom. And I draw the inference—I think sound and just—that an owner might be convicted of having permitted an act to be done if he failed to take reasonable care and supervision in respect of a particular act, in this instance in respect of the conduct of his assistant. What the prosecutor would require to show in order to prove a lack of the exercise of reasonable care and supervision, I forbear to speculate upon; but, undoubtedly, facts and circumstances might be established—and it would be for the prosecutor to establish them—from which the absence of reasonable care and supervision might be inferred.

The truth is that all the questions raised in this case depend upon onus. Is the onus upon the prosecutor to prove that a horse, which has been delivered to a knacker or an assistant knacker, was delivered for knackery purposes, or was delivered to the assistant knacker on behalf of his employers? I am of opinion that it is not, and that the statute makes that very clear. On the other hand, is the onus upon the prosecutor to prove permission when an owner is charged with having permitted an act to take place? I am of opinion that it is, and that he does not discharge that onus by simply proving that the owner knew nothing at all about the transaction; and that is all that is proved in this case against Francis Dundas.

My view, therefore, is that the first question put to us ought to be answered in the affirmative and that, with regard to the second question, we ought to say that Donald Dundas, the assistant knacker, was rightly convicted and that Francis Dundas, his father and master, was not.

Lord Salvesen.—The material facts found by the Sheriff-substitute in this case may be briefly summarised as follows. On 19th November 1913 Donald Dundas, who assists his father, the other appellant, in carrying on his business as a knacker, bought a horse at Whitesands, the market-

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place of Dumfries, at the price of £1 from a man called Walls, who had driven it fourteen miles that day. He tied the horse to the cart belonging to the knackery, when a certain David Purdie came and offered him 10s. more than the price he had paid for it. Donald Dundas thereupon sold the horse to Purdie, who afterwards dispatched it to a Mr Mills for exportation to Antwerp. It is not said that Donald Dundas knew the destination to which Purdie meant to send the horse. Francis Dundas was not present at the time of the purchase and sale of the horse, and only afterwards came to know the facts. This apparently innocent transaction has been made the subject of a prosecution under the Protection of Animals (Scotland) Act, 1912; and both Donald and Francis Dundas have been convicted.

The charge against Donald Dundas is that he, being an assistant in carrying on the trade or business of a knacker, did sell alive to David Purdie, cattle dealer, a chestnut horse which had been delivered to him; and the charge against Francis Dundas is that he, carrying on the trade or business of a knacker, did permit Donald Dundas to sell alive said horse. The section of the Act libelled is section 5 (2), which provides that every person who carries on, or assists in carrying on, the business of a knacker shall observe the regulations set out in the First Schedule. The particular article of the schedule said to have been contravened is in these terms: "The knacker shall not sell or part with alive, or cause or procure or permit any person to sell or part with alive, any animal which has been delivered to him."

The first question is whether this part of the schedule applies to a knacker's assistant. Having regard to the language of section 5 (2) I think it must be held so to apply, because it is reasonably capable of being so applied. In this respect it differs from some of the other regulations; as, for instance, the first—that the name of the knacker shall be painted on the gate of his yard; or the sixth, which prescribes that the knacker shall enter in a book kept for the purpose a description of every animal delivered to him and other particulars. These matters are within the sole control of the knacker; and I think it would be absurd to indict his assistant for a breach of these regulations. On the other hand, there is no prohibition against a knacker's assistant carrying on the business of a dealer in horses, as there is by section 6 in the case of a person who is licensed to slaughter horses. It is, therefore, plain to my mind that, in the case of a knacker's assistant, the mere fact that he sells a live horse cannot be treated as an offence. In the same way, as regards the knacker himself, he may require a horse for the purposes of his business; and, if the language of the regulations be strictly applied, whenever he buys any horse he must kill it within two days from the time it has been delivered to him.

It is obvious, therefore, that the regulation requires construction, and I think it means, both with regard to the knacker and his assistant, that the animal has been sold to either of them for the purpose, whether express or implied, of its being slaughtered. Under such circumstances, I can well understand that Parliament should have thought it desirable, from motives of humanity, that a horse sold for such a purpose (being

presumably unfit for any other) should be immediately slaughtered; but unless this is found as a fact, or has been reasonably inferred by the convicting magistrate from the facts proved before him, I do not think he is entitled to convict. Now, the Sheriff-substitute has not made any finding of this nature. He does not say that Walls knew that Donald Dundas was assistant to his father or that he sold the animal for the purpose of slaughter. The mere fact that the price was only £1 would not by itself be sufficient to entitle the Sheriff-substitute to draw this inference. For all that appears, the motive of the original owner, in selling the animal, may have been that he discovered in the course of his fourteen miles' drive that it was sluggish or vicious, and so useless for his purpose. But the Sheriff-substitute does not inform us what inference, if any, he drew from the facts. If the original owner knew that Donald Dundas was a knacker's assistant, this, taken in conjunction with the price paid, might perhaps justify an inference that, in the owner's opinion, it ought to be slaughtered at once, and was sold for that purpose; but this, to my mind, essential fact is not found at all. I am, therefore, of opinion that neither of the accused should have been convicted on the facts stated.

Even if I had been of a different opinion, I should still have held that there were no sufficient grounds for convicting Francis Dundas. It is expressly found that he knew nothing of the purchase or sale of the horse; and there is no statement that his son was authorised by him to buy on his behalf or to sell alive any horse which had been delivered to him. I cannot see how, in these circumstances, he can be held to have permitted a sale of which he knew nothing. He may be responsible for what goes on in his own premises, of which he has control; but he cannot be responsible for the unauthorised acts of an assistant committed at a distance of three miles from his knackery. On this separate ground, therefore, I would have quashed the conviction so far as relating to Francis Dundas.

Lord Anderson.—This is the first prosecution to come before the Court under the Protection of Animals (Scotland) Act, 1912. The Act deals, in the main, with offences of cruelty to animals, but it also contains provisions as to the registration of knackers, and, in the First Schedule, regulations are enacted for the conduct of the business of a knacker. Sections 5 and 6, and the definition section (section 13) contain the provisions of the Act which deal with knackers. One of the mischiefs for which this part of the Act endeavoured to provide a remedy was the exportation of worn-out horses from Great Britain to Continental ports.

The appellants, who are a knacker and his son, a knacker's assistant, were charged in the same complaint—the son with having sold alive a horse which had been delivered to him, and the father with having permitted the sale, contrary to section 5 (2) of the Act. The offence which was really meant to be charged was one against Regulation No. 9, which prohibits the sale alive of an animal which has been delivered to the knacker. The Sheriff-substitute at Dumfries, after evidence had been led, convicted both accused of the respective offences charged, and fined the father £5, the son being dismissed with an admonition. Both the appellants, being dissatisfied with this judgment, craved and obtained a

Mar. 19, 1914.

Dundas v. Phyn.

Ld. Anderson.

stated case for the opinion of this Court. The questions submitted in the stated case for our opinion are these:—1. Was the relevancy of the complaint rightly sustained? 2. Were the appellants rightly convicted as libelled, on the facts stated?

The ground on which the relevancy of the complaint was challenged, as disclosed in the minutes of procedure, was "that Regulation 9 of First Schedule to 1912 Act only applied to a knacker and not to his assistant." It is to be observed that this was a special defence which was proponed on behalf of the knacker's assistant, and had reference solely to the charge against him. The Sheriff-substitute repelled this plea, and I am of opinion that he was right in doing so. Section 5 (2) provides—[His Lordship read the subsection]. According to the terms of the subsection, therefore, a knacker's assistant is taken bound to observe the regulations. It was pointed out that certain of the regulations, such as the first and the sixth, are inappropriate or inapplicable to a knacker's assistant. This may be so, but the enactment of the subsection quoted must be given effect to so far as that can competently be done, and its purpose, in my opinion, is to make the regulations binding, so far as they are applicable, on knackers' assistants. Regulation 9 is, in my judgment, applicable to a knacker's assistant. If the regulation has not this effect, it will be an easy matter for a knacker to evade its provisions. He need only do the prohibited act through the agency of his assistant, and deny privity or complicity. I am accordingly of opinion that the first question should be answered in the affirmative.

The second question creates greater difficulty. It raises questions of fact which are primarily for the Sheriff-substitute. We can only reverse him on the facts if we are of opinion (*a*) that he misdirected himself in law in reaching his conclusion in fact, or (*b*) that his conclusion in fact is unreasonable and improper on the evidence adduced.

Two general points, applicable to both accused, were taken by the appellants' counsel. It was said, in the first place, that the delivery figured in Regulation 9 was delivery at the knacker's yard. If this construction is correct the regulation could easily be evaded. It seems to me that the suggested construction is negatived by the terms of section 5 (5):—"For the purposes of this Act, an animal shall be deemed to have been delivered to a knacker, if it has been delivered either to the knacker himself, or to any person on his behalf, or at the knacker's yard." If it be the case that the horse was delivered to the knacker's assistant on behalf of the knacker, although not at the yard, this seems a delivery covered by the regulation. It was urged, in the second place, that the Sheriff-substitute has not specifically found that the sale from Walls to Donald Dundas was what I may describe as a knackery transaction. It is not found in the case that Walls knew that Donald Dundas was a knacker's assistant. I do not regard this as vital, in respect that Walls's conduct is not in question. But the point seems more formidable which emphasizes the absence of a finding that Donald Dundas bought the horse for the knackery. I am, however, of opinion that this finding is obviously implied. The trial of the appellants, their conviction, and the statement of the case, all proceeded on the footing that the horse had been bought for the knackery. If the transaction was something different, it was for the appellants to

obtain a finding to that effect from the Sheriff-substitute. I am unable, therefore, to give effect to either of these general arguments. Mar. 19, 1914. Dundas v. Phyn. Ld. Anderson.

I have already dealt with the special point which was taken on behalf of Donald Dundas, and the conclusion I have reached as to him is that he was properly convicted.

A special argument was advanced on behalf of the knacker, which, I think, is unanswerable. He is charged with having permitted the sale by Donald Dundas to Purdie. Now, this prohibited sale took place at Dumfries, three miles from the knackery. It is not found that the knacker was in Dumfries at the time, or that he knew anything about what was taking place. I am of opinion that, under the regulation, there can be no permission if there is not knowledge and sanction. In the absence of any finding that the knacker was cognisant of and authorised the forbidden sale, I am of opinion that he was wrongly convicted.

I am, therefore, of opinion that the second question should be answered to the effect that Donald Dundas's conviction was justified, but that the conviction of his father was not.

THE COURT quashed the conviction against Francis Dundas and *quoad ultra* dismissed the appeal.

J. GEORGE REID, Solicitor—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

ROBERT PATERSON, Complainer.—*Christie, K.C.—Ingram.*
THOMAS MACLENNAN (Procurator-Fiscal, Aberdeen), Respondent.—*Sol.-Gen, Morison—Morton, A.-D.*

No. 17.

May 18, 1914.

Procedure—Sentence—Court of Summary Jurisdiction—Form of sentence—Summary Jurisdiction (Scotland) Act, 1908 (8 *Edw. VII. cap.* 65), *sec.* 53 *and Schedule E.* Paterson v. MacLennan.

The sentence of a Court of Summary Criminal Jurisdiction should always be minuted in the form contained in Schedule E to the Summary Jurisdiction (Scotland) Act, 1908.

Held, however, that, where an accused was charged on a complaint setting forth twenty separate offences, a sentence finding the accused "guilty" might stand although the statutory words "as libelled" had been omitted, it being clear from the subsequent part of the sentence, which imposed a *cumulo* pecuniary penalty, that the accused had been found guilty of each of the twenty offences libelled.

ROBERT PATERSON, farmer, Lendrum, parish of Monquhitter, Aberdeenshire, was charged on a complaint at the instance of Thomas MacLennan, Procurator-fiscal, Aberdeen, with contravening the National Insurance Act, 1911, by failing to pay timeously certain contributions payable by him in respect of a number of servants in his employment. The complaint charged the accused with twenty separate offences.* HIGH COURT. Lord Justice-Clerk. Lord Dundas. Ld. Anderson.

The Sheriff-substitute (Laing), after proof, pronounced the follow-

* The complaint was long, confused, and complicated, and at the hearing before the High Court of Justiciary there was considerable discussion as to the precise number of offences charged. The Court eventually decided that they were twenty in number.

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ing sentence:—"The Court found the accused guilty, and imposed a fine of 15s. for each offence, or £15 sterling in all, and in default of payment sixty days' imprisonment."

The accused presented a bill of suspension in which he sought a suspension of the conviction on the ground, *inter alia*, that the finding and sentence of the Court were not minuted in the forms contained in Schedule E to the Summary Jurisdiction Act, 1908,* and did not state of which offence or offences he was found guilty.

The case was heard on 18th May 1914.

Argued for the complainer;—The sentence fell to be quashed in respect that it was not in the form contained in Schedule E to the Summary Jurisdiction Act, 1908, the use of which form was made imperative by section 53 of the Act. It ought to have been in the form "guilty as libelled," if the Sheriff-substitute's intention was to find the accused guilty of all the offences charged. As the sentence stood it was impossible to tell with certainty to which offences the conviction applied, especially in view of the fact that this complicated complaint might just as well be held to contain 140 charges (one for each week's contribution unpaid) as 20. The question was one of substance and not merely one of form.[1]

Argued for the respondent;—There were twenty offences charged, and a simple sum in arithmetic showed that the Sheriff-substitute had convicted the accused of them all. That was equivalent to a finding of "guilty as libelled," and satisfied the requirements of section 53. In any event, the matter was one of form, and the Court could amend the sentence under the powers conferred by section 75 of the Act.

Lord Justice-Clerk.—I think it is to be regretted that in this case the sentence did not contain the words "as libelled," and was thus not in the form given in Schedule E to the Summary Jurisdiction (Scotland) Act, 1908. How the words "as libelled" got into the form given in the Schedule, I am at a loss to understand, because they constitute an innovation upon the form which was formerly employed in the inferior Courts, and which, in my experience, was never the cause of any inconvenience. Still, the words being in the Schedule, I think—and I say it emphatically—that the statute should be followed, and that Judges in the inferior Courts should use the form prescribed in the Schedule.

When, however, I look at the form of the sentence in the present case,

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* The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—Sec. 53. "The finding and sentence and orders of Court, both as regards offences at common law and under any statute or order, shall be minuted in the forms contained in Schedule E to this Act. . . ."

Schedule E contains the following forms:—

Finding. The Court found the accused guilty as libelled (*or* as first (*or* last) alternatively libelled, *or state to what extent found guilty*), (*or* not guilty), (*or* found the charge not proven), (*or* found A. B. guilty as libelled and C. D. guilty as second libelled), (*or as the case may be*),

Fine. Fined £ (*or* £ each), and in default of payment days' imprisonment (*or* days' imprisonment each).

[1] Johnstone v. Lindsay, 1907 S. C. (J.) 9, 5 Adam, 192; Muirhead v. M'Intosh, (1890) 2 White, 473.

I think that it contains what we may hold to be the equivalent of the omitted words. The sentence is that "the Court found the accused guilty, and imposed a fine of 15s. for each offence, or £15 sterling in all." Now, the complaint charges the accused with twenty offences, and a simple sum in arithmetic shows that the finding of guilty must have extended to all the offences charged.

I wish, however, again to impress upon those who have to try such cases that it is most inadvisable to run the risk of having difficulties raised as to the sentences passed by not adhering to the words prescribed by the Schedule. This case may not be held to be a precedent ruling any future case.

LORD DUNDAS.—I agree with your Lordship, and think that the sentence may stand, because, as I read it, it finds the accused guilty of the twenty offences charged in the complaint, and imposes a fine of 15s. for each offence.

LORD ANDERSON.—I concur with your Lordships. The Summary Jurisdiction Act of 1908 by section 53 enacts that the sentence of Court shall be minuted in the form contained in Schedule E, and the form in the Schedule applicable to a conviction on the whole charge or charges which had been made against an accused is "guilty as libelled." Now, the words "as libelled" are omitted in the sentence with which we are dealing in this case. If the sentence had been framed in accordance with the prescribed form, it would have run,—"the Court found the accused guilty as libelled"; and then, I think, all that the Sheriff-substitute need have added would have been to impose a fine, without specifying, as he has done, how he made up the total amount of the fine. But the words "as libelled" have been omitted, and the only point we have to decide is whether that omission is fatal to the conviction. Now, I do not think that the presence of these words is absolutely essential, provided you have what may fairly be taken as their equivalent, and I think that the words which follow the word "guilty" in the sentence before us clearly indicate that the Sheriff-substitute convicted the accused of all the offences charged, and imposed a fine in respect of each. I accordingly agree with your Lordships that we may hold that in the words to which I have referred we may find an equivalent of the statutory phrase "as libelled," and that, accordingly, the conviction ought to be sustained.

THE COURT refused the bill of suspension.

MACKENZIE & FORTUNE, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

No. 18.

May 25, 1914.

JOHN JAMES M'INTYRE (Police Court Procurator-Fiscal, Glasgow), Appellant.—*Cooper, K.C.—M. P. Fraser.*
FRANK PERSICHINI, Respondent.—*Lippe.*

M'Intyre v. Persichini.

Statutory Offences—Keeping premises open contrary to bye-law—Conviction—Necessity of proving purpose for which kept open—City of Glasgow Bye-laws made under Burgh Police (Scotland) Acts, 1892 to 1911.

A bye-law by the Corporation of the city of Glasgow enacted that "a person registered . . . to keep or use any . . . premises as a place for public refreshment shall not keep such premises open, or suffer them to be kept open," except during hours specified.

Held that proof that an accused person had kept his premises open, or had suffered them to be kept open, after the hours specified was sufficient *per se* to establish a contravention of the bye-law, without any proof as to the purpose for which they were kept open.

HIGH COURT. Lord Justice-General. Lord Guthrie. Ld. Ormidale.

FRANK PERSICHINI, 26 Waterloo Street, Glasgow, was charged in the Central Police Court, Glasgow, on a complaint at the instance of John James M'Intyre, Procurator-fiscal, which set forth:—"You are charged at the instance of the complainer that, being a person registered in terms of section 82 (1) of the Burgh Police (Scotland) Act, 1903, as amended by the Burgh Police (Scotland) Amendment Act, 1911, to keep or use premises situated at 26 Waterloo Street, Glasgow, as a place for public refreshment, you did (first) on Saturday, 17th January 1914, keep said premises as a place for public refreshment open later than 11 P.M. on said day; and (second) on Thursday, 22nd January 1914, keep said premises as a place for public refreshment open later than 10.45 P.M. on said day, contrary to Bye-laws Nos. 1 and 7 * of the bye-laws made and enacted by the Corporation of the city of Glasgow, in virtue of the powers conferred on them by the Burgh Police (Scotland) Acts, 1892 to 1911 (said bye-laws being approved of and confirmed by (1) the Sheriff of Lanarkshire on 30th June 1913, and (2) the Secretary for Scotland on 3rd October 1913), and particularly by sections 82 (2) and 82 (4) of the Burgh Police (Scotland) Act, 1903, and section 1 (2) of the Burgh Police (Scotland) Amendment Act, 1911, and sections 405 to 413 of the Glasgow Police Act, 1866, said section 82 of the Burgh Police (Scotland) Act, 1903, having been adopted by the said Corporation by resolution on 25th April 1905,

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* These Bye-laws enacted:—

"1. A person registered in terms of section 82 (1) of the Burgh Police (Scotland) Act, 1903, as amended by the Burgh Police (Scotland) Amendment Act, 1911, to keep or use any house, building, part of a building, or other premises, as a place for public refreshment, shall not keep such premises open, or suffer them to be kept open, on Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays, except during the hours between five of the clock in the morning and a quarter to eleven of the clock at night, nor on Saturdays except during the hours between five of the clock in the morning and eleven of the clock at night.

"2. Such person shall not keep such premises open, or suffer them to be kept open, on Sundays, except during the hours from ten of the clock in the morning till eight of the clock at night."

. . . . . .

7. [Bye-law 7 imposed a penalty for contravention of the bye-laws.]

and duly recorded in the Sheriff Court Books of Lanarkshire at Glasgow on 12th May 1905."

After proof the Magistrate (Police Judge Neilson) found the charge not proven.

The prosecutor obtained a stated case for appeal.

The following facts were, *inter alia*, set forth as proved:—

"The respondent is a person registered in terms of the Burgh Police (Scotland) Act, 1903, section 82 (1), as amended by the Burgh Police (Scotland) Amendment Act, 1911, to keep premises at 26 Waterloo Street, Glasgow, as a place for public refreshment. . . .

"On Saturday, 17th January 1914, two police-officers observed that the door of the respondent's premises was open after 11 P.M. at night, and remained open until 11.45 P.M., when it was shut. On Thursday, 22nd January 1914, they also observed that the door of the premises remained open after 10.45 P.M. until 11.10 P.M., when it was shut. It was reopened about 12.20 A.M. to allow several persons to come out, all of whom, except his wife and a personal friend, were in respondent's service. On both occasions respondent was personally in charge of the premises, which were being 'tidied up' for the night by him and his servants. The police-officers took no steps to ascertain, and it was not proved, that on either of the dates libelled, after the closing hour, any person not in respondent's service was admitted into the premises; that any customer was allowed to remain on the premises; or that any resort to or use whatever of the premises as a place of refreshment was made. They expressly stated that they did not know anything of what was being done inside the premises, and that the place might have been, so far as they knew, in course of being tidied up for the night as the defence maintained."

The case further set forth, *inter alia*:—"I held (1) that the mechanical fact that the door was indiscreetly not closed did not itself constitute proof of contravention, and (2) that further circumstances than those adduced were required, such, for example, as the presence of customers, to show that the premises were kept open for some business use beyond the closing hour. . . . There was reason to suspect that respondent believed himself free to make some use of the premises more than the bye-laws, as I interpret them, would sanction, but the actual facts established nothing either done or purposed beyond the tidying up of the premises."[1]

The questions submitted for the opinion of the Court were:—"(1) Does the failure to close the door *per se* constitute the offence of keeping the premises open under bye-law 1? (2) Ought I to have convicted the respondent?"

The case was heard on 25th May 1914.

Argued for the appellant;—The Magistrate ought to have con-

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[1] The Magistrate referred to Lena v. Davidson, 1913 S. C. (J.) 76, 7 Adam, 129; Wood v. Campbell, (1877) 5 R. (J.) 1, 3 Couper, 508; Stirrat v. Lang, (1877) 3 Couper, 510; M'Call v. Wood, (1878) 5 R. (J.) 28, 4 Couper, 43; Jeffrey v. Weaver, [1899] 2 Q. B. 449; Commissioner of Police v. Roberts, [1904] 1 K. B. 369; Lloyd v. Barnett, (1900) 19 Cox M. C. 622, 64 J. P. 708; and also to the Shop Hours Act, 1904 (4 and 5 Edw. VII. cap. 31), sec. 2 (2); Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 380 (6); Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 135 (19).

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victed the accused, the prosecutor having proved all that was necessary to entitle him to a conviction, viz., that the premises were open during prohibited hours. It was unnecessary to prove that they were open for purposes of public refreshment, and, indeed, any proof bearing on the purpose or object for which the premises were kept open would have been irrelevant, the prohibition in the bye-law being a simple and absolute prohibition against opening, entirely irrespective of the purpose or object of the opening. This was made clear by Lord Kinnear in *Lena* v. *Davidson*.[1] It was true that the complaint contained the words "as a place for public refreshment," but these words were merely parenthetical and descriptive of the premises, and did not form part of the substantive charge. They were really irrelevant, and any objection with regard to them ought to have been taken at an earlier stage in the proceedings. None of the cases referred to by the Magistrate supported his decision. In the English cases the section of the Act[2] which was alleged to have been contravened was different in its terms from the bye-law here in question, the prohibition being against keeping premises open "for the sale of intoxicating liquors," and further, in *Jeffrey* v. *Weaver*[3] and *Commissioner of Police* v. *Roberts*,[4] the doors of the premises were closed. *Lloyd* v. *Barnett*[5] had to be read in the light of the decision last cited. As to the Scots cases, *Wood* v. *Campbell*[6] was quite different; the prohibition there was against "keeping open house," and the doors were proved to have been open solely for purposes of cleaning. In both *Stirrat* v. *Lang*[7] and *M'Call* v. *Wood*[8] the doors were shut. It was useless and irrelevant to compare, as the Magistrate had attempted to do, the language of other statutes.

Argued for the respondent;—The Magistrate had rightly found the charge not proven. What the Legislature had in view, when it permitted town-councils to make bye-laws regarding the opening and closing of registered premises, was the regulation of the hours during which such premises might be open for purposes of business; and that it was only with opening for business purposes that the bye-law here in question was concerned was clear from the occurrence of the words "as a place for public refreshment" in the earlier portion of the bye-law. This was obviously the view of the prosecutor, as otherwise he would not have introduced these words into the complaint. It followed accordingly that mere proof that the doors were open was not sufficient, and would not have been sufficient even had the complaint merely libelled that the premises were kept open. Even on such a complaint the prosecutor, in order to succeed, would have had to establish the fact that they were open for purposes of public refreshment, or, at anyrate, to negative the possibility that they were open for a legitimate purpose such as cleaning. The cases cited by the Magistrate all supported this view. *Lena* v. *Davidson*[1] merely dealt with the question of the relevancy of the complaint, and did not determine what facts the prosecutor would have had to prove in order to establish a contravention.

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[1] 1913 S. C. (J.) 76, at p. 82, 7 Adam, 129.
[2] Licensing Act, 1874 (37 and 38 Vict. cap. 49), sec. 9.
[3] [1899] 2 Q. B. 449. [4] [1904] 1 K. B. 369. [5] 19 Cox M. C. 622.
[6] 5 R. (J.) 1, 3 Couper, 508. [7] 3 Couper, 510.
[8] 5 R. (J.) 28, 4 Couper, 43.

LORD JUSTICE-GENERAL.—We are merely interpreters of Acts of Parliament and of bye-laws which have the force of statutory enactments, and it is no part of our duty to express our views upon the policy of the enactments or bye-laws which we are called on to interpret.

Here I think that the very experienced Magistrate who tried the case has erred in his interpretation of the bye-law, which seems to me to be a very clear one. The respondent is a person who is authorised under the Burgh Police (Scotland) Act, 1903, as amended by the Burgh Police (Scotland) Amendment Act, 1911, to keep premises situated in Glasgow as a place for public refreshment, and he is charged with two offences, viz., (1) that on the 17th January of the present year he kept these premises open as a place for public refreshment later than 11 P.M., which is the hour of closing on Saturdays fixed by the bye-law which is said to have been contravened; and (2) that on 22nd January 1914, he kept the premises open as a place for public refreshment later than 10.45 P.M., which is the hour fixed by the bye-law for closing on other week days.

Now some comment has been made upon the fact that the complainer here did not charge the offence in the exact terms of the bye-law; but it appears to me that he has substantially done so, and that the introduction of the words "as a place for public refreshment" is mere surplusage. He was authorised to keep the premises as a place for public refreshment, and he could not well keep them—either open or closed—except as a place for public refreshment. If, however, the words are not surplusage, but signify that the premises were kept open for the purpose of doing business, then it must be conceded that the complainer has failed to prove that purpose. But his failure to prove the purpose for which the premises were kept open does not necessarily involve failure to prove a contravention of the bye-law. He may succeed in proving that the premises were kept open, which is all that I think is incumbent upon him in view of the bye-law, and the introduction of the words referred to would merely show that the complainer had undertaken a burden which was not thrown upon him by the bye-law.

Now, it is of importance to notice what exactly was proved against the complainer here. The Magistrate sets out in the stated case that he found that the premises, upon the first occasion charged, were open after 11 P.M. and remained open until 11.45 P.M. Now, critical and subtle observations may be made upon the phraseology that is used; but I think, giving to the language its ordinary meaning, we would understand the Magistrate to mean that he found that at 11 P.M. the accused left his door open and that it remained open for three-quarters of an hour. I read the Magistrate's statement in no other or different sense, and when I come to examine the subsequent part of the stated case, in which the Magistrate more fully develops the facts as he found them proved, I find nothing to warrant the suggestion that the premises were closed at 11 P.M. and merely opened temporarily for a minute or two minutes in the succeeding three-quarters of an hour. The facts relative to the second offence are found in clearer terms, because the Magistrate there says that he found it proved that the door of the premises remained open after a quarter to 11 until 11.10 P.M. when it was shut. I come, therefore, to

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the conclusion without hesitation that on both occasions the premises were kept open after prohibited hours.

Now, in order to constitute an offence under the bye-law, it is not necessary to prove anything more than that the offender kept the premises open, or suffered them to be kept open, after the prohibited hours. The Magistrate has, in distinct terms I think, found that on the two occasions libelled the premises were kept open after the prohibited hours, and, therefore, an offence was committed. I come, accordingly, without hesitation to the conclusion that the first question put to us,—which probably might be improved in its phraseology, but the meaning of which we all understand quite well,—ought to be answered in the affirmative; and that it is unnecessary for us to answer the second question.

LORD GUTHRIE.—I concur. The bye-law is not challenged, and the complaint purports to be in terms of the bye-law. It is not so in fact, because, as your Lordship has pointed out, it introduces an element which the bye-law does not contain. The bye-law, no doubt, refers to the person registered to keep or use any house or other premises "as a place for public refreshment," but it then goes on to say that he "shall not keep such premises open, or suffer them to be kept open," on certain days except during certain hours, the words "as a place for public refreshment" not being repeated. But the words "as a place for public refreshment" are used in the complaint, not only in the passage where the registration is referred to, but in the part where the charge itself is tabled—"you did keep open such premises as a place for public refreshment." That apparently has been done in forgetfulness of the case of *Lena* v. *Davidson*,[1] in which Lord Kinnear said that, if such words were introduced, they would be plainly irrelevant. I agree therefore that, in this case, we are entitled to disregard them; and, indeed, if an objection had been taken on this ground, the Magistrate would, no doubt, have given effect to the motion that would have been made to allow them to be deleted.

The decision which your Lordship proposes to pronounce will not, so far as I can see, in any way conflict with such a case as *Wood* v. *Campbell*,[2] which was a case of a door being opened after hours in connection with certain cleaning operations, and obviously bore no resemblance to the essential facts of the present case.

LORD ORMIDALE.—To my mind the only difficulty in this case arises from the introduction into the complaint of the words "as a place for public refreshment." Occurring, however, where they do, I think they may be read as a mere parenthetical description of the premises—"being a place for public refreshment." But I think the complaint would have been better without them, because, agreeing as I do with what your Lordship has said as to the facts which it is necessary for a prosecutor to prove in order to secure a conviction of a contravention of the bye-law in question, it appears to me that by introducing the words I have referred to the procurator-fiscal ran the risk of finding himself called upon to prove more than was really necessary.

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[1] 1913 S. C. (J.) 76, 7 Adam 129.

[2] 3 Couper, 508.

On the matter of the merits I have no hesitation in agreeing with your Lordship that the first question must be answered in the affirmative and that it is not necessary to answer the second question.

May 25, 1914.

M'Intyre v. Persichini.

THE COURT answered the first question in the affirmative, and sustained the appeal.

CAMPBELL & SMITH, S.S.C.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—Agents.

No. 19.

June 6, 1914.

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ROBERTSON BARCLAY GORDON (Procurator-Fiscal, Elgin), Appellant.—*Sol.-Gen. Morison—W. Mitchell, A.-D.*
GUSTAV HANSEN, Respondent.—*Horne, K.C.—A. R. Brown.*

Fishings—Sea Fisheries Act, 1883 (46 *and* 47 *Vict. cap.* 22), *secs.* 12 *and* 14 (2)—*Powers of sea-fishery officer—Refusing to obey officer's order—Legality of order—Power to "take" offending trawler to nearest port—Trawler ordered to "go" to nearest port—Trawler subsequently acquitted of illegal fishing.*

The Sea Fisheries Act, 1883, section 12, enacts that for the purpose of enforcing the provisions of the Act a British sea-fishery officer may exercise certain enumerated powers, including a power, in the case of any person "who appears to him" to have committed a contravention of the Act, to "take the offender and the boat to which he belongs and the crew thereof to the nearest and most convenient port." Section 14 (2) enacts,—"If any person obstructs any sea-fishery officer in acting under the powers conferred by this Act, or refuses or neglects to comply with any requisition or direction lawfully made or given by . . . any sea-fishery officer in pursuance of this Act, such person" shall be liable to a penalty.

A sea-fishery officer, who had reasonable grounds for believing that he had detected a trawler fishing within the three-mile limit, ordered the captain to go with his vessel to Cromarty, which was the nearest and most convenient port. At the time the sea was too rough to permit of a boat being sent to the trawler to put anyone on board.

Held that the order to go to Cromarty was a lawful order, although the only express authority given by the statute was authority to "take" the offender to port, and that the master of the trawler by refusing to comply was guilty of a contravention of section 14 (2) of the Act. *Opinions* that the order would have been lawful even if the weather had permitted of a boat being sent to the trawler.

Held further that, as the officer had reasonable grounds for believing that the master had been trawling within the three-mile limit, the lawfulness of the order was not affected by the fact that the charge against the master was subsequently found to be not proven.

Procedure—Appeal by stated case—Method of stating case.

Observed that a stated case ought to contain a statement of the facts found proved, not a statement of what the witnesses said.

GUSTAV HANSEN, master of the foreign trawler "Nestor" of Sandefjord, and residing at 146 King Edward Street, Grimsby, was charged in the Sheriff Court of Inverness, Elgin, and Nairn, at Elgin, on a complaint at the instance of Robertson Barclay Gordon, Procurator-fiscal, Elgin, firstly, with having on 30th November 1913 used the method of fishing known as beam or otter trawling at a specified *locus* within the three-mile limit, contrary to the Herring Fishery (Scotland) Act, 1889, section 6, as amended by the Herring Fishery (Scotland) Act Amendment Act, 1890, section 3, and

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secondly, with having on the same date and at the same place refused "to comply with the directions lawfully given by William Angus, commander of the Fishery cruiser 'Freya' to proceed to Cromarty with the said trawler 'Nestor,' contrary to the Sea Fisheries Act, 1883, section 14, subsection 2." *

On 29th January 1914 the Honorary Sheriff-substitute (Hugh Stewart) found the charges not proven.

The prosecutor obtained a stated case on appeal.

The case set forth:—"The material facts proved were as follows:—The 'Freya' was lying off Cromarty when the commander, Captain Angus, saw a trawler from 5 to 6 miles off steaming up the firth at about three miles an hour, and apparently within the 3-miles limit. Suspecting that she was trawling, he went in pursuit and came up with her at the place stated in the complaint. He hailed certain persons on deck through a megaphone that they were trawling within the prescribed limits, and ordered them to go to Cromarty, and he was answered by a man on board whom he did not recognise, but who was afterwards proved to be Karl Rolander, the fishing master on board the trawler, that they were not trawling, and that they would not go to Cromarty. Captain Angus stated that the sea was too rough to send a boat to the trawler to put men on board, and in this he was supported by the second officer, James Murray Logan, and John Stenhouse Grant, leading seaman; that what appeared to be warps were over the starboard side of the trawler and into the sea, and taut as if attached to a heavy weight; that a man came on deck with a buoy, and threw the buoy into the sea, when the warps disappeared. It

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* The Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), which by sec. 7 makes it an offence for a foreign fishing boat to fish within the three-mile limit, enacts:—

Sec. 12. "For the purpose of enforcing the provisions of this Act and of any Order in Council under this Act or under the Sea Fisheries Act, 1868, as amended by this Act, a British sea-fishery officer may with respect to any sea-fishing boat within the exclusive limits of the British Islands and with respect to any British sea-fishing boat outside of those limits, exercise the following powers;

. . . . . .

"(4) He may require the master to appear and give any explanation concerning his boat and her crew, and any person on board his boat. . . .

"(7) He may make any examination or inquiry which he deems necessary to ascertain whether any contravention of the provisions of this Act, or of any such Order of Council as aforesaid, has been committed. . . .

"(8) In the case of any person who appears to him to have committed any such contravention he may, without summons, warrant, or other process, both take the offender and the boat to which he belongs and the crew thereof to the nearest or most convenient port, and bring him or them before a competent Court, and detain him, it, and them in the port until the alleged contravention has been adjudicated upon."

Sec. 14 (2). "If any person obstructs any sea-fishery officer in acting under the powers conferred by this Act, or refuses or neglects to comply with any requisition or direction lawfully made or given by, or to answer any question lawfully asked by, any sea-fishery officer in pursuance of this Act, such person shall be liable" to a penalty.

was proved that the trawler steamed off immediately after said order was given, that the 'Freya' followed the trawler and again informed those on board that they had been trawling within the prescribed limits, and further asked those on board of her to take her to Cromarty, and that the same man again refused; that respondent heard this order being made, but did not comply with it; that the commander of the 'Freya' returned and picked up the buoy already referred to, but the rope attaching it, whatever it was attached to, broke; that, not having grappling irons, he fished with a light anchor for the space of an hour or thereby, but found neither trawl nor warps. On the Tuesday following (2nd December) the 'Freya' returned and again fished with an anchor for the trawl which the commander believed had been cut adrift, but no trace was found. It was not proved that the commander of the 'Freya' intimated to the respondent or to anyone else that he wished to go on board or put men on board the trawler, although it was proved that the fishing master said, 'No one will board this boat,' which statement was made after Captain Angus (the commander) showed some signs of launching a boat. It was proved that the respondent heard the answers given by the fishing master, and did not object to them, but it was not proved that Captain Angus (the commander) had addressed the respondent individually, nor was it proved that the 'Nestor' (the trawler) was actually trawling. It was sworn to by the captain and the fishing master of the trawler, and by Harry Klein, that they had no starboard trawl on the trawler, as it had been lost the night before off Wick, and that they had no trawl in the sea and no warps over the starboard side. It was admitted that on the date libelled the respondent was the master or skipper on board the said 'Nestor,' but there was also on board the 'Nestor' Karl Rolander as fishing master; that the said 'Nestor' when at the *locus* set forth in the complaint was 1⅛ miles from low-water mark of the coast in the parish of Dyke and Moy, Elginshire. The Sheriff found on the evidence that the first charge was not proved. With regard to the second charge the Sheriff decided that inasmuch as the charge of illegal trawling was not proven, and the appellant had not shown that the commander of the 'Freya' had the right on any other ground to order the respondent to take his vessel to Cromarty, the respondent must be held not to have been acting illegally, when the order to go to Cromarty was given, in failing to obey that order, and he was not bound to obey that order, even if it had been proved that the order had been given to him personally, which it was not, although it was given to the fishing master in his hearing. It was contended by the appellant that the order was lawful, and that respondent was bound to obey it, whatever the finding of a Court of law might be as to the matters contained in the first charge. The contrary was maintained on behalf of respondent."

The questions of law for the opinion of the Court were:—"(1) Whether the order given by the commander of the 'Freya' to the respondent to go to Cromarty was lawfully and effectually given? (2) Whether the respondent was guilty of an offence under section 14 (2) of the Sea Fisheries Act, 1883, in not going to Cromarty in compliance with said order? (3) Whether on the facts stated the Sheriff should have convicted the respondent of the second charge contained in the complaint?"

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The case was heard before the High Court on 18th May 1914, when it was remitted to a full bench by whom it was heard on 1st June 1914.

Argued for the appellant;—The accused ought to have been convicted upon the second charge, viz., that of refusing to obey the lawful order of the Fishery officer. The only question in the case was whether the order given was lawful. The Sheriff-substitute had held that the order was unlawful because the master had after trial been acquitted upon the main charge. That ground of judgment was indefensible, and was not supported by the respondent, it being now admitted that the officer was entitled to issue any lawful order provided he had reasonable grounds for suspecting that an offence was being committed, and, further, that the ultimate result of the trial for that offence did not affect the question. On the facts found by the Sheriff-substitute the officer had clearly reasonable ground for suspicion. The real point in the case was one to which the Sheriff-substitute's attention had apparently not been directed, viz., Was the officer entitled to order the trawler to go to Cromarty, when the word used in section 12, subsection (8), was "take"? He clearly was entitled to give the order. The word "take," reasonably construed, covered and included an order to "go." It could not be imagined that the Legislature intended that every offending vessel had to be towed by the Fishery cruiser into harbour without any assistance from her own engines, gear, officers, or crew; but this was what was logically involved in the pedantically strict interpretation of the word "take" contended for by the respondent. If the remainder of the subsection were construed in the same spirit, the Fishery officer would in person have to conduct the offending master into Court, and would in person have to see that he remained in harbour until the trial was concluded. It was clear that subsection (8) covered any reasonable order to precede, accompany, or follow into harbour. Even, however, if the word "take" in section 12 was to be strictly read, the order was still lawful. The powers conferred by section 12 were not exhaustive of the powers of the Fishery officer, and subsection 2 of section 14 impliedly conferred a power to give reasonable directions and to ask reasonable questions. Further, the same subsection made it an offence to obstruct a Fishery officer, and the respondent's conduct was obstruction of the most obvious kind.

Argued for the respondent;—The respondent did not maintain that the view of the Sheriff-substitute that the lawfulness of the order depended upon the result of the trial could be supported. If an order were otherwise unobjectionable, it was sufficient if the Fishery officer had reasonable grounds for his suspicions. In the present case, however, he had not, or at anyrate there was no finding by the Sheriff-substitute that his suspicions were reasonable. Accordingly, upon this independent ground it should be held that the order was illegal. But in any event the order to "go" to Cromarty was *per se* illegal, and accordingly the person who had disobeyed it had not contravened section 14, subsection 2, either by obstructing an officer "acting under the powers conferred by this Act" or by refusing to "comply with any requisition or direction lawfully made or given by . . . any sea-fishery officer in pursuance of this Act." The only orders which could be "lawfully made" were orders which were sanctioned by the Act. Now

the Act conferred no general power on an officer of issuing orders at his discretion, but, on the contrary, conferred by section 12 a very large number of special and widely different powers. That list of powers was obviously meant to be exhaustive, and the only powers referred to in section 14, subsection 2, were those enumerated in section 12. But section 12 did not authorise the order that had been given. "Take" clearly meant to arrest and convey to harbour, which was quite different from an order to "proceed" or to "go," the officer who gave the order perhaps not following himself for hours or days. The argument of the appellant postulated a right to order an offender to "wait" at the nearest port, but such a right was nowhere hinted at in the statute. A penal statute must always be strictly construed.

At advising on 6th June 1914,—

LORD JUSTICE-CLERK.—When this case first came before the Court it was thought advisable, in view of the fact that it was an appeal against an acquittal, and that the prosecution was directed against a foreigner, that it should be considered and disposed of by a full bench. But in sending it forward I did not, and I think my brethren did not, consider that it was a case of serious difficulty. The view I took at the first hearing was that there was ground for the appeal, and a consideration of the case after the second hearing has confirmed me in that opinion.

There were two charges against the accused—first, that he was guilty of trawling in an area of the sea within the three-mile limit, in which trawling was illegal, he not being in the service of or having the written authority of the Fishery Board, and that he so contravened section 6 of the Herring Fishery (Scotland) Act of 1889, as amended by section 3 of the subsequent Act of 1890. The second charge was one of refusing to comply with the directions lawfully given by the commander of the Fishery cruiser "Freya," contrary to section 14, subsection 2, of the Sea Fisheries Act, 1883, which is as follows—[His Lordship read the subsection].

No question of law arises in regard to the first charge. The Sheriff, as he was entitled to do, found that charge not proven, a conclusion which was not contrary to law, as the facts he found proved did not imply that an acquittal must be wrong in law. It is therefore only the second charge which requires to be dealt with. In dealing with it the Sheriff, as it appears to me, has fallen into error. He appears to have been of opinion that the legality of directions, given by the commander of a Fishery cruiser, depends upon whether the offence which that commander believes to have been committed is afterwards proved against the person whom the commander accuses and detains. This view is untenable. It is in order that persons reasonably suspected of offending against the Herring Fisheries Acts may be secured and brought to trial that the power of detention is given to the commander of a Fishery cruiser. Although the proof at a trial may fail, that in no way affects the legality of the action of the commander in taking steps to secure that the supposed offender shall be brought to trial. The Sheriff holds that the respondent was not bound to submit to directions of the commander, because it has turned out that there is not sufficient evidence for a conviction, and that, this

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being so, the respondent "must be held not to have been acting illegally when the order to go to Cromarty was given in failing to obey that order." I have no doubt or difficulty in holding that this judgment was erroneous. The right of the Fishery officer was to have the suspected person secured with his vessel, if it reasonably appeared to him that a breach of the law had been committed; and if he had that right, disobedience to his order was unlawful, and could not cease to have that character because a Court afterwards held that a case had not been made out. The offence was committed by the refusal, and nothing happening afterwards could make the lawful order that was disobeyed an unlawful order. Of course there might be a case where a commander's action was grossly oppressive, as if, without any ground of suspicion, and actuated by malice, he gave an order which had no justification whatever. When such a case occurs it can be dealt with. But here, where it cannot be suggested on the facts stated that the commander of the cruiser had not ground for taking action to bring the trawler's master to trial, the respondent's contention—which the Sheriff has given effect to—that he was entitled to sail away, when challenged with a view to his being brought in and subjected to trial, is obviously untenable.

But further, it is contended for the respondent that, assuming the right of the cruiser's commander to detain the trawler in the circumstances, the action which he in fact took was not such as to be covered by the powers given to him by the Act, and especially by section 14, subsection 2, of the Act of 1883. It does not appear that this point was dealt with by the Sheriff, although the form of the questions put may point to it. The contention is that the order given to the trawler to go to Cromarty was not an order that the master of the trawler was bound to obey. The circumstances were that owing to the roughness of the sea the cruiser could not board the trawler, but that the commander through the megaphone accused those on board of trawling in forbidden waters, and ordered the master to go to Cromarty, the nearest or at least the most convenient port. The question is, was that a lawful direction? I have no doubt that it was. It was in the circumstances the only way in which the cruiser's commander could carry out his duty of taking the suspected vessel to a place for the investigation of the charge before a Court, and I think that he was entitled to put an arrest on the vessel, and that, if the master of the vessel paid no regard to that arrest and steamed away, the master was offending against a legal seizure of his vessel. Just as a man may be arrested on the street by a constable accusing him and directing him to come with him to the police-office, and just as he is then under arrest although the policeman has not touched him, and just as he owes obedience to the officer and need only be taken by force if he tries to run away or refuses and resists, so it appears to me that the power to take and bring in a vessel includes the power to direct those on board to bring it in, and that if those on board steam away after receiving the order they are refusing to comply with an order lawfully and effectually given.

I would move your Lordships therefore to answer all the questions in the affirmative.

I would like to say further that the case is not properly stated for, as

regards both the parties, the Sheriff states what witnesses said instead of giving the facts which he found proved. It is to be regretted that in both cases before the Court to-day there are instances of this mistaken practice, which is much too common.

LORD DUNDAS.—I am of the same opinion. The second charge in this complaint—with which alone we are concerned—is that the respondent refused to comply with the directions lawfully given by the commander of the "Freya" to proceed to Cromarty with his trawler, contrary to the Sea Fisheries Act, 1883, section 14, subsection 2. The Sheriff-substitute seems to have decided in the respondent's favour upon the ground that, inasmuch as the first charge—that of illegal trawling—was not proven, the respondent could not be held to have acted illegally in refusing to obey the direction given to him to go to Cromarty. I do not think this ground of judgment will do at all; and indeed it was not maintained at our bar. If it were well founded, no conviction under a charge such as we are considering could be obtained unless the accused were convicted of an antecedent offence. The respondent's main contention in this Court was that the direction was not lawfully given, inasmuch as the statute does not expressly authorise a commander to order a trawler to go to the nearest or most convenient port, but only to take or bring her there. This view is not, to my mind, in accordance with the fair reading and intendment of the Act. I think that, assuming that the commander had reasonable ground for believing that the respondent was engaged in illegal trawling, a direction given by him to the trawler to proceed to the most convenient port was a direction lawfully given. I hold it to be proved, though the case is not well stated upon the point, that the sea was too rough to enable the "Freya's" commander to put a boarding party on the trawler, and so take her forcibly to Cromarty. That he might legally have done so, if the condition of the sea had permitted the manœuvre, could not be seriously disputed; and I consider that, in these circumstances, the reasonable implication of the statute is that his direction that the trawler should proceed to Cromarty was lawfully given. I do not, however, wish it to be understood that I should have arrived at any different result even if the condition of the sea had been such as to make it possible (or easy) to board the trawler. The Sheriff-substitute ought, in my judgment, to have convicted.

LORD SALVESEN.—The question in this case, although of importance, appears to me to be free from difficulty. The ground on which the Sheriff found the second charge not proven is in my opinion unsound. The Sea Fisheries Act of 1883 confers by section 12 certain powers on British sea-fishery officers with regard, *inter alia*, to sea-fishing boats within the exclusive limits of the British Islands. These powers I take it were conferred with a view to ascertaining whether a contravention of the Act has been committed; and the legality of their exercise cannot depend upon whether a contravention is afterwards proved to have been committed. It was scarcely disputed that the commander of the "Freya" would have been acting lawfully if, when he found the "Nestor" appar-

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ently engaged in trawl fishing within the three-mile limit, he had boarded her and taken the boat with her crew to the nearest or most convenient port. All that the Act provides is that it shall appear to the sea-fishery officer that a contravention has been committed; in other words that he has reasonable grounds for honestly coming to such a conclusion. He may find on inquiry that he is unable to establish that any offence was committed, but that will not make his actings illegal.

The question however remains whether there was evidence upon which the Sheriff-substitute was entitled to convict the accused under section 14 (2) of refusing or neglecting "to comply with any requisition or direction lawfully made or given by a sea-fishery officer." The facts found proved are to the effect that the commander of the "Freya" did not board the "Nestor" because it was not safe to do so in the then state of the weather, but that he ordered the "Nestor" to proceed to Cromarty, and that his order was not complied with although it was heard by the respondent. Was the order then lawfully given? It was contended that it was not so, on the ground that section 12 contains a complete enumeration of the powers conferred upon British sea-fishery officers. If this were so, I fail to see any reason why a refusal or neglect to comply with the direction given by the sea-fishery officer in pursuance of the Act should be made a separate offence from that of obstructing the sea-fishery officer in acting under the powers conferred by the Act. In my opinion the separate offence is created so as to cover *inter alia* the case of an order having to be given in circumstances where the specific powers conferred by section 12 cannot be exercised; as in a case where a boat is found trawling within the three-mile limit but owing to the state of the weather cannot be boarded. It is obvious however that the lawfulness of the order will depend upon circumstances. It must be given in pursuance of the Act; in other words for the purpose of carrying out the provisions of the Act. An order to proceed to a distant port would not have been a lawful order; nor would an order to go to any port, if there was no reasonable ground to suppose that the master of the boat to whom the order was given had committed a contravention of the Act. In the present case however the order was to proceed to Cromarty, which as appears from the chart produced in evidence was, if not the nearest, at all events the most convenient port; and the combined circumstances that the "Nestor" was within a mile and a half of the land, that there were warps from her starboard side which were taut as if attached to a heavy weight, that a man on board came on deck with a buoy and threw the buoy into the sea when the warps disappeared, and that the master of the "Nestor" behaved as detailed in the case—all these circumstances taken together I think fully justified the commander of the "Freya" in giving the order which he did, even although it must now be held that in fact the "Nestor" was not illegally trawling at the time. I think it is matter of fair implication that a person who has right to board a trawler and take it to the nearest or most convenient port is in the same circumstances entitled to order the boat to proceed to such port, especially where the weather or other cause prevents him from boarding her, and that the master of a boat who refuses to obey the order commits a contravention of section 14 (2). I am therefore for answering the first

two questions in the affirmative; and remitting to the Sheriff to convict the respondent of the second charge contained in the complaint. June 6, 1914. Gordon v. Hansen.

LORD MACKENZIE.—I concur in the conclusion to which your Lordships have come, and I desire to make only one observation. I do not consider it necessary that there should be a finding that the sea was too rough to send a boat to the trawler to put a man on board. I should arrive at the same conclusion even if there were no finding to that effect. I regard the provisions of subsection 2 of section 14 of the Sea Fisheries Act of 1883 as being ancillary to the powers conferred by section 12.

LORD ANDERSON.—The important question raised by this stated case is what is the meaning of section 14 (2) of the Sea Fisheries Act, 1883? The Sheriff-substitute acquitted the respondent of a charge, brought under that subsection, of having refused to comply with the direction lawfully given by the commander of the British Fishery cruiser "Freya" to proceed to Cromarty with the trawler "Nestor" of which the respondent was captain. The contention of the Crown is that, in the circumstances disclosed in the stated case, the said direction was lawfully given and that the respondent ought to have been convicted for failing to comply with it.

The respondent contended that, in order to ascertain what is a lawful direction, it is necessary to refer to the provisions of section 12, that section 12 sets forth a list or code of powers which is exhaustive, and that the power to direct a sea-fishing boat to proceed to a port is not embraced therein. The rejoinder of the Crown to this argument was that, if reference must be made to section 12, the necessary power is to be found in subsection 8 thereof which authorises the sea-fishery officer to "take" the sea-fishing boat to the nearest or most convenient port. It was maintained for the Crown that this power to "take" involves the right to order the sea-fishing boat to go. I have difficulty in accepting this contention, and I am not prepared to assent to the proposition that it is the same thing to take a boat to a port and to order a boat to go there.

I have, however, reached the conclusion that it is not essential to refer to the provisions of section 12 at all in determining the question which is before us. The scheme of this part of the Act, which provides for the enforcement of its provisions, is to specify, in section 12, a number of particular acts which a sea-fishery officer may do, and then, in section 14 (2), to set forth a penalty for obstructing the officer in doing any of these particular acts. But it is only the first clause of that subsection which deals with this matter of obstruction. The subsection does not stop there, but goes on to confer on the officer two additional powers of a general nature, to wit, (1) a power to give lawful directions, and (2) a power to ask lawful questions. In my opinion these are new and independent powers which have no relation to, or necessary connection with, the specific powers set forth in section 12. These new powers are expressed in the most general terms, and seem to endow the officer with a very wide discretion. The limitations on the exercise of that discretion are these—(1) the direction can only be given by sea-fishery officers, among whom the commander of a Fishery cruiser is included; (2) the officer must, at the time, be acting

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in pursuance of the statute, that is, in the ordinary case, he must be dealing with a sea-fishing boat in territorial waters; and (3) the direction must be lawfully given.

As to the last point, to wit, when a direction may be said to be lawfully given, it seems to me that there are two distinct tests which must be satisfied—(*a*) the officer must have reasonable grounds for issuing a direction; and (*b*) the particular direction given must be reasonable in the circumstances in which it falls to be complied with. I recognise that this construction is open to the formidable criticism which the respondent's counsel levelled against it—that it makes the officer the creator, in a sense, of the offence against which the penalty enacted by the subsection is directed. But, if my interpretation of the subsection is correct, that is just what the Legislature has enacted, and it is our duty to give effect to the obvious intention of the enacting body. If this construction is sound, I am of opinion that the two tests I have mentioned are satisfied in the present case. It appears from the stated case that the commander of the cruiser saw, or thought he saw, the trawler engaged in trawling within the three-mile limit. These were circumstances in which it seems to me he was justified in issuing a direction. I am also of opinion that, in directing the trawler to proceed to Cromarty, which was only a few miles distant, and which was the nearest, or at all events the most convenient, port, the commander of the cruiser gave a direction which, in the circumstances, was reasonable, and which should have been complied with.

The only other observation I desire to make is as to the law laid down by the Sheriff-substitute in the stated case. He seems to consider it necessary, in order to a conviction under section 14 (2), that a conviction of another offence should have been antecedently or concurrently obtained. I think that this view is unsound, and am of opinion that there may be a conviction under this subsection although no other offence has been proved.

I therefore agree that the questions should be answered as suggested by your Lordship.

Lord Justice-General.—I agree with all your Lordships, but I desire to associate myself expressly with the opinion which has been delivered by Lord Mackenzie. We are here deciding a question of general interest, viz., whether a direction given by a British sea-fishery officer may be lawful within the meaning of the statute of 1883 although it is not sanctioned in express terms by that statute, or, to put it otherwise, whether or no the list of powers given in section 12 is exhaustive of the directions which may lawfully be given under the statute? I answer this latter question, as your Lordships do, in the negative; but, for my part, I desire to lay down no hard and fast rule to the effect that an order such as this may only lawfully be given when the weather is heavy and the operation of boarding, therefore, risky. There may be other circumstances in which such an order as was given by the sea-fishery officer in this case may be justified under the statute. But, to be a legal direction under the statute, I am very clearly of opinion that the direction must be to proceed to the nearest or most convenient port, and that it would be a complete defence

to this complaint if it could be established to the satisfaction of the tribunal trying the case that the port, to which the order to proceed was given, was not the most convenient or the nearest port, as the case may be.

We shall, therefore, follow the proposal made by the Lord Justice-Clerk, and answer all the questions in the affirmative.

THE COURT answered the questions of law in the affirmative, and sustained the appeal.

SIR WILLIAM S. HALDANE, W.S., Crown Agent—ALEX. MORISON & Co., W.S.—Agents.

No. 20.

June 6, 1914.

JOHN BOYD KINNEAR, Appellant.—*D. P. Fleming.*
GEORGE BRANDER (Procurator-Fiscal of Fife and Kinross), Respondent.—*Sol.-Gen. Morison—Morton, A.-D.*

Kinnear v. Brander.

Insurance—National Insurance—Failure to pay contributions—Proof—Sufficiency of evidence—Ordinary and emergency cards—Separate charges—Evidence of single witness to each charge—National Insurance Act, 1911 (1 *and* 2 *Geo. V. cap.* 55)—*Regulations* (1913), *secs.* 3 *and* 6.

An employer, charged with failure to pay the contributions due by him under the National Insurance Act, 1911, in respect of two servants in his employment, was convicted upon an admission in the witness-box, by each of the servants, that he did not get an insurance card (*i.e.*, an ordinary card) stamped by the accused while in his service, and upon proof that the accused and the two servants had refused to give any information when interrogated by the representatives of the National Insurance Commissioners.

Held that the charge had not been proved as, even assuming that the evidence was sufficient to establish that no ordinary cards had been stamped, the prosecutor had failed to prove that the accused had not adopted the alternative course of stamping "emergency" cards.

Observations on the evidence required to prove a charge of failure to pay contributions under the National Insurance Act, 1911, and, in particular, upon the question whether the evidence of one servant that the employer had not stamped a card for him was evidence supporting a similar charge made against the accused with regard to another servant.

HIGH COURT. (Full Bench.) Lord Justice-General. Lord Justice-Clerk. Lord Dundas. Lord Salvesen. Lord Mackenzie. Ld. Anderson.

JOHN BOYD KINNEAR, Kinloch House, Collessie, Ladybank, was charged in the Sheriff Court of Fife and Kinross at Cupar, on a complaint at the instance of George Brander, procurator-fiscal of Fifeshire, with having failed to pay the weekly contributions payable by him under the National Insurance Act, 1911, between 13th January 1913 and 28th November 1913, in respect of Robert Macfarlane, an employed contributor in his service, in contravention of the National Insurance Act, 1911, section 4, Second Schedule, Part I.: Third Schedule; and sections 3 and 6 of the National Health Insurance (Collection of Contributions) Regulations (Scotland) 1913.* The complaint further charged him with a similar offence

* The Regulations provide, *inter alia*:—

Sec. 3. "Every contribution payable under Part I. of the Act shall, except as otherwise provided in these Regulations, be paid by the affixing

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relating to the same period with respect to John Crichton, another employed contributor in his service.

On 3rd February 1914 the Sheriff-substitute (Armour-Hannay) found the accused guilty and imposed a fine.

The accused obtained a stated case on appeal to the High Court of Justiciary.

The case set forth that at the trial "evidence was led on behalf of the complainer, the appellant not tendering any evidence. The following witnesses were examined on behalf of the complainer:—1. David Gerrand, assistant law-agent of the Commissioners. 2. Alexander Smith, depute head of Approved Society Branch. 3. William Leitch, Dundee, inspector of the Eastern District of Scotland. 4. James Thomson, Dundee, assistant inspector of the Eastern District. 5. Robert Macfarlane, grieve, Kinloch Home Farm, and 6. John Crichton, Trafalgar Cottages, Collessie, Ladybank. It was proved that the appellant had been repeatedly written to on behalf of the National Health Insurance Commissioners for Scotland in respect of the non-payment of contributions under the Act, but the appellant refused all information. On 10th February 1913 two inspectors under the Act saw the accused outside his residence and asked him if he had carried out his duties under the National Insurance Act as an employer, but the appellant refused to give any information. On the same day the two servants, Robert Macfarlane and John Crichton, were also interviewed, but they refused to give any information, and referred the inspectors to the accused. Each of the servants admitted in the witness-box that he did not get an insurance card stamped by the appellant while in his service. No evidence was led by the appellant to show that either of the servants had failed to deliver up a card for the purpose of being stamped, or that he (the appellant) had obtained an 'emergency card' in terms of the National Health Insurance (Collection of Contributions) Regulations (Scotland), 1913, section 6 (1) (*c*). The servant Robert Macfarlane, in reply to the Procurator-fiscal, stated that he knew nothing about whether an 'emergency card' had been stamped by the appellant for him. On the evidence adduced I found the appellant guilty as libelled, and fined him four pounds as a *cumulo* penalty."

The questions of law for the opinion of the Court were:—"(1) Was the evidence legally sufficient to convict? (2) Was it necessary for the Procurator-fiscal to prove that an 'emergency card' had not been procured and stamped by the accused?"

The case was heard before the High Court on 18th May 1914,

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of a stamp to the card of the contributor in the space indicated for that purpose upon the card."

Sec. 6. "(1) An employer . . . shall pay . . . contributions . . . in accordance with the following provisions . . . (*a*) he shall, before paying to the contributor the wages . . . affix to the card of the contributor a stamp or stamps in payment of the contributions due . . . (*c*) Where an employed contributor fails to deliver up to his employer a card for the purpose of being stamped under these Regulations, the employer shall pay any contribution payable in respect of him by affixing a stamp to a card, to be obtained for the purpose from a postmaster (in these Regulations called an 'emergency card'), and by delivering the emergency card forthwith to the contributor duly stamped, and the contributor shall thereupon receive the same."

and was remitted to a full bench, before which it was heard on 1st June 1914.

Argued for the appellant;—The conviction was bad, because the case against the accused had not been established. There were two methods of paying contributions under the Regulations, viz., by means of the ordinary card, and by means of the "emergency card." Assuming for the moment that the prosecutor had proved that the first of these methods had not been employed, he had not proved that payment had not been made by an "emergency card," and accordingly his case was obviously incomplete. The duty of proving his case lay upon the prosecutor, and there was no foundation whatever for the contention of the Solicitor-General that, if the prosecutor proved that an ordinary card had not been used, the onus then shifted on to the accused to prove affirmatively that he had used an emergency card. But, in any case, the prosecutor had not even established that payment had not been made in the ordinary way by the ordinary card. The evidence was entirely incomplete. The fact that the accused had refused to give the Commissioners any information could not be used against him, it being a cardinal rule of law that a person suspected of, or charged with, a crime was not bound to say anything which might incriminate himself. Further, no evidence had been adduced to show that the insurance authorities had searched for cards and found none. The result, accordingly, was that the only evidence in the case was the admission of each servant that he did not get a card stamped by the employer. Each of them, however, only spoke to his own case. Therefore, there was only one witness to establish each charge against the accused; and the evidence of a single witness was not, except where expressly provided by statute, sufficient to establish guilt.[1] It was true that in the case of a continuing crime one witness to each of its phases or stages might suffice.[2] But here there were two offences and two charges, which might have been brought by separate complaints, and the fact that no card had been stamped for Macfarlane was not evidence that no card had been stamped for Crichton. The evidence of one witness to a charge was not corroborated by evidence bearing upon a similar but different charge.[3]

Argued for the respondent;—The statement of the servants that they "did not get an insurance card" was broad enough to cover emergency as well as ordinary cards. But, if it was not, it did not matter, because, if the prosecutor proved that payment had not been made in the ordinary way by the ordinary card, it lay upon the accused to establish that the extraordinary method had been adopted. The other criticisms of the appellant with regard to the sufficiency of the evidence were also unfounded. There was really only one charge against the accused, viz., a failure to comply with the provisions of the Insurance Act, and the evidence of both the servants was relevant to establish that charge. The crime was a continuing one, with a number of instances all connected together

[1] Ewing v. Cullen, [1833] 6 W. & S. 566, at p. 577.

[2] Alison's Criminal Law, vol. ii., p. 552; Hume on Crimes, (3rd ed.) vol. ii., p. 385; Dickson on Evidence (Grierson's Edition), pars. 1807, 1808, 1809; Macdonald's Criminal Law, (3rd ed.) p. 497.

[3] A v. B, (1895) 22 R. 402; H. v. P., (1905) 8 F. 232; Inglis v. National Bank of Scotland, Limited, 1909 S. C. 1038.

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and forming part of one and the same criminal conduct, and therefore two witnesses to each instance were unnecessary.[1] Even if the complaint were regarded as making two separate charges the evidence was quite sufficient. One witness, corroborated by circumstances, was sufficient legal proof.[2] Here there were ample corroborative circumstances in the fact that no insurance cards had been produced, the obvious method of showing that payments had been made, and in the conduct of the accused and of his servants towards the insurance authorities, which was entirely inconsistent with payments having been made. The criminal acts in the two cases were repeated and were of a precisely similar nature, and accordingly, even if the charges were separate, each threw a light upon the other. Where an employer was charged with failing at a certain date to pay a certain contribution due in respect of one of his employees, the appellant would apparently argue that no corroboration would be derived from the statements of fifty other employees, similarly situated, that he had failed at the same date to pay similar contributions due in their respect. Such a contention was absurd.

At advising on 6th June 1914,—

LORD DUNDAS.—The appellant was prosecuted in the Sheriff Court at Cupar for having failed to pay certain contributions payable under the Insurance Act in respect of two of his servants, being employed contributors, during the periods specified in the complaint. The prosecutor's task was thus, *ex necessitate rei*, to prove a negative. The Sheriff-substitute convicted the appellant, and we are asked to decide whether the evidence adduced was "legally sufficient to convict"? In deciding that question we must proceed upon the evidence which is laid before us as the basis of the legal question, and must assume that the learned judge by whom the case is stated has given us the whole material facts, admitted or proved, upon which he decided to convict.

So far as the case discloses, the proof led by the Procurator-fiscal was of a most meagre description. He examined six witnesses; but I gather from the stated case that the evidence of the first four of these merely went to show that, prior to the raising of proceedings, the appellant had been repeatedly written to on behalf of the Insurance Commissioners in respect of non-payment of contributions under the Act, but refused all information; that, when two inspectors under the Act saw him outside his house and asked him if he had carried out his duties under the Act, he refused to give any information; and that, on the latter occasion, the two servants in question, Macfarlane and Crichton, were interviewed, but refused to give any information and referred the inspectors to the appellant. I do not think this evidence advanced the prosecutor's case to any material extent. I take it that the appellant was under no legal obligation to furnish information to the Insurance Commissioners, personally or

[1] Counsel referred to the authorities enumerated in footnote [2], p. 143 *supra*; and also cited Milton, (1667) M. 12,636; Landles v. Gray, (1816) 1 Murray's Reps. 79, at p. 81; M'Kenzie v. Ewing, (1832) 10 S. 497; Dombrowitzki v. Dombrowitzki, (1895) 22 R. 906.

[2] Ramsay v. Nairne, (1833) 11 S. 1033.

through his servants, in regard to any proceedings the Commissioners might think fit to institute against him for non-compliance with the Act. The two other witnesses were the appellant's servants, Macfarlane and Crichton. All that we learn from the stated case as to their evidence is that "each of the servants admitted in the witness-box that he did not get an insurance card stamped by the appellant while in his service." Upon this evidence the conviction followed.

The case, therefore, for the prosecution seems to have consisted solely of the testimony, to the effect just quoted, of one witness in support of each of the separate charges contained in the complaint. I am unable to hold that there was sufficient legal evidence to support the conviction. The testimony of one witness, uncorroborated, is not enough to prove a charge in a case of this sort, which is a quasi-criminal one, unless the statute creating the offence shall so provide. I am not at all convinced that the evidence of each of these two witnesses can be taken, as was argued for the Crown, to corroborate the evidence of the other, and I cannot find in the stated case any trace of extraneous corroboration of the testimony of either of them; but, even if one accepts the argument of the Crown, the conjoined evidence of the two witnesses would not, in my judgment, amount to proof of the charges laid in the complaint. It was urged on behalf of the prosecutor that, if the evidence here were held to be insufficient, the Procurator-fiscal would in many cases be unable to secure a conviction. This general argument did not, I confess, greatly move me. If the Act is, to some extent, ineffective, that does not appear to me to be the concern of the Court; our duty is not to fortify, but to construe, the language of Acts of Parliament. The Legislature has in many cases provided, for example, that the evidence of one credible witness shall be sufficient to establish a statutory charge (see Dickson on Evidence, sec. 1813, and note); and there are other cases where the burden is to some extent imposed by statute upon the accused to rebut presumptions adverse to him; but the Legislature has not, in the present case, thought fit to adopt these, or the like, expedients. I am not, however, at all satisfied that the prosecution might not have, at least, bettered its case if it had taken proper care to do so. The charges against the appellant are that he failed to pay certain contributions. No direct evidence was adduced to show that the Commissioners have not, in fact, received the contributions. Again, beyond the single "admission" which appears to have been elicited from the witnesses Macfarlane and Crichton, there seems to have been no attempt made to discover whether or not, in point of fact, either of these witnesses, on entering the appellant's service, took out a contribution card from an approved society or from the postmaster; and if so, whether the appellant ever required the servant to produce it to him. If such cards, or card, were in existence, and unstamped, the case for the prosecution might have assumed a different aspect. But apart from these considerations, which are more or less speculative, I am unable to affirm that, as matters are presented to us upon the stated case, there was legal evidence to warrant the conviction. The first question must, therefore, in my opinion, be answered in the negative. I confess that I reach this conclusion with reluctance, because one cannot avoid the impres-

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sion that the appellant has been evading his duty under the Act. If he has in fact complied with that duty, nothing would have been easier than that he should have produced evidence of his compliance. But he was not bound to go into the witness-box; and I do not think that an adverse inference can be drawn from his not doing so, as I rather think the Sheriff-substitute has drawn it, though such an inference might have been quite legitimate in a purely civil case. The question is put to us as a question of law; and the Court is bound to see to it that no conviction is sustained which is not supported by legal evidence.

If the above views are correct, the second question put to us is of no direct importance in the present case; but it seems right that we should answer it for the guidance of future prosecutions under the Act. The appellant is charged with failure to pay contributions legally due in respect of his two servants. One mode by which the contributions might be paid was by means of an emergency card taken out by the employer, in terms of section 6 (1) (*c*) of the Regulations, stamped by him, and delivered to the contributor. As already pointed out, the prosecution (in the absence of statutory provision to the contrary) is put to prove a negative; and it is, therefore, in my judgment, for the prosecutor to exhaust the problem by establishing, as part of his case, that the mode of payment above indicated has not in fact been resorted to. He has not, so far as I see, established this. The Solicitor-General insisted that the "admission" by each of the two servants "that he did not get an insurance card stamped by the appellant while in his service" applied, according to its true import, to emergency, as well as to ordinary, contribution cards. If that were so, it is difficult to understand the introduction into the stated case of the passage about Macfarlane who "in reply to the Procurator-fiscal, stated that he knew nothing about whether an emergency card had been stamped by the appellant for him"; and impossible (to my mind) to account for the fact that the learned Judge has stated the second question for our consideration. I think we ought to answer that question in the affirmative.

Lord Justice-Clerk.—The opinion which Lord Dundas has just delivered so entirely expresses the views I hold in this case that it would be superfluous for me to add anything.

Lord Salvesen.—In this case two charges were preferred against the appellant of failing to pay the contributions due under the National Insurance Act, and relative Regulations, in respect of two of his servants. The Sheriff-substitute found both the charges proved; and he has stated the facts on which he proceeded. We are bound to assume that he has stated all the facts which he considered relevant. The question for us is whether the facts so found are sufficient to support the conviction. In my opinion they are not.

It may well be that the appellant had really no case on the merits; but he took up the attitude that every accused is entitled to take up of refusing to give any information, and of requiring that sufficient evidence shall be adduced to prove the offences with which he is charged. Now the only

facts which were proved in evidence were that the appellant had been repeatedly written to on behalf of the National Insurance Commissioners for Scotland in respect of non-payment of contributions under the Act and had refused all information; that he gave the same answer to two inspectors who called upon him and asked him if he had carried out his duties under the Act as an employer; that each of the two servants stated in the witness-box "that he had not got an insurance card stamped by the appellant while in his service." This latter statement is open to the construction that the servants neither gave an insurance card to the appellant to be stamped nor received from him an emergency card which he had stamped on their behalf. If this were the true construction of the finding I am not prepared to say that the evidence would not have been sufficient. As at present advised I think that the statement of a servant that the employer did not stamp any insurance card on his behalf might be corroboration of the charge made with reference to another servant. But it is plain from the subsequent part of the Sheriff-substitute's statement that the evidence given by the servants related only to insurance cards which it was their primary duty to obtain and present to the appellant to be stamped; and that no evidence was led to exclude the view that the appellant might have obtained an emergency card and duly stamped it. Were it otherwise I cannot conceive that the Sheriff-substitute should have put to us the question "Was it necessary for the Procurator-fiscal to prove that an emergency card had not been procured and stamped by the accused." This is undoubtedly a way in which an employer can discharge his duty under the Act; and if there is no evidence to exclude his having done so the conviction against him cannot stand.

I desire to add that it appears to me that, assuming the case against the appellant to be well founded in fact, it would have been very easy to have established it by the witnesses adduced. The National Insurance Commissioners must have the means of knowing whether a particular employer has or has not paid his contributions under the Act. If they do not find amongst their files cards applicable to a particular employer, their statement in the witness-box to that effect would be *prima facie* evidence of non-payment. If in addition they cited the servants in question and these deponed that no deduction was made from their wages and that no stamped card of any kind was given to them by their employer, the case would appear to be complete in the absence of any evidence led on behalf of the accused. I presume such evidence must have been available to the prosecutor, for I cannot understand a demand for payment of the contributions unless the files had first been searched to ascertain whether the appellant had complied with the Act; and it would have been as easy to address a question to the servants on the subject of the emergency card as on the subject of the ordinary card which it was their duty in the first instance to take out and hand to the employer for the purpose of its being stamped. I regret that I am unable to affirm the conviction; but the failure of the prosecutor to adduce the evidence that I have referred to leaves me no option.

Lord Mackenzie.—In my opinion the second question should be

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answered in the affirmative, and it follows that the answer to the first ought to be in the negative. The offence with which the appellant was charged was failure to pay contributions. These contributions may be paid either by fixing a stamp to the card of the contributor, or by fixing a stamp to an emergency card. As I read the case there is no evidence whatever as regards the emergency card. That that must have been the view of the learned Sheriff-substitute I think is plain, otherwise he would not have proponed the second question for our consideration. I think the matter may be brought to a very simple test—if a complaint had been served upon the appellant charging him with failure to pay contributions under the Insurance Act inasmuch as he had failed to affix a stamp on the card of the contributor, and if the complaint had stopped there, the complaint would have been irrelevant because it would not have exhausted the modes in which payment might have been made. I regard the evidence in this case as leaving the matter in exactly the same position. The Insurance Commissioners have failed—or the Procurator-fiscal as acting on their behalf has failed—to discharge the onus which lies upon the prosecution to complete the negative evidence necessary to its success.

That being my view, I do not think it necessary to express an opinion upon the argument expressly directed to the first question Speaking for my own part, I much doubt whether, in any future prosecution, the matter can be advanced by putting an officer of the Insurance Commissioners into the box to say that he has made a search for cards and that he has failed to find them. I think the Solicitor-General pointed out that that would be by no means conclusive of the matter, as *non constat*, even if that were said, that the cards were never taken out and stamped.

Lord Anderson.—I had some difficulty in regard to this case at the first hearing. My doubt was as to whether the appellant, under the guise of a question of law, was not really inviting us to review the Sheriff-substitute's decision on the facts. I have, however, reached the conclusion, with your Lordships, that the first question raises what is undoubtedly a point of law. It is a question of law, for the determination of this Court, whether the general conclusion in law which the Sheriff-substitute has reached, is justified by the facts which he has held to be proved. In submitting such a question the Sheriff-substitute ought to state all the facts which have influenced him in reaching his conclusion, and we are bound to assume that he has done so in this stated case. In stating the case, the Sheriff-substitute has fallen into the error, which has been the subject of frequent judicial animadversion, of setting forth what certain witnesses said, instead of stating the facts which were held to be proved. But, on the assumption that the Sheriff-substitute believed what these witnesses deponed, it is plain that there is not a sufficiency of legal evidence to support the conviction. The only material evidence set forth consists of what the two servants admitted as to stamped insurance cards not having been got from the appellant, and what the servant Robert Macfarlane said as to an emergency card. In my opinion this evidence is legally insufficient to convict.

The only point of general importance which emerged at the debate was

whether the two servants could be held as corroborating each other in the testimony which they gave. Decisions were cited which had been pronounced in civil actions, but it is probably unsafe to apply these to criminal procedure, where the rules of evidence are more stringently enforced. I therefore do not propose to examine these authorities. With reference to criminal procedure, Hume (ii. 385) states that the evidence of single witnesses has been held sufficient to establish separate acts of the same kind. Hume refers to a case of attempt to suborn, in which the libel charged a number of instances which had happened at different times and places and with different persons. Each fact was proved by only one witness, but this was held sufficient to warrant conviction of the whole charges. Alison (ii. 552) states that "where a number of instances of the same crime are charged under one general denomination, and connected together, and forming part of one and the same criminal conduct, as subornation, adultery, &c., each separate act may be competently established by the evidence of a single witness, as each act is in truth nothing but the link by which the guilt upon the whole is established." This matter is also dealt with in the case of *Lees* v. *Macdonald*,[1] where the Lord Justice-Clerk says,[2] "Even apart from the statutory rule in cases of day trespass that one credible witness is sufficient, I am of opinion that in any case any fact can be proved by one witness, although the whole case cannot be so proved"; and Lord M'Laren says,[3] "The rule that two witnesses are required to prove the grounds of action or defence in civil or criminal proceedings has been, as I think, sometimes misunderstood. All that the law demands is that there should be two witnesses to prove a case; and, provided that is so, any fact in the case may be proved by the testimony of one credible witness."

Applying these authorities to the present case it seems to me that although the complaint apparently contains two distinct charges, it may fairly be regarded as setting forth a general charge of failure to pay the insurance contributions due in respect of the two servants. The two branches of the complaint libel the same *species facti*—in locus, time, and modus. I should therefore have been prepared to hold, in this case, that the two servants might have been taken as corroborative of one another, and, if they had said enough, that the case would have been proved on their evidence alone.

I have nothing to add to what has fallen from your Lordship as to the second question, and, as regards both questions, I agree that they should be answered as suggested by your Lordship.

Lord Justice-General.—My opinion in this case rests on the identical ground adopted by Lord Mackenzie. This statute prescribes two modes by which an employer may pay his contributions—(first) when paying the servant's wages, he may affix to the servant's insurance card stamps denoting the amount of contributions due. That may be called the usual mode of payment. (Second) if the servant fails to deliver his insurance

[1] (1893) 20 R. (J.) 55, 3 White, 468.
[2] 20 R. (J.), at p. 57.
[3] *Ibid.*, at p. 58.

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card, the employer must then secure an emergency card, affix the stamps to it, and hand it to his servant, who is bound to receive it.

Now, I have formed no opinion and express none on the question whether or no the prosecutor has here negatived effectually the first or usual mode of payment. I am very clearly of opinion that there is no evidence at all to negative the second mode of payment, because I think it impossible to hold—as the Solicitor-General contended—that where the word used is "card" it includes both the servant's insurance card and the emergency card. As Lord Dundas has pointed out, the way the second question is stated quite precludes that view.

In my opinion, it is incumbent on the prosecutor, in order to secure a conviction under a complaint charging failure to pay contributions under the Insurance Act, effectually to negative both modes of payment prescribed under the statute. Accordingly, because I am now prepared to answer the second question in the affirmative, I am also prepared to answer the first question in the negative. We shall, therefore, answer the questions as has been proposed by Lord Dundas.

THE COURT answered the first question in the negative and the second in the affirmative, and sustained the appeal.

TODS, MURRAY, & JAMIESON, W.S.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

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James Keith, Limited, v. Kirkwood.

JAMES KEITH, LIMITED, Appellants.—*Murray, K.C.—Keith.*
WILLIAM DENNETT KIRKWOOD (Inspector of Factories), Respondent.—*Sol.-Gen. Morison—Gillon, A.-D.*

Statutory Offences—Factory and Workshop Act, 1901 (1 *Edw. VII. cap.* 22), *sec.* 149 (1), *and Sixth Schedule, Part II.* (28)—"*Non-textile factory*"—*Bottling beer by machinery in wine merchant's premises*—"*Bottle washing works*"—*Washing bottles by machinery in wine merchant's premises.*

On the first floor of premises occupied by a firm of wholesale and retail grocers, wine merchants, and Italian warehousemen, there was a portable bottle filling machine used for bottling beer, and on the ground floor another machine used for washing the firm's bottles, both machines being worked by electricity.

Held (1) that the premises on the first floor were not a "non-textile factory" within the meaning of sec. 149 (1) of the Factory and Workshop Act, 1901, in respect that the process of bottling beer was neither an "adapting for sale of any article" nor a "manufacturing process"; (2) that the premises on the ground floor were not "bottle washing works" within the meaning of the same section and subsection and the Sixth Schedule, Part II. (28), in respect that the bottle washing was merely incidental to the firm's proper business.

HIGH COURT. Lord Justice-General. Lord Mackenzie. Ld. Anderson.

JAMES KEITH, LIMITED, were charged in the Sheriff Court of Lanarkshire at Hamilton on a complaint at the instance of William Dennett Kirkwood, His Majesty's Inspector of Factories, 74 York Street, Glasgow, that, being the occupiers of a factory at 86 Cadzow Street, Hamilton, within the meaning of the Factory and Workshop Act, 1901, they failed, on 20th January 1914, to keep constantly affixed at the entrance to the said factory the prescribed abstract of the Act.

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The Sheriff-substitute (Shennan) having convicted the accused, they obtained a stated case on appeal to the High Court of Justiciary, the point at issue being whether the appellants were the occupiers of a factory within the meaning of the Factory and Workshop Act, 1901.*

The case set forth that the following facts were admitted or proved:—"The appellants are wholesale and retail grocers and wine merchants and Italian warehousemen in Hamilton.

"Their premises extend to six storeys. In the lowest flat (ground floor) there are two cellars, containing respectively 1509 square feet and 1364 square feet. In the former there is a bottle washing machine, covering an area of 45½ square feet, which is worked by electricity. On the flat above this (first floor) there is a wine store extending to 1364 square feet, and a beer bottling department extending to 1509 square feet. In the latter there is a portable bottling machine, covering 12 square feet, worked by electricity. The next floor (second floor) is devoted to wine bins and to wine bottling, which is done without mechanical power. The floor above this (third floor) contains stores and cellars and a stout bottling department covering 208 square feet, the work here being also done without mechanical power. The fourth floor contains shop, saloon, and offices and loading premises. The highest floor (fifth floor) consists of stores. The conditions of employment are considerably more favourable than the Factory Acts require. The respondent treats the appellants' premises as a factory because of (1) the electrically driven bottle washing machine on the ground floor, and (2) the electrically driven beer bottling machine on the first floor. There was not evidence to show what proportion of the appellants' business the bottle washing represents. It is merely carried on incidentally to the business of wholesale and retail grocers and wine merchants and Italian warehousemen. It includes among much else the washing of bottles, which are afterwards filled by the appellants with wine or beer. Three women and one man work for about twenty-four hours and a half per week at bottle washing, and cleaning up the premises in which the bottle washing is carried on. Only bottles used in the appellants' business are washed, and the bottle washing is a mere ancillary branch of their business. The beer bottling machine on the first floor occupies an area of about 12 square feet, is moveable, and could be shifted to another

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* The Factory and Workshop Act, 1901 (1 Edw. VII. cap. 22), enacts:—Sec. 149 (1). "Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them, that is to say, . . . The expression 'non-textile factories' means . . . (*b*) any premises or places named in Part Two of the [Sixth] schedule wherein . . . mechanical power is used in aid of the manufacturing process carried on there; and (*c*) any premises wherein . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i.) the making of any article or of part of any article; or (ii.) the altering, repairing, ornamenting, or finishing of any article; or (iii.) the adapting for sale of any article, and wherein . . . mechanical power is used in aid of the manufacturing process carried on there. . . ."

Sixth Schedule.—List of Factories and Workshops.—Part II. Non-textile Factories and Workshops—(28) Dry cleaning, carpet beating, and bottle washing works.

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floor if the necessary electrical connection was made. There is a circular pan to which the beer is conveyed from the cask by gravitation. To this circular pan syphon tubes are attached, and the pan is revolved slowly by electrical power. A woman puts each empty bottle on to the syphon tube as the pan revolves. When the bottle is filled a man removes it and places it in a holder on an adjoining disc. This latter disc is revolved by electrical power by which also the bottle is corked, after which it is removed from the machine. The beer is simply bottled, no special treatment being applied to it. In this process the bottler does not alter the beer or "finish" it. He merely puts it under the conditions favourable to the development of certain qualities potential in the beer. Probably some process of fermentation takes place within the sealed bottles. Bottled beer is an article of commerce distinguished from draught beer. Draught beer is ready for drinking practically at once when sold. Bottled beer must be kept from six to eight weeks to mature before it is ready for consumption. The said beer bottling machine is used solely for the bottling of Bass's beer, the sale of which by the appellants constitutes about one-sixtieth part of their business. Bass's beer is never sold by the appellants by retail except in bottle."

The case further stated:—"On these facts I held (1) that no part of the appellants' premises were a bottle washing work within the meaning of the Factory and Workshop Act, 1901, the bottle washing being merely an ancillary part of their business, and (2) that the bottling of beer above described brought the appellants' premises (or part thereof) under the third category of branch (*c*) of the definition of non-textile factory contained in section 149 of the said Act, viz., 'The adapting for sale of any article.' I was of opinion that the proportion of the beer bottling work to the total business of the appellants was immaterial, and irrelevant to the question raised. Accordingly I convicted the appellants of a technical breach of the Act, and found them liable in £1, 3s. 6d. of expenses."

The questions of law for the opinion of the Court were:—"1. Are the appellants' premises, or any part thereof (1) a bottle washing work within the meaning of the Factory and Workshop Act, 1901; or (2) a non-textile factory within the meaning of the said Act? 2. On the facts stated, was I right in convicting the appellants?"

The case was heard before the High Court on 1st June 1914.

Argued for the appellants;—The Sheriff had rightly held that no part of the premises was a bottle washing work within the meaning of the Factory and Workshop Act, 1901. The appellants were grocers and wine merchants and not bottle washers, the washing of bottles being purely ancillary to their ordinary business, in which a constant supply of clean bottles was a necessity. This question had been definitely settled in the appellants' favour by *Kavanagh* v. *Caledonian Railway Company*,[1] and *Caledonian Railway Company* v. *Paterson*.[2] The Sheriff, however, had erred in holding that the premises on the first floor where the beer was bottled con-

[1] (1903) 5 F. 1128.

[2] (1898) 1 F. (J.) 24, 2 Adam 620; *cf.* Nash v. Hollinshead, [1901] 1 K. B. 700.

stituted a non-textile factory within the meaning of the Act of 1901. The premises were indubitably a shop; and, if they were also a factory, then they came under both the Factory and Workshop Act, 1901, and the Shops Act, 1912,[1] and that meant a system of dual control, with incompatible regulations as to holidays, meal hours, and so forth, such as could never have been within the purpose of the Legislature. But if the Act were carefully considered it became clear that the premises were not a factory. To be a factory (*i.e.*, a "non-textile" factory) the premises in this case must, under section 149 (1), be premises in which manual labour was exercised in "the adapting for sale" of an article in a "manufacturing process." Bottling beer, however, was not "adapting" beer. Adapting involved the idea of change and alteration in the article, whereas bottling was merely the transferring from one vessel to another. The fact that some chemical change might take place in the beer *after* bottling was quite immaterial. Further, it was clearly not a "manufacturing process"; and, as both these factors had to be present to constitute the premises a factory, the Sheriff's judgment was wrong. Moreover, this bottling of beer was a mere incident in the grocery business of the appellants, and the argument and authorities adduced to show that the ground floor was not a bottle washing works were equally apposite to negative the idea that the first floor was a non-textile factory.

Argued for the respondent;—The fact that on the respondent's view there might be an overlapping of administration between those responsible for the administration of the Factory and Workshop Act, 1901, and those responsible for the administration of the Shops Act, 1912, did not affect the question, because such overlapping was unavoidable and was clearly contemplated by the Legislature.[2] That in popular language no part of the premises would be described either as a "non-textile factory" or a "bottle washing works" was also beside the mark, because all the cases showed that the terms of the Act, and other kindred Acts, had to be strictly construed, although construction might lead to seemingly absurd results from a popular point of view, such as that a tripe-shop,[3] a shop where natural flowers were made into bouquets,[4] and a room where sweetmeats were made up into packets,[5] had all been held to be factories. Further, the whole premises, ground floor and first floor, must be taken together, the washing of the bottles and the bottling of the beer being all part of the same process. As regarded the bottling:—bottling beer was clearly "adapting" beer for sale. It was not simply transferring it from one receptacle to another. "Bottled beer" and "draught beer" were commercially and chemically different articles, and it was the process of bottling which produced the change. So in *Henderson* v. *Corporation of Glasgow*,[6] it was the sorting out of the refuse, as contrasted with the mere putting of it into carts, that brought the process there under the expression "adapting for sale." Bottling beer was much nearer to

[1] 2 and 3 Geo. V. cap. 3.
[2] *E.g.*, Factory and Workshop Act, 1901, sec. 31 (4).
[3] Doswell v. Cowell, (1906) 95 L. T. 38, 22 T. L. R. 628.
[4] Hoare v. Robert Green, Limited, [1907] 2 K. B. 315.
[5] Fullers, Limited, v. Squire, [1901] 2 K. B. 209.
[6] (1900) 2 F. 1127.

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the popular idea of "adapting" than the processes already referred to in *Hoare*,[1] and *Fullers, Limited*.[2] In *Law* v. *Graham*,[3] Lord Alverstone stated that the very process here in question, viz., bottling, might be said to be adapting for sale, although he added that it was somewhat straining the words of the section. It was also in the same way a manufacturing process, and from the respondent's point of view compared in this respect favourably with the stone-dressing in *Petrie* v. *Weir*,[4] or the carpet-beating in *Johnston* v. *Lalonde Brothers & Parham*,[5] or the laundry in *Owner* v. *Cottingham Sanitary Steam Laundry Company, Limited*.[6] But in any event the words "manufacturing process" in the section[7] did not offer any stumbling block to the respondent, because they introduced nothing new but simply referred back to the three processes already described in the section, of which the third was the one here under consideration, viz., "adapting for sale." The only question, therefore, was, Was this adapting for sale?—for the "manufacturing process" was nothing more nor less than the adapting for sale. As to the ground floor premises they were clearly bottle washing works. A reference to any directory showed that bottle washing was not a separate industry; it was always part of some other business. Bottle washing here was an integral part of the appellants' business; without bottle washing the appellants could not have carried on one of the most important branches of their business, viz., the selling of wines and beer, which was a business which they held themselves out to conduct with anyone and everyone. This distinguished the case from those of *Kavanagh*[8] and *Caledonian Railway* v. *Paterson*,[9] where the hotel washed bottles and clothes on a very small scale and only for the service of the occupants of the hotel.

At advising on 9th June 1914,—

Lord Justice-General.—In this case we have had the advantage—denied, I observe, in more than one of the cases cited from the King's Bench—of listening to an excellent argument from both sides of the bar. The question we have to consider and decide is whether the appellants' premises fall within the Factory Acts, and that again resolves itself into two separate and distinct questions—(first) Do the premises on the first floor constitute a non-textile factory in the sense of the Factory and Workshop Act, 1901? and (second) Do the premises on the ground floor constitute a bottle washing work in the sense of that statute?—for I cannot agree with the Solicitor-General, for the reason I shall presently give, that the premises on both the first and ground floors must be regarded as forming only one set of premises, and that the operations conducted on both these floors must be considered as forming only one operation in the sense of the statute.

The appellants are wholesale and retail grocers and wine merchants and Italian warehousemen in Hamilton. Their premises extend to six storeys. With the four uppermost storeys we are not concerned in this

[1] [1907] 2 K. B. 315.
[2] [1901] 2 K. B. 209.
[3] [1901] 2 K. B. 327, at p. 330.
[4] (1900) 2 F. 1041.
[5] [1912] 3 K. B. 218.
[6] (1910) 102 L. T. 571.
[7] 149 (1) (*c*) (iii.).
[8] 5 F. 1128.
[9] 1 F. (J.) 24, 2 Adam, 620.

case. But, on the first floor, it appears that there is a portable bottle filling machine where beer, taken from casks or other receptacles, is filled into bottles, the operation being conducted by means of a machine actuated by electricity.

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The question whether the first floor premises, because of the existence and the operation of this machine actuated by electricity, are a non-textile factory in the sense of the statute depends upon the construction to be placed upon section 149 (1) (*c*) (iii.), which, read short, is as follows:—Non-textile factory means any premises wherein any manual labour is exercised by way of trade incidental to adapting for sale any article, and wherein mechanical power is used in aid of the manufacturing processes carried on there. Now, it appears to me that there are two pre-requisites—statutory pre-requisites—to the inclusion of premises within the category of non-textile factory—(first) in the premises there must be manual labour exercised for the adaptation of articles for sale, and (second) the premises must be premises in which mechanical power is used in aid of the manufacturing processes carried on there. Accordingly, the first question we have to consider is whether, in premises where there is in use a machine for bottling beer such as is described in the case—in other words, a machine for transferring beer from one receptacle into another—there is in progress an adaptation of an article for sale, and (for it is not alternative) a manufacturing process aided by mechanical power.

I am of opinion that we have no such premises here; for I cannot assent to the argument that merely transferring an article from one receptacle into another can be said to be adapting it for sale. Reference was made to the case of *Hoare* v. *Robert Green, Limited*,[1] in the Court of King's Bench, and to Lord Alverstone's judgment where he said that, by straining the words of the Act, he could place such an interpretation upon the Act that this operation of transferring beer from one receptacle to another might be considered such an adaptation. We are not asked and we are not entitled, I think, to strain the words of this or of any other Act of Parliament. Our duty is to put a fair interpretation upon the words used by the Legislature. And, as I pointed out during the argument, if it were legitimate to strain the words of the Act of Parliament for the purpose of giving effect to what we had reason to believe was its purpose, this is not a case in which the Court is encouraged to take that course, because we are distinctly informed that the conditions of employment in these premises are considerably more favourable than the Factory Acts require. But it is upon a fair construction of the Act of Parliament that I consider that the transference of beer from one receptacle to another is not an adaptation of the article for sale. It appears to me that the case of *Hoare*[1] is a typical case of the adaptation of an article for sale, and, although the case of *Fullers, Limited*, v. *Squire*[2] is somewhat nearer the line, as Lord Alverstone pointed out, it is also a typical case. But, as was pointed out in the course of the argument, the case of *Fullers, Limited*,[2] related to a workshop and not to a factory, and accordingly the words to which I now come were not construed in *Fullers, Limited*.[2]

[1] [1907] 2 K. B. 315.

[2] [1901] 2 K. B. 209.

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The words I now come to are those at the conclusion of the clause—the premises must be premises wherein mechanical power is used in aid of the manufacturing processes. Now, I do not think that, in any reasonable sense of the word, it can be said that transferring an article from one receptacle to another is a manufacturing process. It was argued, no doubt, that carpet beating and laundry work were not manufacturing processes any more than transferring beer from a barrel to a bottle is a manufacturing process, and yet they are there in the Act of Parliament. But the answer is they are there *per expressum*, and if they were not there in express terms, they would not be included within the limits of the Factory Acts. I observe, therefore, that all the cases that have been cited to us seem to me to be in complete harmony with one another. I see no conflict in the decisions, and, following them and placing upon the words of this statute the plain ordinary meaning of language, I have come without hesitation to the conclusion that the Sheriff-substitute was wrong in finding the premises on the first floor to be a non-textile factory within the meaning of the statute.

The second question is whether we find here a bottle washing work on the ground floor? Now, we are not left to grope in the dark with reference to the operations conducted on the ground floor. We are told that the bottle washing is carried on merely incidentally to the business of wholesale and retail grocers and wine merchants. "It includes among much else the washing of bottles which are afterwards filled by the appellants with wine or beer." And again, "only bottles used in the appellants' business are washed, and the bottle washing is a mere ancillary branch of their business." In these circumstances, it appears to me to be vain to contend that we are here dealing with a bottle washing work in the sense of the Act. Mr Gillon told us, no doubt, that when you ransacked the Glasgow Directory, or I suppose the Edinburgh Directory, you would not find under trades or professions any category consisting of bottle washing works alone. That may be so, but their absence from the directory does not appear to me to be a sufficient reason for putting a strained and unnatural interpretation upon the words used in the statute. Indeed, to hold that this was a bottle washing work would, I think, be inconsistent with the cases of *Kavanagh* v. *Caledonian Railway Company*,[1] and of the *Caledonian Railway Company* v. *Paterson*,[2] both of which cases I consider to have been well decided. The principle of these two cases, and the reasoning of the learned Judges seem to me to be directly in point here. Accordingly, on this question I come without hesitation to the conclusion that the Sheriff-substitute gave a right decision.

I propose to your Lordships, therefore, in accordance with these views, that we should answer the first and second parts of the first question in the negative, and the second question also in the negative.

LORD MACKENZIE.—I am of the same opinion. The Sheriff-substitute has dealt with this case as raising two separate and independent points, and in that view of the matter I agree, because I cannot follow the argu-

[1] 5 F. 1128. [2] 1 F. (J) 24, 2 Adam, 620.

ment of the Solicitor-General that the two parts of the case are to be taken in combination in order to make an offence under the Act.

The first finding of the Sheriff-substitute I agree with—that no part of the appellants' premises was a bottle-washing work; and it was frankly admitted that, to reach any other conclusion, would be to go directly counter to the decisions already pronounced in the cases of *Kavanagh*[1] and of *Paterson*.[2] Not only do I not find myself entitled to do that, but I entirely agree in the view that was taken by the Lord President in the case of *Kavanagh*.[1]

In regard to the second point, I am unable to take the same view as the Sheriff-substitute, and for the reason which has been fully explained by your Lordship. I am unable to agree with him, even taking the case as he puts it, and as though the whole question for our consideration was whether there was any adapting for sale of any article in pouring beer into bottles. If that was the whole point, even then I should take the view that that was not adapting for sale. But I think it is impossible to stop there because of the language of section 149 (1) (*c*) which introduces other elements that we must take into consideration. We must consider whether any manual labour is exercised by way of trade or for purposes of gain in or incidental to (and then I pass to subhead iii.) "the adapting for sale of any article." Not only, however, has that question to be considered, but the concluding part of the subhead is just as important as the first part,—"wherein or within . . . the precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

The argument on behalf of the conviction really amounted to this, that either we must read out of the section altogether the words "manufacturing process," or else we must give those words a meaning which they certainly never would receive in ordinary parlance. We are told that we must give that unnatural meaning to this expression in consequence of a decision[3] relating to carpet-beating works, and it was argued that, although carpet beating cannot be said to be a manufacturing process in the ordinary acceptation of the term, yet because carpet-beating works are included in the list of non-textile factories given in the statute, therefore, when you come to consider the applicability of the term "manufacturing process" to some other doubtful operation you must give to the words the same forced and unnatural construction. As I followed the judgment in the case of *Johnston*,[3] which was read by the Solicitor-General, it appeared to me that that case was inapplicable to the present circumstances, because in *Johnston*[3] the Court were compelled by the terms of the statute and by the inclusion of carpet beating in the Schedule, to give to the expression "manufacturing process" a highly technical meaning, whereas in the present case, where we are dealing with bottling which is not mentioned in the Schedule, we are not constrained to give any construction to the words which is not in accordance with ordinary common sense. Accordingly I am unable to see that pouring beer into bottles

[1] 5 F. 1128. [2] 1 F. (J.) 24, 2 Adam, 620.
[3] Johnston v. Lalonde Brothers & Parham, [1912] 3 K. B. 218.

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can, by any stretch of language, be called a "manufacturing process." I therefore agree with your Lordship.

In regard to the other point that was made by Mr Murray, viz., that in any event the bottle washing and beer bottling were merely ancillary to the business proper of the premises, I should prefer at present not to express any opinion.

LORD ANDERSON.—I agree. The debate which we have heard was concerned mainly with section 149 of the statute of 1901, but I think it is not unimportant to keep in view what the appellants are actually charged with in the complaint. They are charged that they, being the occupiers of a factory, did fail to keep constantly fixed at the entrance to the said factory the prescribed abstract of the Factory and Workshop Act of 1901, contrary to section 128 (1) (*a*) of the said Act.

Now, the appellants are shopkeepers and nothing else, and yet, if the Sheriff-substitute is right, they will have to put up at the entrance to their grocers' shop in Hamilton the lengthy abstract of the provisions of this Factory Act. Well, that is a somewhat startling proposition; and, as Mr Murray very properly pointed out, the appellants, in respect that they are shopkeepers, are already subject to the provisions of the Shops Act, 1912, an Act whose purposes are the same as those of the Factory and Workshop Act, 1901, to wit, to compel employers of labour to conform to certain provisions with regard to the conditions of labour under which their employees fulfil their duties.

Now, the Sheriff-substitute has dealt with this case by discriminating between the work which was done on the first floor, namely, bottling beer, and the work which was done in the cellar, namely, washing bottles, and I agree with your Lordships that he took a right course in so discriminating, and that the Solicitor-General was wrong when he suggested that these were really parts of one operation.

With regard to the bottling process, the prosecutor undertakes to prove that this is a non-textile factory, and he says that he does so by reference to the section of the Act which has been alluded to, namely, section 149 (1) (*c*). Now, it seems to me that, in order to make out that any premises are a non-textile factory in the sense of that section, it is essential that three circumstances should concur: In the first place, there must be manual labour exercised by way of trade in the premises for one or other of three specified purposes. Now, it is common ground that the first of these purposes is out of the case, because it is not said that any article was being made in these premises. The Sheriff-substitute, by his finding that the beer was neither altered nor finished, has ruled out the second subhead; and, accordingly, we are left with the third subhead, and the prosecutor maintains that the manual labour by way of trade was concerned with the adapting of the beer for sale. That is in the first place. Secondly, there must be mechanical power exercised in the premises; and, in the third place, there must be a manufacturing process carried on there.

It is agreed by both sides that there was mechanical power employed, but the appellants dispute that there was either manual labour exercised by way of trade for adapting an article for sale, or that there was anything

in the nature of a manufacturing process carried on in transferring beer from casks to bottles.

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I take the view that on both these points the argument of the appellants is well founded. I am unable to affirm the proposition of the Crown that the beer, by what was done, was adapted for sale, and I do not think there was anything of the nature of a manufacturing process connected with that operation, giving to these words their ordinary signification. I think we are bound to give them that ordinary signification, with this explanation—that the Legislature has provided, with reference to certain special occupations dealt with in the schedule, that they may be treated as if they were manufacturing processes. Accordingly I agree with your Lordships with regard to the process of beer bottling, and the result is that we must reverse the decision of the Sheriff-substitute on that point.

Upon the matter of bottle washing, I think the Sheriff has come to a right conclusion. He has stated that this is ancillary to the main business of the establishment, and the case accordingly is ruled by *Paterson*[1] and *Kavanagh*.[2]

THE COURT answered both branches of the first question in the negative and the second question in the negative; sustained the appeal, and quashed the conviction.

JAMES PURVES, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

THE PARISH COUNCIL OF THE PARISH OF GLASGOW, Appellants.—*Horne, K.C.—J. W. Forbes.*
JANE EDWARD, Respondent.—*Christie, K.C.—Paton.*

No. 22.

June 15, 1914.

Glasgow Parish Council v. Edward.

Procedure—Instance—Public or private prosecution—Statutory offence—Children Act, 1908 (8 *Edw. VII. cap.* 67), *Part I.—Title of Parish Council to prosecute for offences under Part I.*

A Parish Council has no title to prosecute a complaint charging a contravention of any of the provisions of Part I. of the Children Act, 1908.

HIGH COURT. Lord Justice-General. Lord Guthrie. Ld. Ormidale.

JANE ROBERTSON OR EDWARD, certified midwife, residing at 3 Elmbank Street, Glasgow, was charged in the Sheriff Court of Lanarkshire at Glasgow on a complaint at the instance of the Parish Council of the Parish of Glasgow, as the Local Authority under Part I. of the Children Act, 1908, with concurrence of James Neil Hart, Procurator-fiscal of Court, which set forth "that (1) you did fail to give notice to them [the complainers], within forty-eight hours, that on 24th October 1913, at 3 Elmbank Street aforesaid, you had received an infant named Yang Sen Leong or Johnston, then aged seventeen days, whose nursing and maintenance apart from its parents you had undertaken for ten shillings per week, contrary to the Children Act, 1908, section 1, subsection (1); (2) you did fail to give notice to the complainers, within forty-eight hours thereof, of the death, on 28th November 1913, at 3 Elmbank Street aforesaid, of the said infant Yang Sen Leong or Johnston, whose nursing and maintenance apart from its parents you had undertaken for ten shillings

[1] 1 F. (J.) 24, 2 Adam, 620. [2] 5 F. 1128.

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per week, as from 24th October 1913, contrary to the said Act, section 1, subsection (5); and (3) you did fail to give notice to the Procurator-fiscal of Lanarkshire, at Glasgow, within twenty-four hours thereof, of the death, on 28th November 1913, at 3 Elmbank Street aforesaid, of the said infant Yang Sen Leong or Johnston, whose nursing and maintenance apart from its parents you had undertaken for ten shillings per week, as from 24th October 1913, contrary to the said Act, sections 6 and 132, subsection (5), whereby you are liable, for each offence, under section 9, subsection (1), of said Act, to imprisonment for a term not exceeding six months, or to a fine not exceeding £25. JAS. R. MOTION, Inspector of Poor and Clerk to Complainers." *

On the case coming before the Sheriff-substitute (Lyell) the accused's agent objected that the complainers had no title to prosecute. The Sheriff-substitute sustained the objection and dismissed the complaint, and the complainers obtained a stated case on appeal to the High Court of Justiciary.

In the case the Sheriff-substitute stated:—"I sustained the objection on the ground that the Children Act founded on gave the complainers no title, either express or implied, to prosecute for contraventions under Part I. of the Act, and that they had no personal or pecuniary interest, and were not persons aggrieved or injured by the contraventions complained of so as to entitle them to prosecute even with the concurrence of the Procurator-fiscal."

The question submitted for the opinion of the Court was:—"Was I right in sustaining the objection that the complainers had no title to prosecute, and dismissing the complaint?"

The case was heard before the High Court of Justiciary on 15th June 1914.

Argued for the appellants;—The appellants, the Parish Council of Glasgow, had a good title to prosecute for offences against Part I. of the Act. The Parish Council had always prosecuted for this class of offences under the old Act—the Infant Life Protection Act, 1897 [1]—and there was at least a strong presumption that the new Act, which took the place of the old Act, had not altered the *status quo* in this respect. Such an alteration could not be inferred by mere implication, and there was no provision in the Act expressly taking away the power. It was true that under the Act of 1897 the Parish Council obtained the penalties, and that fact by itself

* Part I. of the Children Act, 1908 (8 Edw. VII. cap. 67), consists of sections 1 to 11, and deals with "Infant Life Protection."

Section 1 provides for the notices to be given by persons receiving nfants for reward.

Section 9 provides for the prosecution of offences and application of fines, and enacts "(1) Every person guilty of an offence under this Part of this Act shall on summary conviction be liable to" imprisonment or fine. "(2) Any fines under this Part of this Act shall . . . be paid to the local authority" [in Scotland, the Parish Council]. By section 132 (23) of Part VI., however, it is enacted that subsection (2) of section 9 shall not apply to Scotland.

Part II. of the Act deals with "Cruelty to Children and Young Persons," and enacts, section 34 (1), "A board of guardians [in Scotland, a Parish Council] may institute any proceedings under this Part of this Act for any offence in relation to a child or young person . . ."

[1] 60 and 61 Vict. c. 57.

would doubtless have given a title to prosecute. But the terms of the Act of 1897 also gave a title to prosecute by implication, and it was this implied title to prosecute which was carried on into the Act of 1908, and upon which the appellants founded. It was true that the right of a parish council to penalties had been taken away by section 132 (23) of the Act of 1908, but that fact did not detract from this title by implication. The implication followed clearly from the direct interest which the Parish Council had in the provisions of Part I. of the Act. Part I. dealt with Infant Life Protection, and its eleven sections were in the main concerned with the notices, &c., which had to be given to the Local Authority, *i.e.*, the Parish Council, in order to enable the Parish Council to enforce the Act. As the authority to whom such notices had to be given the Parish Council had an interest to prosecute quite different from the general interest which every member of the public had in seeing that the laws were obeyed. The offences under Part I. were in effect offences against the Parish Council, which rendered the Parish Council's interest in Part I. of the Act quite different from the interest which they had, *e.g.*, in Part II. Part II. dealt with Cruelty to Children and Young Persons, and struck at a series of offences against the ordinary law of the realm, with which the Parish Council had no more concern than any other members of the public, and they would, accordingly, have had no title to prosecute had not a title been expressly conferred upon them by sections 34 (1) and 132 (7). The fact, therefore, that an express title to prosecute was given to the Parish Council as regarded Part II., but not as regarded Part I., was capable of this simple explanation, and did not militate against the appellants' contention. The cases on this branch of the law all supported or, at worst, were not adverse to the appellants. The most recent and authoritative of them was *Rintoul* v. *Scottish Insurance Commissioners*.[1] The appellants in the present case had a title to prosecute in virtue of two of the four qualifications there mentioned (at pp. 128-9) by Lord Justice-General Dunedin, viz., they were "personally wronged" by the offences committed, and they had a title "by implication." In *Rintoul*[1] the Insurance Commissioners were not immediately interested, and for that reason they were held to have no title. In *Simpson* v. *Corporation of Glasgow*,[2] the interest of the complainer derived from his proximity to the offending tramway line, and in *Burns* v. *Turner*,[3] the prosecutor's interest to see that his trade mark was not infringed, were not appreciably greater or more personal than the interest of the present appellants in seeing that the requisite notices were given. Similarly, the railway company's interest to prosecute for the offence of trespassing in contravention of their private Act in *Caledonian Railway Company* v. *M'Gregor*,[4] and their interest to prosecute for the use of obscene language in their carriages in *Great North of Scotland Railway Company* v. *Anderson*,[5] were not essentially different from the appellants' interest in this case. *Simpson* v. *Board of Trade*,[6] on which the respondent founded, was easily distinguishable. The offence there charged was the making

[1] 1913 S. C. (J.) 120, 7 Adam, 210.
[2] (1902) 4 F. 611.
[3] (1897) 25 R. (J.) 38, 2 Adam, 450.
[4] 1909 S. C. 1010.
[5] (1897) 25 R. (J.) 14, 2 Adam, 381.
[6] (1892) 19 R. (J.) 66, 3 White, 167.

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of a false statement by a seaman on engagement, a matter in which the Board of Trade, who prosecuted, had no special interest. *Lockwood* v. *Chartered Institute of Patent Agents*[1] afforded another instance of the class of interest which conferred a right to prosecute, and was not adverse to the appellants. Further, and independently, the appellants had a right to prosecute under the Summary Jurisdiction (Scotland) Act, 1908.[2] Section 132 (19) of the Children Act, 1908, provided that offences were to be tried under the provisions of the Summary Jurisdiction (Scotland) Acts, and section 18 of the Summary Jurisdiction (Scotland) Act, 1908, enacted that all proceedings for the trial of offences should be instituted by complaint in the form of Schedule C, and should be signed by the prosecutor, and section 2 defined prosecutor as including "any other persons prosecuting in the public interest," under which category the appellants were clearly included.

Argued for the respondent;—A parish council had no title to bring a prosecution under Part I. of the Act. An express title was given to prosecute for offences against Part II., and this in itself was almost sufficient to show that they had no title under Part I. There were other indications in the Act pointing in the same direction. For example, section 6 provided for notice to the procurator-fiscal, which indicated that he was the natural and proper prosecutor, and section 132 (23) enacted that the parish council were not to get the penalties (which they had formerly got under the Act of 1897), which was explicable only on the footing that they were not to have the right to prosecute. None of the conditions were present which had been held to confer a right by implication. As already mentioned, the parish council did not get the penalties,[3] and they had no interest in the matter of such a particular and personal nature as was to be found in all the cases cited by the appellants in which the Court had held that a right to prosecute had been impliedly conferred. The appellants' only interest arose out of the fact that on them was imposed the duty of carrying out the provisions of the Act, but an analogous duty was also present as regarded the prosecutors in *Simpson* v. *The Board of Trade*,[4] and *Rintoul* v. *Scottish Insurance Commissioners*,[5] where private prosecutors had been held to have no title. [The Court did not call for an answer to the argument of the appellants founded on the Summary Jurisdiction (Scotland) Act, 1908.]

Lord Justice-General.—This case has been remarkably well argued to us, but I have no doubt, for my part, what is the decision at which we ought to arrive.

The complaint is presented at the instance of the Parish Council of the Parish of Glasgow against a person named Edward for contravention of certain provisions of the Children Act, 1908, contained in the first eleven sections of the Act, which form Part I. of the Act and relate exclusively to infant life protection. The complaint was met by the defence that there was a fatal defect in the title of the Parish Council to pursue the

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[1] 1913 S. C. (J.) 8, 7 Adam, 14. [2] 8 Edw. VII. cap. 65.

[3] Lockwood v. Chartered Institute of Patent Agents, 1913 S. C. (J.) 8, 7 Adam, 14.

[4] 19 R. (J.) 66, 3 White, 167. [5] 1913 S. C. (J.) 120, 7 Adam, 210.

action. That contention was sustained by the Sheriff-substitute and he gives his reasons in the stated case for coming to the conclusion he reached. With these reasons I am perfectly satisfied.

It is true that, under Part I. of the Act, very clear and definite duties are confided to the Local Authority for the purpose of administering the Act and seeing to the care and control of the infants referred to. Notice is required to be given by persons to whom are entrusted the nourishment and maintenance of these young children, not merely to the Local Authority to which is confided the administration of Part I. of the Act but, in certain cases, to the Procurator-fiscal. These notices are required obviouslyto secure the efficient administration of the statute by the public body; and it was contended to us that its title to prosecute for a contravention of the provisions of this part of the Act was based, not on the terms of the statute itself, or on general grounds of expediency, but on the fact that it was wronged, or injured, or aggrieved, by the contravention of the statutory provisions.

Now, I think it plain that a public authority, to which is confided the administration of an Act of Parliament, is not thereby authorised to prosecute for a contravention of the provisions which it is its duty to administer, and that the failure to observe these statutory provisions does not constitute an "injury" done to the Local Authority. If there were any patrimonial interests at stake here, the question would be totally different. But I cannot conceive any case in which a public body—whether a Government Department or a Local Authority—entrusted with the administration of an Act of Parliament can be said to be aggrieved or injured by failure to observe the statutory provisions.

In Scotland there is set up the machinery by which prosecutions for infringement of statutory provisions require to be conducted, and to that machinery is entrusted, in every instance I think, the prosecution for statutory offences, except where the right to prosecute is expressly conferred; for I can find no example in the books of any instance in which, by reasonable implication from statutory provisions, a right to prosecute is conferred on any public body.

It appears to me that this case is covered by authority if authority were needed, for the same plea was stated in the case of *Simpson* v. *The Board of Trade*.[1] It was there said that, by a violation of the Merchant Shipping Act, the Board of Trade was aggrieved, because the Act of Parliament confided to the Board of Trade the duty of administering the Act of Parliament. Now, it is nothing to the purpose to say, by way of distinguishing this case from the case of *Simpson*,[1] that, in the Act here under consideration, very precise and very definite machinery is provided for the purpose of enabling the Local Authority effectively to administer the Act; for in *Simpson's* case[1] it was clearly recognised that the Merchant Shipping Act of 1854 empowered the Board of Trade "to carry into execution the provisions of the Act," and yet that it could not be said that the Board of Trade was aggrieved if the Act of Parliament was contravened. The Lord Justice-General says in his opinion at p. 73 of the report, "It would be a most extraordinary and unwarrantable stretch of such language

[1] 19 R. (J.) 66, 3 White, 167.

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to represent the department of Government which was concerned with the administration of the Act as aggrieved by the violation of some of its provisions . . . I do not think that on the statute itself the mere contravention of one of the provisions constitutes a grievance in the sense of this Act, or that the Board of Trade can be fairly described as a party aggrieved." And Lord Adam also, at p. 76, says "I think it is idle to say that a public body in the meaning of this section is the party aggrieved by the proceedings here." Lord M'Laren expresses himself to the like effect. If authority, therefore, were necessary, I think there is ample, for Mr Horne quite frankly conceded to us that he could point to no one expression in any one of the eleven sections embraced in this part of the Act from which he could necessarily or reasonably infer a right to prosecute on the part of the Parish Council.

Comment was made upon the fact that power is expressly conferred on the Parish Council to institute prosecutions under the second part of the Act. That is quite true, but it obviously tells rather in favour of the respondent than in favour of the appellants here, because, although the offences set out in the second part of the Act are all of a different description from those set out in the first part of the Act, still, in both instances, it is merely a case of contravening the statutory provisions enacted in the public interest.

I, therefore, come to the conclusion, without hesitation, that the Sheriff-substitute's decision is right and that we ought to answer the question put to us in the affirmative.

LORD GUTHRIE.—I agree. I do not think that the Sheriff-substitute's decision raises any question of real public interest, because throughout Scotland there are recognised prosecutors who will be able to act when any offence arises such as is alleged to have arisen here.

The Sheriff-substitute puts the matter with accuracy when he says that the Act gave the Parish Council no title, either express or implied. That there is no express title is admitted, and by implied title I suppose he means something that would involve a necessary implication, such as a section which referred, even parenthetically, to prosecutions at the instance of the Local Authority.

He also says that they had no personal or pecuniary interest. As regards the former the Sheriff-substitute is not challenged; as regards the latter I cannot assent to Mr Horne's suggestion that they had a pecuniary interest in respect that they might incur greater expense in the course of their administration if such offences were committed. I do not think any of the cases at all favoured the view that a remote interest of that kind could be, in the sense of the decisions, a pecuniary interest. Then the Sheriff-substitute says lastly, "they were not persons aggrieved or injured by the contraventions complained of so as to entitle them to prosecute even with the concurrence of the Procurator-fiscal." It is admitted that no case has hitherto occurred coming directly under this category, and I do not think that we require now to decide whether there may not be cases of that kind where it would be held that the amount of injury was sufficient to give a title, even without a direct pecuniary consequence. The present case in no way approximates to the cases figured.

LORD ORMIDALE.—I agree with your Lordships. The matter appears to me to be concluded by authority. I can see no difference whatever between the present case and the case of *Simpson* v. *The Board of Trade*.[1]

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THE COURT answered the question of law in the affirmative, and dismissed the appeal.

MACKENZIE, INNES, & LOGAN, W.S.—CLARK & MACDONALD, S.S.C.—Agents.

No. 23.

MACBETH & MACLAGAN, Appellants.
ROBERT DUNCAN MACMILLAN (Procurator-Fiscal, Rothesay), Respondent.—*Gillon, A.-D.*

June 15, 1914.

Macbeth & Maclagan v. Macmillan.

Procedure—Administration of Justice—Counsel—Charge against firm—Appeal to High Court—Competency of partner appearing on behalf of firm.

Held that a firm of law-agents, appealing to the High Court of Justiciary against a conviction of failing to pay contributions due in respect of their employees under the National Insurance Act, 1911, could not be represented in the High Court by one of the partners of the firm, but must employ counsel.

HIGH COURT. Lord Justice-General Lord Guthrie. Ld. Ormidale.

J. & A. PEDDIE & IVORY, W.S.—SIR W. S. HALDANE, W.S., Crown Agent—Agents.

No. 24.

MARY ANN M'SPIRITS OR BLACKWOOD, Appellant.—*Duffes.*
JOHN JAMES M'INTYRE (Procurator-Fiscal, Glasgow), Respondent.—*Millar, K.C.—A. Crawford.*

July 6, 1914.

Blackwood v. M'Intyre.

Statutory Offences—Managing a brothel—Manager found "in" a "building" used as a brothel—Two tenements having same access, but separated by common court—Burgh Police (Scotland) Act, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 403.

The Burgh Police (Scotland) Act, 1892, sec. 403, enacts that any house or building reasonably believed to be used as a brothel may be entered under a magistrate's warrant, and "any person found therein" who manages such brothel shall be subject to a penalty.

Certain premises consisted of two separate tenements of dwelling-houses, a front tenement facing the street, and a back tenement separated from the front tenement by a common court. Access to both tenements was obtained by a close running from the street through the front tenement to the common court. A woman found in the front tenement was charged with, and convicted of, managing the back tenement as a brothel.

Held that as the accused had not been found in the back tenement she had not been found "in" a house or building used as a brothel in the sense of the section, and conviction *quashed*.

HIGH COURT. Lord Justice-General. Lord Salvesen. Lord Dewar.

MARY ANN M'SPIRITS OR BLACKWOOD was charged in the Eastern Police Court of Glasgow on a complaint at the instance of John James M'Intyre, Procurator-fiscal, which set forth "that you, being a person found in a house situated at 93½ Green Street, Calton, Glasgow, and occupied by Jane Murray, on the 18th day of No-

[1] 19 R. (J.) 66, 3 White, 167.

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vember 1913, did on said 18th day of November 1913, and for a period of eleven days immediately preceding said date, manage or assist in the management of said house as a brothel, contrary to the Burgh Police (Scotland) Act, 1892, section 403,* duly adopted for the city and royal burgh of Glasgow by the Corporation of the city of Glasgow, in terms of said Burgh Police (Scotland) Act, 1892, section 15, as amended by the Burgh Police (Scotland) Act, 1903, conform to resolution by said corporation of date 18th April 1912, declared by the Sheriff of Lanarkshire on 13th May 1912 to have been so adopted, and on the same date recorded in the Sheriff Court Books of Lanarkshire, at Glasgow."

The magistrates found the accused guilty as libelled, and at her request stated a case for appeal to the High Court of Justiciary.

The case set forth, *inter alia*:—"We found the following facts proved:—That the building known as No. 93½ Green Street, Calton, Glasgow, consists of two tenements of dwelling-houses, one fronting the street and the other a back tenement separate from the front tenement, there being a common court about twenty yards wide between the two tenements; that the only access to both tenements is by the close forming No. 93½ Green Street aforesaid, which runs from the street through the front tenement to said court, that the whole building is tenanted by Jane Murray, Glasgow, and is used by her as a farmed-out property; that is, the rooms have a certain amount of furniture and crockery in them and are let out by the night to parties desiring a night's lodging: That the accused was the caretaker of said building employed by the said Jane Murray, and lived in one of the rooms in the front tenement: That the said back tenement had been managed by the accused as a brothel for eleven days prior to the date libelled, . . . [that certain officers of police entered a room in the back tenement on the date libelled] and that at the time the said officers of police entered the building the accused was in the room in the front tenement occupied by her, and was sent for by the said police officers and brought to said room in back tenement.

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts:—Sec. 403. "The magistrate may, on a complaint by the burgh prosecutor, grant warrant to enter into and search from time to time, during any period not exceeding thirty days from the date of such warrant, any house or building, or part of a house or building, or other place, which on examination of the chief constable or an inspector or lieutenant of police and at least one other person, not holding any office or situation under this Act, the magistrate is satisfied there is reasonable ground for believing to be kept, managed, or used, or suffered to be used as a brothel; and any constable under authority of such warrant may take into custody and convey to the police-office the occupier of such house or building, or part of a house or building or place, or any person found therein who either temporarily or permanently manages or assists in the management of such brothel, and every such person shall be liable on conviction before the Sheriff or two magistrates of being the occupier of, or of temporarily or permanently managing or assisting in the management of such brothel, to a penalty not exceeding twenty pounds, or to imprisonment without the option of a fine, for any period not exceeding sixty days, and failing payment of any such penalty, to imprisonment not exceeding sixty days. . . ."

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"We then heard the assistant Procurator-fiscal for the prosecution and the accused's law-agent for the defence.

"On the facts above stated we held in law that the building known as 93½ Green Street aforesaid, comprising the front tenement and the back tenement as aforesaid, is a 'building' within the meaning of section 403 of the Burgh Police (Scotland) Act, and that the accused was a person found in said building in terms of said section 403 of said Act, and found her guilty as libelled and passed sentence of a fine of £5, and in default of payment thirty days' imprisonment."

The questions of law for the opinion of the Court included the following:—"(1) Was the accused on the facts stated a person found in a building managed as a brothel within the meaning of section 403 of the Burgh Police (Scotland) Act, 1892?"

The case was heard before the High Court of Justiciary on 6th July 1914, when counsel for the appellant argued, *inter alia*, that the appellant had not been found "in" a "building" used as a brothel. In the course of the argument on this point the undernoted authorities were referred to.[1]

Lord Justice-General.—This conviction cannot, I think, stand. The accused was charged before the Magistrates in Glasgow with a contravention of the 403rd section of the Burgh Police (Scotland) Act, 1892. The charge against her was that she managed or assisted in the management of a certain house as a brothel. But it is essential to a conviction under that clause of the Act that the accused person be found in the house which it is said she managed as a brothel. Now, in this case, the accused was found in the front tenement of a certain house facing Green Street, Calton, and it is not said that she managed that house—that tenement—as a brothel. It is alleged and found to be proved by the Magistrates that she managed the back tenement as a brothel, but she was not found in the back tenement.

The stated case sets out, quite clearly, what is the difference between the two tenements. The building, it is said, consists of two separate tenements of dwelling-houses, one fronting the street and the other a back tenement separated from the front tenement, with a common court between them. Now, it appears to me that, on these facts, the Magistrates were not warranted in finding in law that these two separate and distinct tenements constituted a building in the sense of the Act; and, accordingly, that the complainer failed to prove his case, it being absolutely essential to secure a conviction that the accused should be found in the building which it is said she managed as a brothel.

This case, it seems to me, stands clearly distinguished from the case of *M'Intyre* v. *Thomson*,[2] which was strongly relied upon by Mr Crawford, for there the accused was found on the landing outside the house which he unquestionably owned and managed as a brothel. And, although no doubt the landing of the stair led to other houses as well as to the house

[1] M'Intyre v. Thomson, 1912 S. C. (J.) 19, 6 Adam, 564; Martin v. M'Intyre, 1910 S. C. (J.) 72, 6 Adam, 252; Woods v. Lindsay, 1910 S. C. (J.) 88, 6 Adam, 294.

[2] 1912 S. C. (J.) 19, 6 Adam, 564.

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which he occupied, it was the one and only access to his house. Accordingly, as Lord Dundas pointed out, the place where the police came on him was the necessary and only access to the premises, and, although other persons had no doubt common rights in the passage, it seemed to his Lordship that none the less was he in the house in the circumstances stated in the case. And I observe that Lord Salvesen and Lord Guthrie gave opinions to the like effect. In the present instance the accused was found in a separate house altogether, not in the access to this house; and accordingly, it appears to me that an all-essential preliminary to a conviction was not established. [His Lordship then dealt with other questions with which this report is not concerned.]

Lord Salvesen.—I am entirely of the same opinion. The Magistrates have held that two separate buildings of dwelling-houses constituted one building because they have a common access and because a person residing in one used the other for a particular business. I do not think they were right in so deciding. It seems to me that the section has in view what, in popular language, is a building, that is to say, a separate physical structure; and that a person is not found in a particular building if he or she is, at the moment, in another and separate building.

I think the case is clearly distinguished from that of *M'Intyre* v. *Thomson*,[1] where there was only one building in question, but where part of that building was used for the purposes of a brothel, and we held that the landing or staircase by which the occupier of the building obtained access to it formed part of the house within the meaning of section 142 of the Glasgow Police Act, 1866.

If Mr Crawford's argument were right, it would follow that the two buildings might be separated to any extent if, in point of fact, they were used for the purposes of the same business. Now, that is not what the statute means. This woman was not found within the building with regard to which the Magistrates held that it was used as a brothel. She was sent for by the police to come from another building in which she was, in point of fact, residing, and she was in that sense found in the back building, because she had been sent for by the police to come there. In other words, she was not found in the brothel, but brought there. Accordingly I agree with your Lordship in holding that the first question should be answered in the negative. [His Lordship then dealt with another question with which this report is not concerned.]

Lord Dewar.—I concur.

The Court answered the first question of law in the negative, sustained the appeal, and quashed the conviction.

James G. Bryson, Solicitor—Campbell & Smith, S.S.C.—Agents.

[1] 1912 S. C. (J.) 19, 6 Adam, 564.

GUISEPPE PORCELLI, Appellant.—*Sandeman, K.C.—Lippe.*
JOHN JAMES M'INTYRE (Procurator-fiscal, Glasgow), Respondent.—*A. O. M. Mackenzie, K.C.—M. P. Fraser.*

No. 25.
July 6, 1914.

Porcelli v. M'Intyre.

Statutory Offences—Registration of places for public refreshment— Ice-cream shop—Ice-cream vendor already registered under Dairies, Cowsheds, and Milkshops Order, 1885—Necessity for registration under Burgh Police (Scotland) Acts, 1903 and 1911—Dairies, Cowsheds, and Milkshops Order, 1885, sec. 6—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 82—Burgh Police (Scotland) Amendment Act, 1911 (1 and 2 Geo. V. cap. 57), secs. 1 and 3.

The Burgh Police (Scotland) Acts, 1903 and 1911, impose a penalty on any person using premises as "a place for public refreshment" between certain hours without being registered in a register to be kept for that purpose; but by sec. 3 of the 1911 Act it is enacted that the expression "place for public refreshment" does not extend to "any premises in respect of which a licence or other sanction or permit is for the time being in force, issued in virtue of specific powers conferred on a town-council."

Held that the registration of an ice-cream vendor in a register of purveyors of milk, kept by the Corporation of Glasgow under the Dairies, Cowsheds, and Milkshops Order, 1885, was not "a licence or other sanction or permit" with regard to his premises in the sense of the above section; and accordingly that he was not exempt from registration under the Burgh Police Acts as a person using premises as a place for public refreshment.

HIGH COURT. Lord Justice-General. Lord Salvesen. Lord Dewar.

GUISEPPE PORCELLI, ice-cream dealer and confectioner, 27 and 29 London Street, Glasgow, was charged in the Central Police Court, Glasgow, on a complaint at the instance of John James M'Intyre, Procurator-fiscal, which set forth "that, being the occupier of premises situated at 27 and 29 London Street, Glasgow, you did, on Saturday 7th March 1914, between the hours of eight o'clock at night of said day and five o'clock of the following morning, keep or use, or suffer to be kept or used, said premises as a place for public refreshment without being registered as required by the Acts hereinafter mentioned; contrary to the Burgh Police (Scotland) Act, 1903, section 82 (1), as amended by section 1 (1) of the Burgh Police (Scotland) Amendment Act, 1911,* said section 82 of the

* The Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), enacts:—Sec. 82 (1). "Every person who shall keep, or suffer to be kept or used, or use any house, building, part of a building, or other premises, as an ice-cream shop or aerated water shop, without being registered in a register to be kept by the town-council, who are hereby required to keep a register for that purpose, in which they shall enter the names of applicants without charge, shall be liable to a penalty. . . ."

The Burgh Police (Scotland) Amendment Act, 1911 (1 and 2 Geo. V. cap. 51), enacts:—

Sec. 1 (1). "Subsec. (1) . . . of section 82 of the Burgh Police (Scotland) Act, 1903, shall . . . be amended by the omission of the words 'an ice-cream shop or aerated water shop' occurring therein, and by the insertion in lieu thereof of the words 'a place for public refreshment at any time between the hours of eight of the clock at night and five of the clock of the following morning or at any time on Sunday.'"

Sec. 3. "In section 82 of the Burgh Police (Scotland) Act, 1903, as amended by this Act, the expression 'place for public refreshment'

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Burgh Police (Scotland) Act, 1903, having been adopted by the Corporation of the city of Glasgow by resolution on 25th April 1905, and duly recorded in the Sheriff Court books of Lanarkshire at Glasgow on 12th May 1905."

The Police Court Judge, having found the accused guilty as libelled, imposed a fine; and at his request stated a case for appeal to the High Court of Justiciary.

The case set forth, *inter alia*:—

"The following are the facts found proved:—The appellant is the occupier of an ice-cream and confectionery shop situated at 27 and 29 London Street, Glasgow, which he acquired in 1906. About 11.15 P.M. on 7th March 1914 two police-officers of the Glasgow Police observed the shop of the appellant at 27 and 29 London Street aforesaid open, and on entering the shop found a number of persons therein. Some of them were consuming aerated waters and ice-cream, and some were being supplied with further refreshments of the same class, and the premises were being used as a place for public refreshment. Appellant was personally present, and the police-officers intimated to him that the case would be reported for prosecution. He replied that he had been advised by his law-agent that he did not come under the registration requirement. . . .

"Previous to 1894 the provisions of the Dairies, Cowsheds, and Milkshops Order did not apply to a dealer in ice-cream, but by the Glasgow Corporation and Police Act, 1895, section 28, the term 'purveyor of milk' was extended to include 'any dealer in ice-cream.' Since 1895 dealers in ice-cream have been registered in

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includes any building, or part of a building, or other place of public resort for the sale for consumption therein of provisions or refreshments of any kind (including confectionery, ice-cream as defined in the said section, fruit, and aerated waters), but does not extend to any premises certificated or registered under the Licensing (Scotland) Act, 1903, or any premises in respect of which a licence or other sanction or permit is for the time being in force, issued in virtue of specific powers conferred on a town-council or other authority by the Burgh Police (Scotland) Acts or any other statute."

The Dairies, Cowsheds, and Milkshops Order, 1885 (issued by the Privy Council in terms of the powers conferred by the Contagious Diseases (Animals) Act, 1878 (41 and 42 Vict. cap. 74)), enacts:—"6. (1) It shall not be lawful for any person to carry on in the district of any local authority the trade of cowkeeper, dairyman, or purveyor of milk unless he is registered as such therein in accordance with this article. (2) Every local authority shall keep a register of persons from time to time carrying on in their district the trade of cowkeepers, dairymen, or purveyors of milk, and shall from time to time revise and correct the register. (3) The local authority shall register every such person, but the fact of such registration shall not be deemed to authorise such person to occupy as a dairy or cowshed any particular building, or in any way preclude any proceedings being taken against such person for non-compliance with or infringement of any of the provisions of this Order or any regulations made thereunder."

The Glasgow Corporation and Police Act, 1895 (58 and 59 Vict. cap. cxliii.), enacts:—Sec. 28. "In the application within the city of . . . the Dairies, Cowsheds, and Milkshops Order of 1885 . . . 'purveyor of milk' includes manufacturer of, merchant, or dealer in ice-cream, or any similar commodity manufactured or made, either wholly or in part, from or with milk or cream."

the register kept by the Corporation under the 1885 Act and other milkshop statutes. When appellant acquired the premises in London Street he was entered in the register under the Dairies Order on 8th May 1906, as a purveyor of milk, and his name still remains as such on that register.

"In the Burgh Police (Scotland) Act, 1903, a provision was made requiring that every person keeping premises as an ice-cream shop must be registered in a register for that purpose kept by the Town-Council. In 1911, by the Burgh Police (Scotland) Amendment Act, 1911, section 3, an important change in the 1903 Act was made. The provision of section 82 of the 1903 Act originally applicable to *an ice-cream shop or aerated water shop* was altered and extended to apply to a place used for public refreshment at any time between the hours of 8 o'clock of the night, and 5 of the clock of the following morning, or at any time on Sunday. After the passage of the 1911 Act appellant's name and his premises at 27 and 29 London Street were on his application entered in the Register of Places for Public Refreshment, and remained upon that register until 6th March 1914, when he formally withdrew the entry. The entry was cancelled on the morning of 7th March 1914. That afternoon there was no entry of appellant's name or of his premises on the register."

The case further set forth:—

"At the trial appellant's defence was that his premises are a registered milkshop; that he is protected by the exception in the 1911 Act at the end of section 3 as holding a licence or other sanction or permit issued in virtue of specific powers conferred on the Town-Council by statute; and that therefore he is not liable to register under the 1903 and 1911 Acts.

"Previous to the 1911 Act the requirement of registration had been applicable to any ice-cream shop or aerated water shop, but by the 1911 Act, section 1, subsection 1, the provision ceased to be applicable to any such shop unless it was used as a place for public refreshment late at night or in the early morning. Section 3 expressly declared that this requirement did not 'extend to any premises certificated or registered under the Licensing (Scotland) Act, 1903, or any premises in respect of which a licence or other sanction or permit is for the time being in force, issued in virtue of specific powers conferred on a town-council or other authority by the Burgh Police (Scotland) Acts, or any other statute.' It seemed to me that this clause of exception was framed with a distinct view of a licence or permit under the liquor laws as the primary exception contemplated, and of some analogous licence or permit of kindred order being the only other class of exception. I was unable to find that appellant's registration as a purveyor of milk under the Dairies and Milkshops Order gave any solid ground for his contention that it amounted either for himself or for his premises to licence, sanction, or permit at all. Holding that appellant's premises came under the requirement for registration if used as a place for public refreshment, I convicted him of the charge as libelled, and fined him as above stated."

The questions of law for the opinion of the Court were:—"(1) Did appellant's premises, which are used as a place for public refreshment, require to be registered as such in the Register of Places for Public Refreshment in terms of the Burgh Police (Scotland)

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Act, 1903, section 82 (1), as amended by the Burgh Police (Scotland) Amendment Act, 1911, section 1 (1)? or, (2) Were said premises, in view of the entry in the Register kept under the Dairies, Cowsheds, and Milkshops Order exempt from registration as a place for public refreshment by virtue of the Burgh Police (Scotland) Amendment Act, 1911, section 3?"

The case was heard before the High Court on 6th July 1914.

Argued for the appellant;—The appellant was registered as a purveyor of milk under the Dairies, Cowsheds, and Milkshops Order, 1885, and in respect of that registration he possessed "a licence or other sanction or permit" which, by section 3 of the Burgh Police Act of 1911, exempted him from registration as a keeper of a place for public refreshment.

Argued for the respondent;—The register kept under the Dairies Order, 1885, was a register of persons, and registration therein gave no licence to occupy any particular premises, whereas the exemption in section 3 of the Burgh Police Act, 1911, expressly referred to licensed premises. The exemption in that section had no reference to registration in such a register as was instituted by the Dairies Order for a purely sanitary purpose. The purpose of registration under the Burgh Police Acts was to regulate the hours of trading with a social object, and the exemption was only intended to apply to places already subject to similar regulation. If ice-cream shops were to be exempt from all regulation, the main purpose of the provisions as to registration of places for public refreshment would be entirely defeated, because, by selling ice-cream and registering under the Dairies Order, the keeper of any place of refreshment could escape these provisions.

LORD JUSTICE-GENERAL.—It has frequently been observed in this Court that it is no part of our duty to consider the intention or the policy of the Legislature in passing an Act of Parliament. We are required to put a construction upon its terms. It is equally true that it is no part of our duty to defeat the purpose of an Act of Parliament when we are called upon to construe it.

In this case, in order to give effect to the contention of the appellant, it appears to me we should require to do violence to the terms of the statute. A complaint was made against him for a contravention of the 82nd section of the Burgh Police (Scotland) Act, 1903, as amended by the Burgh Police (Scotland) Amendment Act, 1911. It is conceded that he did contravene that Act of Parliament if it applies to him, but he contends that it does not apply to him in respect that he, at the present moment is, or was at the time when the prosecution was brought, on the register of milksellers which is kept in terms of the Dairies, Cowsheds, and Milkshops Order. That order, which is dated in 1885, was extended to ice-cream sellers in Glasgow by the Glasgow Corporation and Police Act of 1895. In a single sentence, his defence is this—that the premises which he now occupies are a registered milkshop. In my opinion, that is a wholly irrelevant defence.

Even if his premises were a registered milkshop, they do not appear to me to be embraced within the exceptions set out in section 3 of the Burgh Police (Scotland) Amendment Act, 1911. The part of that clause

to which the appellant appeals in support of his defence states in effect that his premises are to be exempted if he holds a licence for them or a sanction for them or a permit for them issued in virtue of specific powers conferred upon a town-council or other authority by any statute.

Now, in respect of the premises at 27 and 29 London Street, Glasgow, the appellant, at the present moment, holds no licence, no sanction, and no permit issued to him in virtue of any powers whatsoever. He is upon a register of persons who are entitled to carry on the business of ice-cream selling and milk selling by virtue of section 6 (1) of the Dairies Order, but it is expressly set out in the order that the insertion of his name in that register is not to be deemed to authorise him to keep as a dairy or milk-shop any particular building. Reading the order as applied by the statute of 1895, his registration is not to be deemed to authorise him to occupy as an ice-cream shop any particular building. And, accordingly, it is a pure misnomer to say that his premises are registered. They are expressly excluded from licence or permission or sanction, or even from the register, by the terms of section 6 of the Dairies Order to which I have just referred. The object of the order is to secure, by sections 7 and 8, that before any premises can be occupied as a milkshop they must comply with certain regulations which are designed to make these premises healthy premises from which unwholesome milk cannot come.

Now, it appears to me that registration of premises is an impossibility under the Dairies Order of 1885, because that register may exist for an indefinite time. The magistrates are enjoined to revise it and correct it as they think proper from time to time, but, during the period it exists, and during the period the appellant's name is upon it, he may occupy a dozen different premises in all of which he may continue his business, provided, not that they are on the register, but provided that they are suitable, *i.e.*, that they comply with the provisions of sections 7 and 8.

I agree with the Stipendiary Magistrate in the ground of judgment which he has adopted—that to place the interpretation upon section 3 of the Burgh Police Act of 1911 which the appellant contended for would be to defeat the prior part of the section, and to read that part of the section out of the Act altogether, and that the rule of *ejusdem generis* is clearly applicable to this case. But, speaking for myself, and myself alone, I hold that these premises are not registered premises under any Act of Parliament or Order which gives sanction, permission, or licence to sell ice-cream or anything else in them; and, accordingly, that the conviction ought to stand, and that we ought to answer the first question in the affirmative and the second question in the negative.

Lord Salvesen.—This case turns entirely on the exemption clause of section 3 of the 1911 Burgh Police Act. I agree with your Lordship that the appellant here does not hold a licence or other sanction or permit in respect of any premises. He is registered under the Dairies, Cowsheds, and Milkshops Order, 1885, as a purveyor of milk, and he is subject, under that Order, to certain regulations in respect of the premises which he occupies, these regulations having been framed for reasons of public health. But the premises themselves are not sanctioned or licensed.

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Apart from that perhaps somewhat technical construction of the statute, it appears to me that it would defeat the whole object of the Legislature if we were to adopt the construction for which the appellant contends. We should practically have to read section 3, which expressly includes ice-cream shops, as not applying to any ice-cream shops which were in existence at the time when the Act was passed, but as only having a possible application to subsequently established places of refreshment of the same kind.

I think there is a sufficiently clear indication in the statute that the exemption clause does not apply to places with which the main clause expressly deals, and that view is confirmed by a consideration of section 4, the effect of which appears to be that, after the expiration of three months from the date of the passing of this 1911 Amendment Act, all the regulations existing under previous bye-laws or statutes applicable to ice-cream shops are swept away. If the appellant's contention were well-founded, he would now be in the privileged position of being able to carry on his business without regulation by the local authority. Plainly the Act was not intended to have that effect. The exemption clause may reasonably be accounted for on the supposition that it was intended to apply to places of public refreshment—a theatre where there are bars was suggested by way of illustration—where there was a certificate or licence or sanction in the proper sense issued by the local authority in respect of the premises, and which, being already under public control, required no further regulation in the public interest.

LORD DEWAR.—I concur.

THE COURT answered the first question of law in the affirmative, and the second in the negative.

MENZIES, BRUCE-LOW, & THOMSON, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

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Traynor v. Macpherson.

JOHN TRAYNOR, Appellant.—*M'Lennan, K.C.—Ingram.*
CHARLES ANGUS MACPHERSON (Police Court Prosecutor, Edinburgh), Respondent.—*Macmillan, K.C.—MacRobert.*

Statutory Offences—Betting—Betting-house—Ready-money or credit betting—Betting Act, 1853 (16 *and* 17 *Vict. cap.* 119), *sec.* 1.

The Betting Act, 1853, by section 1, prohibits the keeping of any house or office for the receipt of money as the consideration for a promise to pay money thereafter on any event or contingency of or relating to any horse race.

A bookmaker occupied premises in Edinburgh, where he carried on his business by receiving communications from his clients by telephone, the client subsequently sending by post a note of the bet along with a postal order for the sum staked. In a prosecution of the bookmaker for contravention of the Act no instance was proved of money being received by the bookmaker before the race on which it was staked was run, but it was proved that clients did not receive their winnings until after their money had been received by the bookmaker.

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Held (*diss.* Lord Salvesen) that the bookmaker had committed a contravention of the Act.

Opinions reserved (*per* the Lord Justice-General and Lord Dewar) as to whether a credit system of betting would be an infringement of the Act.

HIGH COURT. Lord Justice-General. Lord Salvesen. Lord Dewar.

JOHN TRAYNOR was charged in the Edinburgh Police Court at the instance of Charles Angus Macpherson, public prosecutor, on a summary complaint which set forth "that you being the occupier of, or person using, a room or office at No. 85 Hanover Street, Edinburgh, and a room or office at No. 116 Rose Street, Edinburgh, between 1st and 16th, both days of January 1914, both days inclusive, did open, keep, and use said rooms or offices for the purpose of money or other valuable thing being received by you, or on your behalf, as the consideration for an undertaking, promise, or agreement, express or implied, to pay thereafter money on events or contingencies of or relating to horse races, contrary to the Betting Act, 1853, sections 1 and 3,* as extended to Scotland by the Betting Act, 1874.†"

On 12th March 1914 the Judge of Police, after hearing evidence, found the accused guilty as libelled and fined him £50 with the alternative of three months' imprisonment.

The accused obtained a stated case for appeal to the High Court of Justiciary. The case set forth:—"The following facts were proved:—1. During the period libelled the appellant was occupier of an office at 85 Hanover Street, and of another at 116 Rose Street, both in Edinburgh. 2. During said period large numbers of letters were daily received by post at the office at 85 Hanover Street, and after each postal delivery, these letters were collected by one of the appellant's servants, and taken to the office at 116 Rose Street, where they were opened and dealt with. 3. That on 14th January 1914 a warrant was obtained to search both offices, and on 16th January 1914 said warrant was executed at 116 Rose Street. 4. The police officers arrived at the premises about 3.40 P.M. on said last-mentioned date, and although the appellant was absent at the moment of their entry, he arrived shortly afterwards. 5. The premises consisted of four apartments utilised as an office with three telephones and two safes. There was found a large quantity of betting material relating to horse racing carried on during the period libelled. 6. In one of the safes the police found a small brief bag which was locked. The appellant, on being asked what

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* The Betting Act, 1853 (16 and 17 Vict. cap. 119), enacts:—Sec. 1. "No house, office, room, or other place shall be opened, kept or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise. . . ."

† 37 and 38 Vict. cap. 15, sec. 4.

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it contained, replied that there was nothing of any value in it; just one or two private papers. When required to open same, he stated that he had not the key, but, on the police threatening to force it open, he eventually produced the key, and the police, on opening the bag found therein the parcel of 539 postal orders, amounting in value to £144, 7s. referred to in next article.

"7. In the premises there were found and taken possession of by the police, *inter alia*, the following:—(1) The said 539 postal orders amounting in value to £144, 7s. These postal orders varied in amount from 6d. to 21s., and for the most part bore dates within the period libelled. The majority of these were of small value, there being 9 at 6d., 129 at 1s., 60 at 2s., 52 at 3s., 74 at 4s., and 57 at 5s. (2) A large quantity of betting slips or investment forms containing bets on horse races run on 7th, 9th, 10th, 13th, 14th, and 15th January 1914. The amounts invested corresponded in a large proportion of instances with amounts in the postal orders above referred to, while the places from which they had been despatched likewise corresponded in a similar proportion with the post marks on the postal orders. The investment forms which were used in the great majority of instances were published by the appellant, and contained printed thereon the addresses of both his offices, with the date, name and address of sender, amount invested, and name of horse or horses backed filled in in blank spaces reserved for the purpose. A number of these slips bore on their face or by letter attached that accompanying them had been sent money to the value of the particular bet. . . . None of the slips referred to were proved by the senders. (3) A large number of unused investment forms similar to the above. (4) A number of ready stamped envelopes with address printed thereon 'John Traynor, 85 Hanover Street, Edinburgh.' (5) Two books, one for 1913 and the other for 1914 containing the conditions upon which the appellant was prepared to bet with his clients. Rule 14 reads, 'Letter commissions a specialty. Payment same night.' (6) Eight betting slips afterwards identified by the senders.

"8. Specific betting transactions by four individuals with the appellant during the period libelled were proved. In each case the betting slips sent to the appellant were identified by the senders, who stated that therewith they had sent postal orders for the exact amount invested, and explained the circumstances, as after stated, under which they did so. The said postal orders were not identified by them. Said slips were addressed to the appellant at 85 Hanover Street, and were among those seized in the premises at 116 Rose Street on 16th January 1914. In each case the bets were sent on the footing that if successful the sender would receive from the appellant the winnings due.

"9. The following are the specific transactions spoken to by the said four witnesses:—(*a*) Alexander Dickson, 9 Earlston Place, identified a slip sent by him, containing a bet for 2s., on 15th January 1914, on a race to be run on the same date, accompanied by a postal order for said amount. He posted it at Abbeyhill at 1.35 P.M., being prior to the hour of the race or races in which the horses he backed were to run. He had no prior communication with the appellant before putting on this bet, and had no arrangement for credit. There was no racing on 15th January 1914 owing to frost, and the race upon which the bet was laid was not run.

(*b*) William Gillan, 98 Montgomery Street, identified a slip sent by him, containing a bet for 2s., on 14th January 1914, and enclosing postal order for said amount. On the following day he wrote in these terms to the appellant:—'I sent 2s. yesterday as follows:—1s. each way "Mr Peffer." This horse did not run, so please make this bet for to-day 1s. each way "Sentry," 3.30 race.' As no racing took place on 15th January, he received back his money from the appellant on 16th January, by post, the one communication crossing the other. Witness telephoned the bet to the appellant in the morning of the 14th, and thereafter in the afternoon posted on the slip with the postal order. This was his first bet with the appellant, and he had no arrangement for credit, having had no communication with him thereanent. (*c*) Arthur James Warner, 34 Brunswick Road, Edinburgh, identified two slips sent by him on 14th and 15th January respectively. The former was a bet of 2s. 6d., along with which he sent a postal order for that amount. He received 4s. of winnings on the morning of 15th January, and thereafter, same date, sent a bet of 6s. together with postal order for that amount. He subsequently had the 6s. returned owing to no race taking place on 15th January. In each case he telephoned the bet in the morning, and posted the slip and the postal order therefor late in the afternoon, but in no case did he get a settlement of his winnings until after the appellant had received his money. (*d*) James Alexander, 4 Lauriston Park, Edinburgh, identified four slips sent by him on 9th, 10th, 13th, and 14th January 1914. These were bets of 8s., 5s., 7s., and 6s. respectively; along with each he sent postal orders for the amount invested. In each case he telephoned the bet in the morning, and posted on the slip and the postal order later in the afternoon. He had no credit from the appellant, and did not want it, and on no occasion had he asked for it. He had had other betting transactions with the appellant, and on no occasion had he received any winnings that were due him until after the appellant had received his money.

"10. It was maintained that in respect of the practice of the three last-named witnesses to telephone the bet in the morning and send on the written slip and postal orders later in the day, there was only disclosed a system of credit betting on the part of the appellant, but I was satisfied that in each case there was deposit of money in advance as the consideration for the appellant's undertaking to pay over any winnings that might be due."

The questions of law for the opinion of the Court included:—"(2) On the facts stated, could I competently find the appellant guilty of the offence charged?"

The case was heard before the High Court on 6th and 11th July 1914.

Argued for the appellant;—In order to establish a contravention of the Betting Act it was necessary to show that the bookmaker received money from his client before the decision of the event on which the bet was made. If the bet was made by the bookmaker, not in consideration of an immediate money payment, but on the faith of a future payment by the client if he lost his bet, there was no contravention of the Act.[1] It was not found proved in the case

[1] Powell v. Kempton Park Race Course Co., [1899] A. C. 143, *per* Lord James, at p. 192; Traynor v. Macpherson, 1911 S. C. (J.) 54, 6 Adam, 407.

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that the appellant had ever received money before a race was run, indeed, it appeared from the findings that in every case the money sent by the clients must have been received after the events were decided. But even if money had sometimes been received before the race was run, that was an ultroneous act on the part of the client and was not part of the accused's system. The system disclosed was a system of credit betting, which was not struck at by the Act. It was immaterial when the accused paid out the winnings, if the bets were accepted and the liability incurred before the payments were received. Counsel also referred to the undernoted authorities.[1]

Argued for the respondent;—It was immaterial whether the bookmaker received the money before or after the event. The essential question was whether the money was sent by the client as the consideration for which the bookmaker undertook to pay money on a contingency. It appeared from the facts found proved that the sending of the money by the client was a necessary preliminary to the bookmaker honouring his bet. In no case were winnings sent to a client until after his money had been received. The evidence adduced in this case was sufficient, on the authorities, to justify the magistrate in holding that the offence had been proved.[2]

At advising on 18th July 1914,—

Lord Justice-General.—This is undeniably an important case, although, as your Lordships are aware, I have not found it attended with difficulty.

The appellant was charged before the Magistrate with a contravention of certain sections of the Betting Act of 1853, as extended to Scotland by the Betting Act of 1874. What he was accused of doing was keeping and using certain premises at 116 Rose Street, Edinburgh, for the purpose of money being received by him as the consideration for an undertaking to pay thereafter money on events or contingencies of or relating to horse racing. In plain and simple language, the contravention charged was this, that he kept these premises at 116 Rose Street for the purpose of receiving cash from senders on an undertaking given by him that he would send money to the people who sent him the cash, if the horses which they backed won the races for which they were backed. And, after evidence led, the Magistrate came to the conclusion that the facts which he found proved warranted a conviction.

The question we have to consider is whether or no the facts, as set out in the stated case, were sufficient to warrant the Magistrate's decision? I think they were, for what was found in the premises at 116 Rose Street when search was made leaves no doubt in my mind that the premises

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[1] Duff v. Neilson, (1892) 20 R. (J.) 33, 3 White, 399; Hodgsons v. Macpherson, 1913 S. C. (J.) 68, 7 Adam, 118; Stoddart v. Hawke, [1902] 1 K. B. 353.

[2] Hart v. M'Creadie, (1899) 2 F. (J.) 1, 3 Adam, 35; Maguire v. Renton, 1909 S. C. (J.) 21, 5 Adam, 652; M'Connell v. Brennan, [1908] 2 I. R. 411, *per* Gibson, J., at p. 421; Rex v. Mortimer, [1911] 1 K. B. 70, *per* Lord Alverstone, C.J., at p. 75.

were used for receiving money to be retained by the appellant, and that the consideration which the appellant gave for the money was an undertaking to pay money to those who sent the cash, when the horses which they backed won the races for which they were backed. In the premises there were found 539 postal orders for small sums, amounting in all to £144, 7s. Upwards of a hundred of the postal orders were for one shilling, and a large number of them were for four and five shillings. That money was received undoubtedly in the premises, and it was unquestionably retained by the appellant, for there is no suggestion in the case that the 539 postal orders were found there by accident, and that, if the police had not anticipated the appellant, he would have sent the cash back to those who sent it. And the only question the Magistrate had to consider was—For what purpose was the money sent? What was the consideration which the appellant gave for the £144, 7s. of cash which he received in these premises?

The evidence led before the Magistrate left no doubt upon that question, because there were found hundreds of betting slips with the appellant's name upon them, and letters; and in hundreds of cases it was found that the betting slips and letters corresponded with hundreds of the postal orders. "The amounts invested," we are told, "corresponded, in a large proportion of instances, with the amounts in the postal orders above referred to, while the places from which they had been dispatched likewise corresponded in a similar proportion with the postmarks on the postal orders. The investment forms which were used in the great majority of instances were published by the appellant, and contained printed thereon the addresses of both his offices, with the date, name, and address of the sender, amount invested, and name of horse or horses backed filled in in blank spaces reserved for the purpose. A number of these slips bore on their face or by letter attached that accompanying them had been sent money to the value of the particular bet." It is nothing to the purpose, of course, to say that none of the slips were proved by the sender. There they were on the premises. 539 persons sent cash which the appellant retained, and the only consideration which he gave for that cash was an undertaking that he would pay them the winnings when the horses which they backed won.

Now it is said, no doubt, that all of these postal orders and betting slips might have arrived at 116 Rose Street after the race had been run. I ask—What then? The statute makes no reference whatever to the date when the cash is received. But the statute is very specific regarding the consideration which is given for the cash. The statute draws no distinction between cash being received before the race is run or after the race is run. All that the statute requires in order to constitute an offence against it is that the premises be kept open for the purpose of receiving cash for which the receiver gives a consideration, and the consideration he gives is to pay the senders money when the backed horses win. Accordingly I should have thought that the Magistrate had adequate evidence before him to convict on the facts which I have just narrated.

It was urged further, however, that the bets may all have been made

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on the morning of the day by telephone, and that the bargain was then concluded, while the money was sent on at a later period. Once more I ask—What then? The statute says nothing about betting, so far as I am aware. The statute asks nothing except—Are the premises kept open for the purpose of receiving money as the consideration for an undertaking to pay thereafter money on events or contingencies of or relating to horse racing?

But the Magistrate went on to investigate four specific and distinct cases on which, apparently, he rests his judgment. These cases certainly present three or four elements in common. (First) In all four cases the bettors sent their postal orders to the appellant, and he kept them. (Second) These postal orders were accompanied by investment slips or letters in which the senders told the appellant what he was to do with the money—the horses he was to back, and the races for which they were to be backed. And (third) in no instance were winnings ever paid except after the cash had been received. Now, these are the features which are common to all the cases; and it is nothing to the purpose to say that, when a race was off, the money was returned to the bettor, for it had been received, and received for the purpose specifically mentioned in the statute. Equally little to the purpose is it to say that the bets may have been concluded, and were concluded, by telephone before the race was run, for it is certain that in no instance were winnings paid to any man until after his cash had been received. The Magistrate was, therefore, well entitled to reach the conclusion which he did, for, in every instance, there was a deposit of money in advance as a consideration for the appellant's undertaking to pay over any winnings that might be due.

Throughout the opinion I have just expressed I have assumed that the statute specifically and clearly contemplates the payment of money by the man who keeps the premises if he has received cash from the bettor. The statute, when it speaks of "paying money thereafter," apparently speaks of money being paid after money has reached the premises. Now, that was the case in all the instances which were adduced. But I am not to be held as concurring in the view that the cash must be paid by the keeper of the premises after he has received cash from the bettors. It seems to me, so far as I can at present judge, to be wholly immaterial that cash is sent after cash has been received. What is the essence of the matter, so far as I can judge, is that the consideration given for the cash received is an undertaking to pay money upon certain contingencies relating to horse races, and, if that essential condition is satisfied, it does not appear to me to be material to consider what was the date when the money was actually received. What is material and what is the essential matter is the consideration that was undertaken to be given by the receiver to the sender in return for the cash sent.

I desire expressly to reserve my opinion whether or no a credit system of betting would be an infringement of this Act of Parliament. It is said, no doubt, in the present case that the appellant intimated clearly to the public and to his clients that he would receive no money in advance; that he proposed to conduct his betting transactions upon credit principles; and that, if clients chose to send money in advance, that was their affair

and not his, but that that was not the system on which he carried on his business. To this, I think, there are two answers. The first is that *de facto*, in every case, he received the cash and retained the cash, and the Magistrate does not find that there was any intention on the part of the appellant to return the cash. And the second and conclusive answer is, as I think, that the statute makes no reference whatsoever to the time when the cash is sent, and confines its attention exclusively to the consideration for which it was sent.

I therefore think, on the facts which he found proved, the Magistrate was warranted in reaching the conclusion which he did reach; and accordingly that we ought to answer both questions put to us in the affirmative.

Lord Salvesen.—In this case the appellant asks us to quash a conviction obtained against him, under sections 1 and 3 of the Betting Act, 1853. The Act is said to have been contravened, in respect that the appellant kept an office for the purpose of receiving money as the consideration for an undertaking, promise, or agreement, express or implied, to pay thereafter money on events or contingencies of or relating to horse races. If in fact the appellant conducted his business, which is that of a bookmaker, on the footing of receiving deposits of money prior to a race, or other sporting event on which his customers desired to bet, there is ample authority for holding that he contravened the Act, and this I gather to have been found by the Magistrate who convicted. The question for our decision really is whether the facts found proved justify any such inference.

That the appellant does a considerable business with the working classes as a bookmaker is undoubted; but this fact ought not to allow us to be prejudiced against him. There is no law against betting; and, whatever one may think of the business of a bookmaker and of its effects upon the morals of society, it is not in itself an illegal business. Nor is there any illegality in a bookmaker, any more than any other person, receiving payment of a bet, which he has made on a sporting event and which his client has lost. A bookmaker must reside somewhere; and, no doubt, if he is in the habit of making bets, he will receive payment of his debts, from the persons with whom he makes them, at his office or place of residence. Obviously, this is not an offence under the statute. It may be reprehensible for people to make bets, but it is still more so for them to make such bets and not to pay when they lose; and I cannot see how it is an offence in the winner to receive payment of his winnings, any more than it is an offence for the loser honourably to pay his debt. Nor, again, can it make any difference, in the legal aspect of the case, whether a man engages only in isolated transactions of the kind, or repeatedly makes bets with the object of securing a profit to himself from his larger experience of the chances of success or failure of any particular horse in a race that falls to be run. It has already been held by this Court that credit betting, though indulged in by a bookmaker, is not an offence under our present law, any more than credit betting between private individuals. The object of the statute, as I gather from its terms, was to discourage betting amongst the humbler classes, whose circumstances may not be such as to justify the

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bookmaker in giving them credit, by making it illegal for a bookmaker to receive a deposit beforehand of the sum which the customer stands to lose, as a condition of an undertaking to pay the customer his winnings if the latter should be successful. In such a case parties are not betting upon equal terms. The customer has only the honour of the bookmaker to trust to; whereas the bookmaker has in his possession the sum which the customer is prepared to risk before the sporting event takes place.

The above being, as I understand, the law which has been laid down both in England and in Scotland on this subject, it becomes necessary to consider the facts actually found proved, in order to see whether they justify the inference which the Magistrate drew—that the appellant kept an office, either for the purpose of receiving there deposits of the sums which his clients instructed him to put upon the horses they wished to bet on, or alternatively, on the footing that any bet which he accepted was conditional on a postal order for the amount which the client desired to risk being posted before the race took place. In my opinion that is not established by showing isolated cases in which clients did either send money to the appellant before the race was run, or put it beyond their control by dispatching a postal order before the race on which the bet was made was run.

A careful scrutiny of the facts found proved has convinced me that they do not justify the inference which the Magistrate drew. When the police made a raid on the appellant's premises, they found in his bag no less than 539 postal orders for small sums of money, which I take it represented so many bets which had been made by the senders. In only four isolated cases out of the whole number did the public prosecutor attempt to show that these were not remittances of debts of honour (originally incurred on credit), after the sporting event had taken place, and the appellant's customers had ascertained that they had lost their moneys. Had it been the appellant's system to receive money beforehand at the office where he carried on business, one would have expected a very different result. Again, if the conditions which the appellant issues as those upon which he does business had shown that he would not honour a bet that he arranged with a customer unless the customer first made him a deposit, it would have been easy to draw the inference that he kept his office for the purpose of receiving such deposits. Admittedly, however, there is nothing on which the public prosecutor can found in these rules. On the contrary, in his starting-price rules for 1914, the appellant commences by stating that "all business is done by correspondence. No contracts are entered into by Mr Traynor with persons resorting to his premises," and clause 23 is to the following effect: "Short credits will be understood to be clients who do not receive detailed weekly statements, but have one or two days' credit. Short credits are perfectly legal. No money taken in advance." Substantially the same clause appears in the rules for 1913. The appellant, accordingly, takes such means as he can to inform his customers that his office is not open for the purpose of receiving advances or deposits of money, that none such will be received, and that his whole system implies mutual trust. He conducts his operations, therefore, in exactly the same way as any private

individual who makes a bet with a friend before a race, and who, of course, expects to be paid his winnings if the horse he backs is successful. These being the conditions on which the appellant does business, it was conceded at the bar that there is nothing in them which, if acted upon by a client, would contravene the sections founded on. Is there, then, anything to show that the appellant, contrary to his own rules, received deposits at his office, so as to infer that he kept his office open for that purpose? I think there is absolutely nothing. Only four witnesses were examined. In the case of the first two, the bets which they made were their first transaction with the appellant. One man posted his betting slip and the postal order for the amount staked—2s.—prior to the hour of the race being run. Why he did so does not appear from the Magistrate's statement; but as he had had no prior communication with the appellant, it must have been on his own initiative. No race was run; and, accordingly, this man was entitled to get back his money, which it may be assumed he did. The same observations apply to the next witness —Gillan—except that in his case the bet was telephoned on the morning of the 14th, and that it was not till the afternoon that the slip and postal order were posted—presumably after the race was over. The third witness—Warner—made two bets, both of which he telephoned in the morning. He posted the slip and the postal order therefor later in the afternoon—admittedly after the race was run. The fourth witness made four bets on four days in January, in each case telephoning the bet in the morning, and posting on the slip and postal order later in the afternoon; but it is not said that he did so before the race on which the bet was made was run. In not a single case, therefore, was there a deposit of money in advance, as the consideration for the appellant's undertaking to pay over any winnings that might be due; and yet that is the inference which the Magistrate has drawn. The correct inference, in my judgment, was just the contrary. Stress was laid upon the point that, in several of the bets with the last two witnesses, it is found as a fact that neither got a settlement of his winnings until after the appellant had received the postal orders. I cannot see how that affects the appellant. As the postal orders were sent the same day by the customer, and the winnings only fell to be remitted in the evening, it could not have been otherwise; but this was the result of the client unnecessarily sending his postal order before he knew the result of the race, and not of any invitation by the appellant. It might have been otherwise if it had been shown that sums of money deposited or received in the appellant's office before a race was run had been retained by him; but there is no evidence of this. If the decision of the case, therefore, rested on my judgment, I should have come unhesitatingly to the conclusion that the second question falls to be answered in the negative.

Lord Dewar.—The charge against the appellant is that he kept premises open for the purpose of *receiving* money in respect of a promise to *pay* money thereafter on horse-racing contingencies or events. There is no dispute that this is a relevant charge. The only question is whether the Magistrate was justified on the evidence in convicting. I think he was.

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The material facts found proved are briefly as follows:—The police found on the premises a large quantity of betting material—slips, forms, and rules, relating to horse racing—the usual stock-in-trade of a betting business. These slips, forms, and rules were obviously intended for the convenience and use of persons who desired to make bets on horse-racing events. And there is evidence that they were in fact used for this purpose. In the appellant's safe a small brief-bag was found, and in that brief-bag there were 539 postal orders, amounting in value to £144, 7s. How did these postal orders come to be in the appellant's possession? No explanation was offered, nor was it explained why the appellant had assured the police that there was nothing of value in the bag, and protested that he had no key until they threatened to open it without a key. In the absence of explanation I think the Magistrate was justified in assuming that these postal orders had been sent, to the knowledge of the appellant, in respect of his promise to pay in the event of some particular horse winning a particular race. I think that evidence would, in the circumstances, have been sufficient to warrant conviction. But that is not all. Four witnesses were examined, and every one of them admits that he sent money to the appellant's premises in respect of his promise to pay in the event of a particular horse winning some race. It is said that it was not proved that the money reached the appellant before the race was run, and that it therefore must be assumed to have been what is called "credit betting." I am not satisfied that it is lawful to keep premises open for the purpose of credit betting, and I reserve my opinion upon that question. But I do not think that it arises here, because it is clear that the appellant gave no credit. On the contrary, he required and received a deposit, and in respect of that deposit he promised to pay thereafter (that is after receipt of the deposit) money on an event relating to horse races. That, I think, is a breach of the statute. It does not appear to me to be material to consider at what moment the event was determined.

I am, accordingly, of opinion that both questions should be answered in the affirmative.

THE COURT answered the second question in the affirmative, and dismissed the appeal.

C. STRACHAN PETRIE, Solicitor—SIR THOMAS HUNTER, W.S.—Agents.

No. 27.

July 22, 1914.

Mather v. H. M. Advocate.

SAMUEL MATHER, Complainer.—*Cooper, K.C.*—*Normand.*
HIS MAJESTY'S ADVOCATE, Respondent.—*Morton, A.-D.*

Crime—Fraud—Relevancy of indictment—Tendering worthless cheque in payment for goods already delivered.

An indictment set forth that the accused, having purchased and obtained delivery of nine cattle through a cattle mart, did fraudulently tender in payment to the cashier of the mart a cheque upon a bank, although he had no funds in the bank and knew that the cheque would not be honoured, and that he thus defrauded the mart of the price of the cattle.

Held that the indictment did not contain a relevant charge of fraud, in respect that it did not set forth that the accused had obtained delivery of the cattle by means of the worthless cheque.

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Mather v. H. M. Advocate.

High Court. Lord Justice-General. Lord Dundas. Lord Guthrie.

SAMUEL MATHER was charged on an indictment at the instance of Thomas Hart, Procurator-fiscal of Forfarshire, by authority of His Majesty's Advocate, which set forth, "that on 7th June 1913, having purchased and obtained delivery of nine cattle through the Farmers' Mart, Limited, Brechin, within their premises at Park Road, Brechin aforesaid, you did on said date and within said premises fraudulently tender to John William Henderson, cashier of the said Farmers' Mart, Limited, a cheque for £189, 2s. 6d., in payment of the price of said cattle, which amounted to £183, 12s. 6d., and of a balance of £5, 10s., due by you on a former transaction, the said cheque being drawn by you on the West End Perth Branch of the British Linen Bank, you having no funds in said Bank to meet said cheque and well knowing that said cheque would not be honoured, and you did thus defraud the said Farmers' Mart, Limited, of the sum of £183, 12s. 6d."

An agent on behalf of the accused objected to the relevancy of the indictment on the ground that the facts contained therein did not constitute an indictable offence.

The Sheriff-substitute (Neish) repelled the objection, and the accused was thereafter tried before the Sheriff (Ferguson) and a jury, and found guilty as libelled.

He brought a bill of suspension in which he pleaded;—(1) The indictment being irrelevant, suspension and liberation should be granted. (2) No crime having been libelled in the indictment, suspension and liberation should be granted. (3) No fraud being libelled in the indictment, suspension and liberation should be granted. (4) No false representation by the complainer having been libelled in the indictment, suspension and liberation should be granted. (5) The complainer not having obtained either the delivery of the cattle, or goods, or payment of money by tendering said cheque, suspension and liberation should be granted.

The case was heard before the High Court on 22nd July 1914.

Argued for the complainer;—The indictment was irrelevant. An indictment for fraudulent misrepresentation, which was the crime charged here, was only relevant if the misrepresentation founded on induced the aggrieved person to put himself into a worse position than he otherwise would have been in. In the present case the sellers had parted with the cattle before the alleged misrepresentation was made, and there was no averment that the cattle had been delivered on the faith of a statement by the accused that he had money in the bank to meet the cheque.[1] The mere giving of a cheque was not a representation that the drawer had funds in the bank,[2] and even if it were, telling a falsehood was not *per se* a crime by the law of Scotland. Further, it had been held that a charge of presenting a cheque in the knowledge that there were no funds to meet it did not constitute a relevant charge of falsehood, fraud, and wilful imposition.[3]

Argued for the respondent;—The indictment must be read as a whole, and when so read it set forth a relevant charge of fraud at common law, viz., the obtaining of the cattle without the ability or

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[1] Regina v. Brooks, (1859) 1 F. & F. 502; Rex v. Dale, (1836) 7 Car. & Payne, 352.

[2] Rex v. Hazleton, (1874) L. R., 2 C. C. R. 134.

[3] Rae v. Linton, (1874) 3 Coup. 67, 2 R. (J.) 17.

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the intention to pay for them. Although the cattle had been delivered to the accused before he presented the cheque, it was known to the accused that probably he would not be able to remove them from the market without payment, and it was this right to remove the cattle which the accused sought to obtain by his cheque. Accordingly, the whole circumstances clearly disclosed a case of fraud.[1]

LORD JUSTICE-GENERAL.—I think this indictment relevantly charged the accused with telling a falsehood, but telling a falsehood *simpliciter* is not a crime by the law of Scotland. I think it is equally clear that it does not charge the complainer with fraud according to the law of Scotland; because it appears that he actually had purchased and obtained delivery of the nine cattle, and had obtained credit for the former debt of £5, 10s., before granting the cheque in question in this case. It is not a relevant statement of a crime to say, as the indictment does, that when the accused granted the cheque he knew that he had no funds at the bank to meet the cheque. Is it then relevant to infer fraud to add that he well knew that the cheque would not be honoured? I think not.

In plain language what he did was this. Having obtained delivery of the cattle—I know not how long before the cheque was granted—he said to the seller of the cattle: "Here is a written order upon A. B., who will pay you the money," well knowing that A. B. would not pay the money. That was a falsehood, but it was not the means by which he either secured delivery of these cattle or obtained credit for £5, 10s. I do not for a moment doubt that the law is as stated in the cases to which we were referred, viz., that if a person obtains goods or money by issuing a cheque, he having no funds in bank and knowing the cheque will not be honoured, he commits a fraud. The essence of that statement lies in the little preposition "by," which is lacking in this indictment. That, I think, is a fatal flaw.

Therefore I am of opinion that the conviction ought to be suspended and liberation granted.

LORD DUNDAS and LORD GUTHRIE concurred.

THE COURT quashed the conviction.

ALLAN LOWSON & HOOD, S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

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[1] Macdonald's Criminal Law, (3rd ed.) p. 84; H. M. Advocate v. Hall, (1849) J. Shaw (Just. Reps.), 254; H. M. Advocate v. Bradbury, (1872) 2 Coup. 311.

WILLIAM MOIR SCOTT, Appellant.—*Lippe.*
MELVILLE JAMESON (Procurator-Fiscal of Perthshire), Respondent.—*Morton, A.-D.*

No. 28.
July 22, 1914.

Scott v. Jameson.

Statutory Offences—Motor car—Charge of exceeding speed limit—Proof—Sufficiency of evidence—Motor Car Act, 1903 (3 *Edw. VII. cap.* 36), *sec.* 9.

The driver of a motor car was convicted of driving his car over a measured distance at a speed exceeding the speed limit, the only evidence being that of two constables, who had been stationed at either end of the measured distance, and who deponed, the one to the time at which the car entered, the other to the time at which it passed out of, the measured distance.

An objection to the sufficiency of the evidence on the ground that, as each of these times was a fundamental fact in the charge, it could not be established by the uncorroborated testimony of a single witness, *repelled*; and conviction *sustained.*

HIGH COURT. Lord Justice-General. Lord Dundas. Lord Guthrie.

WILLIAM MOIR SCOTT, Elmbrae, West Park Road, Dundee, was charged in the Sheriff Court of Perthshire at Perth on a complaint at the instance of Melville Jameson, Procurator-fiscal, which set forth that "you did on the 13th May 1914, on the main Dundee road in Invergowrie, Longforgan Parish, Perthshire, from a point opposite the door of the dwelling-house in M'Gaffin's Land there, occupied by John Robertson, millworker, to a point opposite the west entrance gate leading to the dwelling-house there, occupied by James Wilson, mill manager, drive a motor car at a speed exceeding 10 miles per hour, contrary to the Motor Cars Regulation (County of Perth) (No. 2) Order, 1905, and to section 9 of the Motor Car Act, 1903."

The accused, having been found guilty by the Sheriff-substitute (Sym), obtained a stated case on appeal to the High Court of Justiciary.

The case set forth, *inter alia*:—"No proof was led for the defence. The question which was raised was raised on the evidence for the prosecution, whether it was sufficient in law for a conviction. It arose on the following facts, which were proved, viz.:—There is on part of the road from Dundee to Perth, where it passes through the village of Longforgan, Perthshire, what is known as a 10-miles-an-hour limit of speed for motor cars; the village being one which extends a considerable distance along the roadside, the 10-mile limit is about half a mile in length.

"Within this limit on the occasion in question there was taken a distance of about a quarter of a mile, or (exactly) 440 yards. At a point at one end of this distance was placed a constable with a chronograph watch. The hand connected with the movement which is used for measuring exact time stood at zero. The watch had on the same day very shortly before the events to be referred to been carefully compared with another chronograph watch which is mentioned below. This constable was so placed as to be able to observe the precise moment at which a motor car entered the 440 yards from the east or Dundee end thereof. At the other or west end of the 440 yards was posted another constable, provided with the said other chronograph watch with the hand of the movement for measuring exact time also standing at zero. This second constable—a sergeant of police—was so placed as to be able to note

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the exact moment at which such a car passed the point of exit from the 440 yards. A third constable was posted a short distance to the west of this latter point. His duty was to stop a motor car which had passed the exit. On the day mentioned in the complaint a motor car driven by the appellant came up to the point at which the first of these constables was stationed. That constable observed the exact moment at which it passed the point which he was watching—*i.e.*, the entrance to the said portion of the 10-mile limit under observation. He started by pressure the movement of his chronograph watch and then cycled after the car. At the precise moment at which the car passed the exit point of the 440 yards the second constable—the sergeant of police—observed that precise moment and started by pressure the movement of his chronograph watch. The car was stopped by the third constable mentioned. He took the appellant's name and address. The first constable came up on his cycle to the sergeant and handed his watch to him and he instantly stopped both. The accurate stopping or starting of the watches was proved. The watches were forthwith compared and the difference noted. The difference was 62 seconds. The number of the car was noted. The appellant was—as was not disputed—given an opportunity of comparing the watches and checking the constables' comparison. The speed at which the car had travelled the 440 yards was then computed from the difference in time between the passing the point of entrance and the passing the point of exit of the 440 yards. It proved to be 14 miles 908 yards per hour.

"The point raised was whether there should not have been two witnesses at the first constable's point of observation (himself and another) to speak to the starting of the chronographic movement of the watch at the moment at which the car entered the space taken for observation, and also two witnesses—himself and another—at the second constable's point of observation to speak to the starting of the chronographic movement of his watch at the moment of exit from the said distance of 440 yards.

"In many previous instances—though not universally—I have observed that the plan was followed of there being two witnesses at each end of the distance chosen for observation. In this case the accused, William Moir Scott, maintained that this was indispensable in point of law to any conviction. He maintained that the matters which happened at each of the points must be established by two witnesses.

"It appeared to me that, while the amount of evidence had for some reason been in this particular case reduced to its lowest limit, I could not accept the view of the accused, because an individual fact in a case can competently be proved by one witness and another individual fact related to it can be proved by another witness. Each fact does not require to be proved by several witnesses, but the matter to be established requires to be proved by more than one. I thought that the constables provided with the chronograph watches each proved sufficiently an individual fact and that, taking their evidence, which I believe and hold to be correct, together, the fact as to the speed at which the car passed over the distance under observation was established.

"On the evidence I thought that a speed of between 14 and 15 miles over the distance chosen for examination had been main-

tained, and that the place being limited to speed of 10 miles an hour, it was needful to convict. The excess of speed not being great, I limited the fine to £1, 1s."

The question of law was:—"Was I right in holding that the evidence was sufficient in law to support the complaint?"

The case was heard before the High Court on 22nd July 1914.

Argued for the appellant;—The evidence was insufficient to warrant the conviction. It was a settled rule of the criminal law of Scotland that the evidence of a single witness, however clear and conclusive it might be, was not sufficient to warrant a conviction unless corroborated by facts and circumstances pointing to guilt, the ratio of the rule clearly being that the word of a single witness was not *per se* sufficient to outweigh the word of an accused who pleaded not guilty.[1] The appellant's objection to the present conviction was that, in effect, he was convicted upon the evidence of a single witness who was entirely uncorroborated. It was true that *ex facie* of the proceedings two witnesses had been produced against him, but their combined evidence was, at best, only equivalent to that of a single witness. It was, indeed, less reliable, owing to the possibility of error between the two watches, than would have been the evidence of one constable who had transferred himself, by his bicycle or by a short cut, from the point of entrance to the point of exit, and who had been able thus to take the times at both points. Such a case was quite conceivable, and obviously there the evidence of the single constable would not be held sufficient. It was true that two witnesses were not required for every fact in a criminal case. The evidence of a single witness to each fact in a train of circumstances was sufficient.[2] But in the present case there was no such train of circumstances. The one fact threw no light of any kind upon the other and did not corroborate the other, and the accused was only guilty of the offence if each fact was accurate, each being fundamental to the charge. There was a clear distinction between facts which were merely important and those which were fundamental to the charge. Unless the rule of law as to a single witness was the merest formality which could in every case be avoided by putting a second witness into the box to speak to some quite unconnected and irrelevant matter—unless, indeed, the question of the sufficiency of evidence resolved itself into the simple process of counting heads—the rule must be applied here and the conviction quashed. The case of *Wright* v. *Mitchell*[3] was quite different, there being there two witnesses to all the facts spoken to, and the only question being whether, in the circumstances, their testimony could be relied on as sufficiently accurate.

Argued for the respondent;—The Sheriff had rightly convicted the accused, the evidence being sufficient. An accused could not be convicted, it was true, on the evidence of one witness; but more than one witness was not required for each fact in the case. Here there were two witnesses, each speaking to a separate fact in the criminal proceeding, and each believed by the Sheriff to be speaking

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[1] Alison's Criminal Law, vol. ii., p. 551; Dickson on Evidence, (3rd ed.) vol. ii., secs. 1807 *et seq.*

[2] Alison's Criminal Law, vol. ii., p. 551.

[3] 1910 S. C. (J.) 94, 6 Adam, 287. . . .

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the truth. If the Sheriff was satisfied as to that, then there was no room for the possibility of error as there was in the case of *Wright* v. *Mitchell*.[1] There was no authority for the distinction between fundamental and non-fundamental facts.

LORD JUSTICE-GENERAL.—No question is raised in this case as to the quality of the evidence submitted to the Sheriff-substitute. That was the question raised and determined in the case of *Wright* v. *Mitchell*,[1] to which we were referred. The sole topic of controversy here is whether the evidence was adequate in law to support the conviction. I am of opinion that it was.

There can be, of course, no doubt that, if the only evidence in support of a charge is the unsupported testimony of one witness, that would not be sufficient in point of law to warrant the conviction. In this case there were two witnesses in support of the charge, and I cannot, for my part, recognise any distinction in law between what counsel have called fundamental facts and important facts. There are here, if one examines the case critically, four important facts—call them fundamental facts if you please—viz., (1) the point of time at which the car entered the stretch of road; (2) the time of exit; (3) the length of the roadway; and (4) the identity of the car. I am of opinion that each of these facts, important as each is, can be proved by one witness, if the tribunal trying the case considers that the evidence in quality is reliable.

I do not say that it would be possible to prove a case of this kind with less evidence than we have here before us. The prosecutor appears to have relied on what I may call the irreducible minimum; but if the Sheriff-substitute was satisfied with the quality of the evidence, I do not think we should disturb the conviction on the ground that it was inadequate. I am, accordingly, for answering the question in the affirmative.

LORD DUNDAS.—I agree. I think the Sheriff-substitute has treated the matter quite correctly. The question argued is a purely legal one, viz., whether the evidence adduced was in law sufficient to warrant the conviction? I think it was; and that for the reasons which your lordship has stated. It would be quite another matter to say that the kind of evidence adduced here conforms to an ideal standard to be universally followed, or that it may not be safer for prosecutors, in cases of this nature, to adduce a fuller amount of evidence. That must be a matter for consideration in each case as it arises. But, in the case before us, the Sheriff-substitute thought the proof sufficient, and I consider, with your lordship, that he was right, and that the question should be answered accordingly.

LORD GUTHRIE.—I am of the same opinion. If, in order to establish a charge, evidence is only tendered regarding one fact, that fact must be proved by two witnesses. But, if several facts require to be proved and these form a consecutive chain, leading to one conclusion, then it appears to me that each may be proved by one witness. If they do not form a consecutive chain leading to one conclusion, then it may be that each of

[1] 1910 S. C. (J.) 94, 6 Adam, 287.

these facts will require to be proved by two witnesses. I agree with what your Lordships have said regarding the practice in such cases. It does not follow from the decision which we are about to pronounce that any change of practice need necessarily result. One witness may in certain circumstances be sufficient to speak to a fact, but only if the Sheriff is satisfied that his testimony can be regarded as reliable.

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THE COURT answered the question of law in the affirmative, and refused the appeal.

DALGLEISH, DOBBIE, & Co., S.S.C.—SIR WILLIAM S. HALDANE, W.S., Crown Agent—Agents.

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1913-1914.

CHARLES HENRY SCOTT PLUMMER, Petitioner.—*J. A. Christie.*
THE BOARD OF AGRICULTURE FOR SCOTLAND, Respondents.

No. 1.

Sept. 23, 1913.

Scott Plummer v. Board of Agriculture.

Lease—Small holdings—Compulsory creation of small holdings by order of Land Court—Petition by landowner for appointment of arbiter to award compensation—Competence of petition where order has not fixed fair rent and conditions—Duties of Land Court and Board of Agriculture—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49), *sec.* 7 (9) (11).

In an application by the Board of Agriculture to the Land Court for an order for the compulsory constitution of new holdings upon an estate, the Land Court pronounced an order empowering the applicants to constitute new holdings on certain portions of the estate, and to enter thereon for the purpose of carrying out the necessary works. The order did not fix the fair rent for the new holdings, nor did it determine the terms and conditions on which they were to be created. The owner of the estate having thereafter presented a petition in the Bill-Chamber for the nomination of an arbiter to fix the amount of compensation due to him—

Held **(by the Lord Ordinary on the Bills, Lord Johnston) that the petition was premature and fell to be dismissed, in respect that the order of the Land Court had not determined the fair rent of the holdings or the terms and conditions thereof, all of which had, under sec. 7 (9) (11) of the Small Landholders (Scotland) Act, 1911, to be determined before a petition to appoint an arbiter could be presented.**

Observations **on the provisions of the Small Landholders (Scotland) Act, 1911, and on the duties of the Land Court and the Board of Agriculture, in regard to the creation of small holdings.**

Bill-Chamber. Ld. Johnston.

CHARLES HENRY SCOTT PLUMMER, owner of the estate of Sunderland Hall, including the farm of Lindean, in the county of Selkirk, presented a petition in the Bill Chamber of the Court of Session under the Small Landholders (Scotland) Act, 1911,* and particularly section 7 (11) thereof, for the nomination of an arbiter to decide the amount of compensation due to him in respect of the compulsory constitution of small holdings upon the farm of Lindean.

The petition stated:—"That on or about 27th January 1913 the Board of Agriculture for Scotland applied to the Scottish Land Court for the approval of a scheme for dividing up the said farm of Lindean into small holdings, in terms of the Small Landholders (Scotland) Acts, 1886-1911. That the petitioner lodged answers and appeared

* The relevant sections of the Act are quoted by Lord Johnston in his opinion.

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before the said Court and opposed the said scheme. That on 18th April 1913 the said Court pronounced an order whereby, after excepting certain parts of the said farm, they approved of the taking of the remainder of said farm for the purpose of forming small holdings and pronounced certain consequential findings.* That the said order was intimated to the petitioner on 23rd April 1913, and on 10th May 1913 the petitioner's agents intimated to the said Board of Agriculture that he claimed a sum in excess of £300 as compensation in respect of the formation of said small holdings. That the petitioner and the said Board have failed to agree as to the nomination of an arbiter to decide the amount of compensation due to the petitioner."

Appearance was entered against the petition by the Board of Agriculture for Scotland.

On 23rd September 1913, the Lord Ordinary officiating on the Bills (Lord Johnston) dismissed the petition as presented, and found the respondents the Board of Agriculture liable in expenses.

OPINION.—It is much to be regretted that the procedure in this, which I believe to be the first case, or at least the first to which public notice has been drawn, of compulsory taking of land for the purpose of constituting new land-holdings of the class contemplated by the Small Landholders Act, 1911, has miscarried, with results which must be serious either to the owner of the land proposed to be taken, or to the Board of Agriculture, and most probably to both.

The responsibility unfortunately rests with the Land Court, to which the execution of the Act is committed, and which in pronouncing an order (of 18th April 1913) authorising the constitution of new holdings on the farm of Lindean belonging to the petitioner in the county of Selkirk in accordance with an approved scheme, under sections 7 *et seq.* of the Act,

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* These findings were:—"Therefore find, declare, and determine that the applicants are empowered to constitute new holdings on, and in respect of, the said farm of Lindean other than the portions thereof above expressly excluded, and to exercise this power up to the 28th day of May 1914, or such other date as may be agreed on between the applicants and the landlord, but reserving as to the extension of the said date on cause shown; and further find and declare that the applicants are entitled, as from the date of intimation of this order by the Sheriff-clerk, to make this order effective by entering on the said farm of Lindean other than the portions thereof above expressly excluded, and executing or carrying on all works which may, in their judgment, be required for the erection or adaptation of dwelling-houses, steadings, offices, or other buildings thereon, or for the division, preparation, or adaptation of the land, or for the provision of drainage or water supply, or for similar purposes, with a view to the constitution of new holdings thereon and the registration of new holders in respect thereof, reserving all claims of damage or compensation competent to the respondents or any of them: Appoint the applicants to lodge with the principal clerk within fifteen days after intimation of this order (1) an amended plan showing the number of holdings, and the boundaries and acreage of each holding which they propose should be constituted on the said farm of Lindean other than the portions thereof above expressly excluded, and also (2) a statement specifying such terms and conditions, if any, as they desire shall be made by the Court terms and conditions of the tenure of the said holdings, and allow the respondent, C. H. Scott Plummer, Esquire, to lodge a statement with regard to these matters, if so advised, within ten days thereafter; and with these findings continue the application for further procedure."

has omitted to perform one or more of the essential duties imposed upon it by the Act, and, though apparently urged to take the matter up so as to remedy the defect, has for six months refused or at least delayed to do so.

So far as I am concerned with the Act of 1911 in regard to the present question, it may be described as an engine for the creation of new small holdings, which, subject to a system of registration provided by the Act, shall be held on a statutory tenure in many respects approaching that of crofting holdings in the Highlands and the adjoining counties under the former Crofters Acts. It is not so expressed, but is, I think, tacitly and of necessity contemplated that such new holdings are in the main to be carved out of lands at present let on lease or otherwise devoted to agriculture. And therefore their creation must, at any rate where the compulsory powers of the Act are resorted to, involve a grave interference with estate management, and cannot be effected without the destruction of capital sunk in years past, by the owner or his predecessors, to secure the present beneficial occupation of the land. I desire to say that I am not concerned with any criticism of the object of the Act, and the expectations of its framers. I am only concerned with its provisions for the attainment of its objects, which are both difficult of application—or rather of correlation—and are, I am afraid, likely to be found somewhat insufficient.

Such new holdings may be created by agreement, but provision is also made for their being created compulsorily. The initiative lies with the Board of Agriculture, with whom also is to a large extent the administration. But the executive is with the Land Court, without whose intervention the Board of Agriculture is powerless. Now, where an existing and going farm is to be broken up for the purpose of constituting new holdings on an approved scheme (and this is the general conception of a compulsory constitution under the Act), inevitably the interests of the owner of the land are affected, and very possibly injuriously affected, for it is seldom that an existing system, which has cost money to create, can be replaced by a totally different system also costing money to create without the loss of some of the capital already sunk, and without affecting the value of the original product of that capital. And, moreover, there are special provisions relating to the new holdings when constituted under the Act—viz.: those relating to the vacating of holdings and the resumption of holdings (sections 17-19), imposing heavy obligations on the landowner involving the payment of compensation (in the event of a scheme for constitution of new holdings breaking down after having been put in motion), for works, &c., executed in pursuance of the Act,—which on their face make the change intended to be effected under the Act a very serious thing to the owner of the land. It is therefore not to be supposed that the Act does not make some provision for protection of the owners' interests, though that these provisions are as difficult to work as they are to construe is forcibly illustrated in the present case. The root of the difficulty is in the correlating, in point of order and of time, of what has to be done by the Board of Agriculture, by the Land Court, and by the landowner, in order to give effect to the apparent intention, so far as it goes, of the statute to protect and compensate the last mentioned.

The machinery provided by the Act is this. Under the heading "Powers to facilitate the constitution of new holdings," which are practically all comprised in one section, section 7, with its various subsections, the Act, section 7 (2), imposes on the Commissioner for small holdings the duty to report to his Board the demand for small holdings in any district, the land available to meet the demand, the conditions under which the land is presently cultivated, and the employment which it affords. He is then, section 7 (3), to negotiate with the owners of such land with a view to the adjustment of a scheme, and, section 7 (4), failing agreement, such

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land may be made available for the registration of new holders compulsorily, as prescribed in the subsequent subsections.

There follows a provision of some practical importance, section 7 (7), viz.:—Where, with a view to, or as incidental to, the registration of a new holder or holders in respect of any land, the Board are of opinion that assistance should be provided "for the purpose of dividing, fencing, or otherwise preparing or adapting the land, making occupation roads, or executing other works, such as works for the provision of drainage or water supply, or erecting or adapting a dwelling-house or dwelling-houses or other buildings, or for other similar purpose, the Board may provide such assistance by way of loan or (except as regards dwelling-houses or other buildings) by way of gift, and subject to such conditions as they may prescribe. . . ."

Then section 7 (9) proceeds to provide the compulsory powers. After submitting to the landowner a scheme for constitution of new holdings, if the landowner does not agree with him, the Commissioner is to report to the Board, and the Board may, after notice and hearing parties, intimate to the landowner that it is in the public interest that new holdings should be constituted on his land in accordance with the scheme, and that they propose to apply to the Land Court "to make an order or orders for the constitution of one or more new holdings on the land in accordance with such scheme, to be occupied by new holders, at a fair rent and upon such terms and conditions, not inconsistent with the Landholders Acts, as the Land Court consider just; and thereafter to apply accordingly."

It will be noted that the fair rent and the terms and conditions are essential features of the order. Accordingly section 7 (11) says that the Land Court shall determine "and by order or orders declare" four things —(*a*) In respect of what land specified in the scheme new holdings may be constituted, and up to what date the power to constitute them compulsorily may be exercised; (*b*) the fair rent for each new holding; (*c*) what land embraced in the scheme should be excluded; and (*d*) whatever else may be necessary for the purpose of making the scheme effective, and of adjusting the rights of parties.

But the order or orders for the constitution of one or more new holdings, while it or they must determine these four things, is and are subject to this proviso, viz.:—That where the Land Court "are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, . . . or to any landlord . . . in respect of any depreciation in the value of the estate of which the land forms part, in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court determine," with right to the landowner to demand arbitration, if his claim exceeds £300.

Now this right conferred upon the landowner is severely hedged about, and it is the time-limitations imposed which to a large extent create the difficulty in this case and will do so equally in future cases. Before any claim can arise to the landowner the Court must have pronounced an order under subsection (11) determining the four matters enumerated, for it is made incumbent on him within twenty-one days of receipt of such an order to intimate to the Court and to the Board that his claim exceeds £300, and his demand for arbitration, and it is impossible that he should do so until he knows at least the determination of the Court upon these four matters and all of them. Again he is limited to fourteen days to agree with the Board on an arbiter, and failing that to apply to the Lord Ordinary on the Bills for the appointment of one; but his award is only to be binding on the Board in the event of the scheme being proceeded with, that is to say, the Board are to be free to accept or reject the award,

whereas the landowner is bound by it. And again the arbiter is limited to three months from his nomination for the issue of his award, failing which the matter reverts to the Land Court. Such drastic limitations of time bear hardly on the landowner in any case, when the complication of elements statutory and otherwise bearing upon his claim of compensation is kept in mind, and make it at least essential that every item of these elements is clearly determined and ascertainable before the order of the Court, which is the starting point of these limitations, is issued.

Lastly, so far as section 7 is concerned, it is provided by subsection (13) that upon an order providing for the constitution of new holdings being issued, the Board "may proceed to make it effective by entering on the land, carrying out works, and otherwise as may be required (due compensation to such amount as may be agreed, or as, in case of dispute, may be determined by the Land Court, being made for surface damage), and may negotiate with one or more duly qualified applicants with a view to their registration as new holders in respect of the land." It will be noted that the power or right of entry arises automatically on the issue of the Court's order, and requires no further intervention of the Land Court.

Now one thing which the Act wholly omits to do, and this complicates the landlord's position when he comes to formulate his claim, is to make any direct provision for what is to happen during the transition from, as is the case here, a single holding fully equipped to a state of parcel holdings, for which new holders are to be found, and which have got to be equipped when these have been found. I say that the Act wholly omits to make any such direct provision, but in self-defence,—inasmuch as the Small Landholders Act of 1911 not only creates an entirely new departure but incorporates by reference, and codifies with amendment but without re-enactment, that is to say codifies by reference, the whole crofter legislation of the last twenty-five years, contained in six Acts of Parliament,—I must disclaim any certainty that no such indirect provision may exist, embedded somewhere in some of the Acts. I can only say that I have not found, and that my attention has not been directed to, any such. And there is another thing which acts, and that seriously, in the same direction, namely the doubt that there must be in the minds of all concerned until the arbiter pronounces his award, and I am inclined to think possibly much longer, as to whether the scheme is to proceed.

The registration of new holders is provided for by section 15. I shall subsequently refer to section 17 which provides for the amendment of the law as to vacant holdings.

Now in these provisions there are, as I think I have already indicated, a great many points which act and react upon one another. They must all pretty well get through the gate abreast. And this I think has been inadequately appreciated by the Land Court. The situation created by the Act is this. The Board apply for a compulsory order. In granting it the Court must *inter alia* fix a fair rent and fix conditions of let. The Court cannot do this without knowing a great deal more than merely what area is proposed to be affected, and how it is proposed to be divided. They must have the details of a fully prepared scheme, showing what the Board propose to do in the way of preparing and developing the land for new holdings, and particularly in the way of adapting existing buildings, and possibly also what they propose to do under section 7 (7) in the way of assisting new holders. If the Court grant an order, three things immediately follow. 1st. The Board may at once enter on possession to make effective their scheme by carrying out necessary works, &c. 2nd. The landowner is put under very drastic limitations to make and prosecute his claims for compensation. 3rd. The Board, if the proposal is to be worked out in a businesslike way, must at once begin to negotiate with tenants.

It is in the first place impossible that the landowner can proceed to

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state and prosecute his claim for compensation, even so far as the potential damage to him is realised by the statute, unless he has before him at least all that the Court has had before it, when it came to pronounce its order. In the second place it is, I think, essential that the Board (though the statute contemplates that they will at once on the issue of the Court's order enter on possession), should have before them, before they do so, the arbiter's award of compensation to the landowner. For they can hardly enter on such possession to make their scheme effective until they have determined to proceed with it, and they have *locus pœnitentiæ* at least until the issue of the award, nay further. And, in the last place, unless it be assumed that the Board enter on their scheme with a number of willing tenants on leash, the Board cannot begin to negotiate with applicants until all the data for determining whether they are to proceed with the scheme are not only before them but before such applicants.

Now in this relation there is one matter which is left indefinite, viz.:—What amounts to proceeding with the scheme, and therewith in what the constitution of a new holding consists; and presumably there is some relation between such constitution and the Board "proceeding" with the scheme. The order of the Court does not constitute the holding. It is merely an order for, which must mean empowering, the constitution. Section 7, subsection (11) (*a*), clearly shows that it is the Board who are to constitute the holding or holdings, for the time to be allowed them to do so is to be limited. But what amounts to constitution is left indeterminate. The statute jumps over constitution and passes to registration, and it is not clear whether the constitution is the Board's determining to proceed with the scheme or the act of the Board in entering on possession of the land, or an agreement with an applicant (as to which the Act is throughout silent), or the registration of an accepted applicant. This is of importance, for the Act makes no direct provision for the compensation of the landlord for loss of the use of his land while the Board is making up its mind whether it is to proceed with its scheme, is executing works, and is negotiating with tenants. Further, it is not made clear whether the Board, if it constitute one holding, must constitute all *unico contextu*, or whether it can constitute one or more holdings, and abandon its scheme *quoad* the rest, and if it does, what redress the landowner has whose compensation is *ex hypothesi* already fixed on the footing that the whole scheme is to come to maturity. For I cannot see that section 17 would be applicable. These last considerations may not be directly germane to the present question. But they at least give point to the conclusion that everything is to be included in the landowner's claim and the arbiter's award for which the statute provides that the landowner is to be compensated.

The least, however, that the Act contemplates to that end is, I think, that the compensation to the landowner must be settled before the Board can determine whether it will proceed with its scheme; that before the landowner can be called on to claim or the arbiter to award, however hypothetical the situation may be, both must know not merely the four things which by section 7 (11) the Court are called on to include in their order but the whole details of a comprehensive scheme, which cannot be altered after the issue of the Court's order, or at any rate without abandoning and beginning again.

I have no full information about the scheme of the Board and how far it is complete. But I do know that the excuse of the Land Court for stopping short was stated to be that the fair rent cannot be fixed until the Board either settle or do something, I am not sure which or what. I also know that the Board, though they have unfortunately ousted the landowner and taken possession, say that they can do nothing either in the way of developing the holdings or dealing with applicants until they know the fair rent, the conditions, and the amount of compensation. And the landowner justly says that he cannot proceed to arbitration until

everything is settled between the Board and the Court. And there the *impasse* has arisen and has remained now for six months. The Court having visited the estate has laid its hand on the land and has approved a scheme of division, for that is all that its order ostensibly does, has assumed to give authority to the Board to enter, and has gone to other work and makes no further move. The Board by way of avoiding the *impasse* asks that, as the landowner, impelled by the statutory limitations on him, has presented *ob majorem cautelam*, on 22nd May 1913, a petition for nomination of an arbiter, on which however in the circumstances no step has yet been taken, I should at once make an appointment, even *invito* the landowner. I think that that would not clear the ground, even if it was competent, and that it is at present wholly incompetent.

The Land Court must return and complete its duty under the statute, and then it will be time for the landowner to apply for the appointment of an arbiter. When the Land Court pronounces the statutory order, and not till then, will the Board be automatically and legally entitled to enter into possession, and will not require such an order as that on which they have acted, but which the Land Court had no statutory authority to pronounce. A perusal of that portion of the order of 18th April 1913, viz. :—"And further find and declare that the applicants" (*i.e.*, the Board of Agriculture) "are entitled, as from the date of intimation of this order by the Sheriff-clerk, to make this order effective by entering on the said farm of Lindean other than the portions thereof above expressly excluded, and executing or carrying on all works which may, in their judgment, be required for the erection or adaptation of dwelling-houses, steadings, offices, or other buildings thereon, or for the division, preparation, or adaptation of the land, or for the provision of drainage or water supply or for similar purposes, with a view to the constitution of new holdings thereon, and the registration of new holders in respect thereof; reserving all claims of damage or compensation competent to the respondents or any of them," shows how entirely the situation has been misapprehended, while what follows, viz. :—"Appoint the applicants to lodge with the principal clerk within fifteen days after intimation of this order (1) an amended plan showing the number of holdings and the boundaries and acreage of each holding which they propose should be constituted on the said farm of Lindean, other than the portions thereof above expressly excluded; and also (2) a statement specifying such terms and conditions, if any, as they desire shall be made by the Court terms and conditions of the tenure of the said holdings; and allow the respondent C. H. Scott Plummer, Esq., to lodge a statement with regard to these matters, if so advised, within ten days thereafter; and with these findings continue the application for further procedure," shows how inchoate the matter was even on the face of the order.

I have some difficulty as to how best to deal with the petition, whether to continue or to dismiss it. It is premature at present—though looking to the terms of the Land Court's order I think it was justified—and I think it better to dismiss it. There is no knowing how the position may develop meanwhile, and whether or not a similar petition will ultimately be Mr Scott Plummer's proper course. But the situation having been created by one public body in consequence of the action of another public body, I think that the private individual is entitled in the circumstances, and in this the first case in which it has been necessary to consider the compulsory provisions of the Act, to his expenses against the latter. It might have been otherwise if the respondents had not sought to take advantage of the petition in their own interest.

MYLNE & CAMPBELL, W.S.—Sir HENRY COOK, W.S.—Agents.

No. 2.
Oct. 16, 1913.

ADAM MAITLAND, LORD PROVOST OF ABERDEEN, AND OTHERS (Directors of Aberdeen Female Domestic Servants' Benevolent Fund), Petitioners.—*J. H. Millar.*

Aberdeen Servants' Benevolent Fund.

Charitable and Educational Trust—Administration—Settlement of scheme—Application by ex officio directors for authority to denude and transfer the funds to a charitable association.

Circumstances in which *ex officio* directors of a charitable society for the benefit of domestic servants in Aberdeen were *authorised* to denude of the trust, and to transfer the funds and management thereof to the Aberdeen Association for Improving the Condition of the Poor.

1ST DIVISION. ON 13th May 1913 a petition was presented to the Court by Adam Maitland, Lord Provost of Aberdeen, and others, the directors *ex officio* of the Aberdeen Female Domestic Servants' Benevolent Fund, for a scheme of administration of that fund.

The petition set forth:—"That the said fund was instituted at a meeting held in Aberdeen on 7th October 1853, apparently on the initiative of a lady resident in Aberdeen, who is stated to have paid a handsome donation thereto. The rules adopted at the said meeting . . . provided, *inter alia*, that the society should be for the benefit of female domestic servants employed in Aberdeen and in that part of the parish of Old Machar lying south of the river Don, while afflicted with sickness and unable to maintain themselves, and who are at the time members of the society; that every member shall pay half-yearly at least one shilling, and to entitle any servant who is a member to prefer a claim on the funds of the society she must have paid thereto at least two consecutive half-yearly payments of not less than one shilling each at the distance of six months from each other; and that any person, male or female, not a domestic servant, may also become a member of the society under the regulations on payment of at least two shillings each year, but without thereby creating any claim of benefit from the funds. The said rules further made provision for the appointment of a considerable number of directors.

"The earlier history of the fund is involved in obscurity, but it appears that at a meeting of the directors held on 20th December 1881, the late Mr William Kendall Burnett, advocate in Aberdeen, who died on 17th July 1912, was appointed treasurer and secretary to the fund, with instructions to revise the rules dealing with the constitution thereof with a view to rendering it more efficient, and to report to the directors as soon as possible. The rules so revised were approved at a meeting of directors held on 28th January 1882, and were printed and circulated in the following month. . . . By the said rules it was provided that, in addition to two directors elected by subscribers, there should be four *ex officio* directors, viz., the Lord Provost of Aberdeen, the senior Bailie, the Dean of Guild, and the chairman of the Association for Improving the Condition of the Poor. These six directors were to co-opt four others.

"It is at the instance of the four *ex officio* directors above named that the present application is presented. . . .

"The number of members of the fund, which in 1882 stood at 23, rose in 1883 to 25. Since that date, however, it has steadily diminished. In 1886 only five members, and in 1889 only three

members remained, and from 1893 onwards there has been only one member of the fund, Miss Amelia Crombie. No benefits have been distributed since 1897, and the funds of the society, which in 1894 were augmented by the receipt of two legacies, have continued to accumulate.

"The accounts for the financial year ending 17th January 1913 show that, as at that date, the funds amounted to £436, 14s. 11d.

"With a view to testing the possibility of resuscitating the fund upon its existing basis, the petitioners, in the month of December 1912, caused an advertisement to be inserted thrice in each of the two morning newspapers, and four times in each of the two evening newspapers, circulating in Aberdeen and the adjacent district, calling attention to the conditions and benefits of the fund, and inviting applications for membership. No such application has been received, and in point of fact the advertisement . . . elicited only two inquiries.

"From the experience of the past twenty years, as well as from the absence of any response to their advertisement, the petitioners are satisfied that it is impossible to carry on the fund upon the present footing, and that a continuance of the contributory element will necessarily involve a complete failure of the trust purposes. Any prospect of a revival of the fund upon the old lines appears to be irrevocably closed by the coming into operation of the National Insurance Act, 1911. If, accordingly, your Lordships should be satisfied of the expediency and competency of carrying on the administration of the fund upon a non-contributory basis, the petitioners would humbly crave your Lordships' authority to denude of the trust, and to transfer the trust funds, as well as the duty of administering the same, to the Association for Improving the Condition of the Poor in Aberdeen. The said association was founded in the year 1869, and has conducted various branches of charitable work among the poor in the city of Aberdeen. It devotes special attention to the obtaining of accurate information of the state of the poor and the verifying of such information by personal investigation. The work of the association is controlled by a large and representative acting committee, under whose supervision the detailed work is conducted by sectional committees and a body of visitors. The association expends on various charitable objects a yearly income of over £1100, and is possessed of funds exceeding £3900. One of the chief objects of the association is by the gradual consolidation of existing charitable agencies to diminish the expenditure of money and labour attending numerous distinct organisations. The association has already been entrusted with the custody and administration of funds belonging to other charitable organisations, and, in particular, there were transferred to it in the year 1898 the funds of the Aberdeen Sick Man's Friend Society, a benevolent institution dating from 1792. The petitioners believe that they themselves are not a suitable body to administer a trust of this character, and that, if they are to do so with any success, they must be almost entirely guided by such information and advice as the said association or some similar body may be prepared to supply them with. The petitioners have lodged a draft scheme, printed in the appendix hereto, giving effect to the foregoing proposal, and embodying the rules under which they would suggest that the association should henceforth administer the fund, and the association has intimated that it is prepared to accept and

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execute the trust under the regulations and conditions therein contained.

"If, however, it should appear to your Lordships to be incompetent or inexpedient to allow the petitioners to denude of the trust, the petitioners would crave your Lordships' sanction to an alternative scheme of administration, under which they would themselves propose to administer the trust for the future."

The Court having remitted to Lord Kinross, advocate, to report on the petition, he reported in favour of the alternative scheme proposed by the petitioners, stating that it did not appear to him that, in order to invoke the aid of a society like the Aberdeen Association for Improving the Condition of the Poor, it was necessary to replace the existing trustees.

The petition was heard before the First Division (consisting of Lord Kinnear, Lord Johnston, and Lord Mackenzie) on 16th October 1913.

Counsel for the petitioners, in moving the Court to approve of the original scheme proposed by the petitioners (the scheme which involved their denuding of the trust), submitted that the case was distinguishable from that of a trust constituted by the writings of a benefactor where the funds were to be held by *ex officio* trustees of his selection.[1]

The Court, without delivering opinions, approved of the original scheme proposed by the petitioners.

MACKENZIE & KERMACK, W.S., Agents.

No. 3.

Oct. 18, 1913.

Macleod's Trustees v. Macleod's Trustees.

CHARLES CAMPBELL M'LEOD AND OTHERS (Dr John Macleod's Marriage-contract Trustees) AND OTHERS, First, Third, and Fourth Parties.—*Moncrieff, K.C.—Black.*

CHARLES CAMPBELL M'LEOD AND OTHERS (Dr John Macleod's Testamentary Trustees), Second Parties.—*Howden.*

THE REV. ROBERT BALDOCK SCOTT AND OTHERS (Mr and Mrs Scott's Marriage-contract Trustees) AND OTHERS, Fifth and Sixth Parties.—*Blackburn, K.C.—Hon. W. Watson.*

Succession—Faculties and Powers—Power of appointment—Validity of exercise—Appointment to persons not objects of power—Consent of objects of power.

A father made provision in his marriage-contract for payment after his death of certain sums to the capital value of £3000 to the children of his marriage, reserving to himself power to apportion these sums among his children. He died survived by sons and daughters. In his will he professed to exercise the reserved power by bequeathing a legacy of £25 to each of his sons, and by directing his trustees to hold a sum of £7000 of the residue of his estate for his daughters in liferent and for their issue in fee. In a special case in which the daughters, as parties, consented to and upheld the validity of this appointment—

Held, following *Mackie* v. *Mackie's Trustees*, (1885) 12 R. 1230, that the appointment, although made to persons who were not objects of the power, had been wholly validated by this consent.

Mackie v. *Mackie's Trustees doubted per* Lord Johnston.

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[1] M'Lean, (1898) 1 F. 48, distinguished in M'Grouther's Trustees, 1911 S. C. 315.

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Macleod's Trustees v. Macleod's Trustees.

1st Division.

On 13th July 1912 a special case was presented for the opinion and judgment of the Court as to the validity of an appointment made by the Rev. John Macleod, D.D., minister of the parish of Govan, in his testamentary settlement, in exercise of certain powers reserved to him in the marriage-contract entered into between him and his wife Alexandrina Macpherson.

By this marriage-contract Dr Macleod conveyed to trustees a policy of assurance upon his own life for £1000, and provided that, after the death of the survivor of himself and his wife, the proceeds thereof should be divided among the children of his marriage, "declaring that if there shall be more than one child of said intended marriage, it shall be lawful to and in the power of the said John Macleod at any time of his life and while unmarried after the death of the said Alexandrina Macpherson, and even on deathbed to divide and proportion as he shall think fit and proper among said children the foresaid principal sum of One thousand pounds or the balance thereof and any additions thereto and interest thereof herein before provided to them and failing of any such division then the said sum of One thousand pounds or the balance thereof and any additions thereto and interest thereof shall belong to and be divided among said children equally and share and share alike." The marriage-contract also contained this provision:—"And for provisions to the children if any of the said intended marriage the said John Macleod binds and obliges himself and his foresaids to pay to such child or children the sum of Two thousand pounds sterling as at the date of his death with interest at the rate foresaid from that date till payment and that in such shares and proportions if more than one child as he shall fix and appoint by any writing under his hand and failing such writing then equally and share and share alike." The provisions in favour of children were declared to be in full satisfaction of all their legal rights.

Dr Macleod died on 4th August 1898, survived by his wife, and by five sons and two daughters. One of these sons, Duncan Archibald Macleod, died on 9th December 1907. Dr Macleod's widow died on 20th May 1910.

Dr Macleod left a trust-disposition and settlement, by which he conveyed his whole estate, including any sums with regard to which he might have a power of disposal in virtue of the terms of his marriage-contract, to trustees for certain trust purposes. By the fourth of these purposes he directed his trustees to pay to each of his sons, on majority, the sum of £25; by the fifth purpose he directed them to hold the residue of his estate for behoof of his widow in liferent. The sixth purpose was in these terms:—"I direct and appoint my trustees upon the death or second marriage of my said wife, or upon the youngest of my surviving sons attaining majority should such event not take place before the death or second marriage of my said wife, and in the event of there being two or more of my daughters surviving, to hold, retain and invest, in their own names as trustees foresaid, a sum of Seven thousand pounds sterling out of the remainder of my means and estate, and to pay or apply the free annual income arising therefrom to or for behoof of my said daughters in equal proportions for their liferent alimentary use allenarly, and on the death of any or all of my said daughters leaving lawful issue, my trustees shall pay to or for behoof of such issue, in equal proportions, the share of free annual income which would have effeired to their mother had she survived, and on the youngest of said issue attaining majority

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(until which event vesting shall not take place), my trustees shall pay to the issue then surviving and equally among them the share of the capital of the fund hereinbefore directed to be liferented by their mother and them respectively." In the event of there being any residue remaining after satisfying the provision of £7000 just mentioned, the trustees were directed to divide it equally among his sons.

The settlement contained the following declaration:—"And I hereby declare that the provisions hereinbefore conceived in favour of my sons and daughters are made by me in exercise of the powers of apportionment and division conferred upon me by the foresaid Contract of Marriage in regard to a sum or provision of Two thousand pounds sterling, and the contents or proceeds of a Policy of Assurance for One thousand pounds sterling, effected on my life, both particularly mentioned in said Contract of Marriage, and shall be accepted of by my said sons and daughters in full satisfaction of all claims competent to them or any of them on my decease under said Contract of Marriage in regard to said sum or provision of Two thousand pounds sterling, and the contents or proceeds of said Policy of Assurance for one thousand pounds sterling." The testator further declared that, in the event of any of his children repudiating the provisions in their favour, that child's interest in the marriage-contract funds should be restricted to £25, and he should forfeit all further interest in the testator's estate.

The parties to the case were — (*First*) Dr Macleod's marriage-contract trustees, (*Second*) his testamentary trustees, (*Third*) his four surviving sons, (*Fourth*) the executor of his deceased son, (*Fifth*) and (*Sixth*) the marriage-contract trustees of his two daughters, with the concurrence of the daughters and their husbands respectively.

The questions of law included the following:—"(1) Is the exercise of the power of appointment contained in Dr Macleod's trust-disposition and settlement (*a*) wholly valid, (*b*) only partially valid, or (*c*) wholly invalid as an exercise of the power reserved in the marriage-contract with reference to the policy of assurance and the sum of £2000?"

The case was heard before the First Division (without the Lord President) on 4th July 1913.

Argued for the third and fourth parties;—The appointment was wholly invalid, having been made to grandchildren who were not objects of the powers, and the consent of the daughters was ineffectual to validate the appointment. Where an estate was directed to be divided among a certain class, certain members of that class could not authorise its division among persons who were outside it.[1] The case of *Mackie*[2] which was cited for the fifth and sixth parties was wrongly decided. The decision that an appointment to persons outside a power might be validated by the consent of a person who was an object of the power stood upon the authority of the Lord Ordinary (Lord Fraser) alone, and the authorities on which his Lordship relied did not support his judgment. As had been pointed out by Lord Dundas in the case of *MacGillivray's Trustees* v. *Watson's Trustees*,[3]

[1] Crum Ewing's Trustees v. Bayly's Trustees, 1910 S. C. 484, *per* Lord Kinnear, at p. 497.

[2] Mackie v. Mackie's Trustees, (1885) 12 R. 1230.

[3] 1911 S. C. 1103.

Lord Fraser's opinion had been acquiesced in in the Inner House, but the present question had not been argued there. The only question which was argued in the Inner House on this branch of *Mackie's* case [1] was whether such consent must necessarily be in writing. Nor was it possible in the present case to hold that the appointment was partially valid. No doubt if an appointment, valid in itself, was hedged about by invalid conditions, the latter might be held *pro non scriptis*.[2] But here the appointment itself was invalid, for the reasons already given, and therefore it could not be sustained to any extent.[3]

Argued for the fifth and sixth parties;—It was conceded that the appointment might have been open to attack from one of the beneficiaries whose interest had been cut down from a fee to a liferent, but this appointment was acquiesced in by the daughters, the only beneficiaries whose interest had been so treated. It would have been competent for the testator to restrict the daughters' interest to one of liferent by provisions to that effect inserted in their marriage-contracts, with their consent, during his lifetime.[1] There was no reason why the fact that such consent was not given until after his death should alter its legal effect.

Counsel for the fifth and sixth parties gave formal consent at the bar to the appointment which had been made.

At advising on 18th October 1913,—

Lord Kinnear.—[After narrating the terms of the marriage-contract and of Dr Macleod's trust-disposition and settlement]—Now, it is perfectly clear—and it is not disputed—that it is no objection to the exercise of the power that the testator has thrown the moneys to which it applies into the general estate and disposed of them in terms as if they were part of the general estate. Nor is it any objection that, if the will takes effect, the sons will have little more than what has been called an illusory gift—£25—the greater part of the small estate remaining to be divided going to the daughters in liferent and to their children in fee. So far the execution of the power is admitted to be perfectly regular and valid, but then the question which has occasioned the present dispute arises.

The dispute arises from his settlement of the shares which he gives to his daughters upon them in liferent and their children in fee, because it is obvious that that brings into the distribution persons who are not objects of the power, to wit, the grandchildren. He is bound by his marriage-contract to divide these moneys among his children, and the grandchildren being outside the limits of the power to which he is by contract restricted, it is said that the execution of the power has failed, and that the estate must be divided among the children equally.

Now, I think that might have raised a question of considerable difficulty if it had not been already settled by authority which is binding upon this Court. It is exactly the question which arose for decision in

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[1] Mackie v. Mackie's Trustees, 12 R. 1230.

[2] Dalziel v. Dalziel's Trustees, (1905) 7 F. 545; Middleton's Trustees v. Middleton, (1906) 8 F. 1037.

[3] Dick's Trustees v. Cameron, 1907 S. C. 1018, was also referred to.

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the case of *Mackie* v. *Mackie's Trustees*,[1] where it was held that, under a power to appoint among children, interests might be given to grandchildren, either by way of settlement or otherwise, with the concurrence of their mother, provided that the mother herself was an object of the power. I take that to be quite clearly and distinctly laid down as law in that case. The circumstances were exactly the same as those with which we are concerned, because the testatrix in that case had settled, by marriage-contract, certain heritable and moveable estate for herself in liferent and for her children in fee in such proportions as she might appoint by writing under her hand. She died leaving a trust-disposition and settlement in which she stated her intention to exercise this power of appointment, and directed her trustees to pay a certain legacy to her son and the rest of her estate to her daughter in liferent and the daughter's children in fee. Now, that is exactly the same position as we have to consider. It was objected on behalf of the son that the exercise of the power was invalid, because it brought in persons who were not objects of the power. The Court held, on the ground I have mentioned, that the power was well exercised in so far as it settled a liferent upon the daughter, and the fee upon her children, inasmuch as she consented to that disposition of the fund.

I think that case is binding upon us, and that we are bound to follow it. If it were open to consideration we should have no power to review or to overrule it as the Court is at present constituted, and the only way in which, if it were erroneous, it could be corrected would be by an appeal to the House of Lords, or by decision of a Court of seven Judges. I should not have been averse to take the second of these two courses if the estate with which we are concerned had been a large one, but I should have assented to that proposal only out of deference to certain views which have been expressed in the other Division, in a later case, and also in deference to what I believe to be the view of my learned brother, Lord Johnston. As far as I am concerned I see no reason to doubt that the decision in *Mackie* v. *Mackie's Trustees* [1] is based upon a body of authority which justifies it. I think the law has been laid down by the highest authorities, and especially by the authority upon whom we always have looked as the weightiest of all authorities upon the doctrine of powers, Lord St Leonards. And in the series of cases to which I have already referred it is found to be no objection to the exercise of a power that it gives the fee to the grandchildren, who are not objects of the power, provided that that is done with the consent of a parent who is an object of the power, and to whom the liferent is given.

In the present case there can, of course, be no question at all that we have the consent of the daughters, so far as their interest is concerned, and that we must proceed upon that consent, because they have expressed it in the simplest and most effective of all possible ways by appearing in this case and supporting the execution of the power by their father's will as valid. We must take it, therefore, that the thing is done with their approval and consent.

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[1] 12 R. 1230.

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In those circumstances I should not myself have thought it necessary that the case of *Mackie* v. *Mackie's Trustees*[1] should be reconsidered, but if there had been sufficient estate in dispute to justify such a course I should not have been averse to the proposal to send this case to seven Judges. But then the estate is an extremely small one—there is not much over £3000 to be divided, I think, among six children—and I think it would be really oppressive to expose these people to the expense of further litigation and a new hearing because of any difficulty which this Court might have in accepting the case of *Mackie*.[1] My view is that, whatever our own opinion may be, we are bound by that decision, but so far as I am concerned I see no reason to doubt its soundness.

I should, therefore, propose to your Lordships to answer the first question in the affirmative, in so far as it regards the first alternative of that question: "Is the exercise of the power of appointment contained in Dr Macleod's trust-disposition and settlement wholly valid?" I think we should say that it is.

Lord Johnston.—The late Rev. John Macleod unquestionably intended by his will to exercise a power of appointment among his children of the provision made by him for them in his antenuptial marriage-contract. It is not immaterial to note that these provisions were onerous, the children's legal rights being by a term of the contract satisfied thereby. Dr Macleod exercised his power by a practically illusory appointment to his sons and the appointment substantially of the whole fund to his daughters equally in liferent and their issue in fee. *Prima facie*, therefore this is, *quoad* the fee, an appointment in favour of strangers to the power. But it is said that such an appointment, the daughters raising no objection to the settlement upon their children, is valid on the authority of *Mackie's* case.[1] I have carefully examined that case and the authorities on which it proceeded, and I am satisfied that it is so closely identical with the present that we could not, without repudiating its authority, do otherwise than sustain the appointment here. I agree with your Lordship that we are bound to follow it, or submit the question to a combined Court of both Divisions. It is not without hesitation that I concur in abstaining from the latter course in the present case. But the reasons which your Lordship has stated, and in which I understand that Lord Mackenzie concurs, prevail. At the same time I desire respectfully to associate myself with the doubt of the authority of the decision in *Mackie's* case,[1] expressed by Lord Dundas in the case of *MacGillivray's Trustees*.[2] I am not satisfied that the English authorities on which the judgment in *Mackie's* case[1] proceeded have been examined with sufficient discrimination, and I think that the question is deserving of reconsideration in a more appropriate case than the present.

I therefor concur in disposing of this special case as your Lordship proposes.

Lord Mackenzie.—I agree with Lord Kinnear. I am prepared in this

[1] 12 R. 1230. [2] 1911 S. C. 1103.

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case to follow the decision in the case of *Mackis*,[1] an authority which is directly in point.

THE COURT answered the first branch of the first question in the affirmative.

BELL, BANNERMAN, & FINLAY, W.S.—HORNE & LYELL, W.S.—Agents.

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THE SCOTTISH INSURANCE COMMISSIONERS, Petitioners.—*Sol.-Gen. Anderson—A. R. Brown.*

REV. DAVID PAUL, LL.D. (Clerk to The General Assembly of the Church of Scotland) AND ANOTHER, Respondents.—*Johnston, K.C.—Cowan.*

Insurance — National Insurance — Employment — Contract of service — Church—Assistant ministers—Student missionaries—Lay missionaries—Master and servant—National Insurance Act, 1911 (1 *and* 2 *Geo. V. cap.* 55), *secs.* 1 (1) *and* (2), *and First Schedule, Part I.* (*a*).

The National Insurance Act, 1911, enacts, Part I., section 1 (1) and (2), and First Schedule, Part I. (*a*), that persons employed within the meaning of the Act shall include all persons who are engaged in any "employment in the United Kingdom under any contract of service. . . ."

Held that,—in the Church of Scotland and in the United Free Church of Scotland,—(1) assistant ministers were not employed persons within the meaning of the Act, in respect that they were persons holding an ecclesiastical office, who performed the duties of that office subject to the laws of the Church and not subject to the control and direction of a master under a contract of service; (2) student missionaries were not employed persons, in respect that their services were rendered as an incident in the course of their studies and not as work done under a contract of service; (3) lay missionaries, who held no ecclesiastical status, and were appointed by, and subject to the control of, a minister or a kirk-session or a committee, were employed persons within the meaning of the Act.

1ST DIVISION. ON 30th January 1913 the Scottish Insurance Commissioners, established under the National Insurance Act, 1911, presented a petition, in accordance with the provisions of section 66 (1) (iii.) thereof, for the decision by the Court of a question which had arisen under the Act.

The petition, after quoting the sections of the Act affecting the question,* proceeded as follows:—"A question has arisen as to

[1] 12 R. 1230.

* The National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), Part I., enacts:—

Sec. 1. "(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this Part of this Act shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned may be, insured in manner provided in this Part of this Act, and all persons so insured (in this Act called 'insured persons') shall be entitled in the manner and subject to the conditions provided in this Act to the benefits in respect of health insurance and prevention of sickness conferred by this Part of this Act.

"(2) The persons employed within the meaning of this Part of this Act

whether the classes of employment of (*a*) assistants to ministers of the Church of Scotland, (*b*) assistants to ministers of the United Free Church of Scotland, (*c*) lay missionaries of the Church of Scotland, (*d*) student missionaries of the Church of Scotland, (*e*) lay missionaries of the United Free Church of Scotland, and (*f*) student missionaries of the United Free Church of Scotland, are employments within the meaning of Part I. of the Act."

On 9th July 1913 answers were lodged by the Reverend David Paul, LL.D., Clerk to the General Assembly of the Church of Scotland, and the Reverend Archibald Henderson, D.D., Clerk to the General Assembly of the United Free Church of Scotland. A joint minute for the parties was lodged on the same date, in which the material facts relative to the classes of employment referred to in the petition were stated as follows:—

"(a) *Employment of Assistants to Ministers of the Church of Scotland.*

"Assistants to ministers of the Church of Scotland must be licentiates or probationers—those terms being synonymous—of the Church, no one being eligible unless he has received a licence from a presbytery. This licence is granted by the presbytery within whose bounds a candidate for licence resides, and is conferred only after the presbytery is satisfied that the candidate has attended the prescribed course of study at a university and that he possesses qualifications suitable for the ministry, and also after he has answered the questions appointed by Acts of Assembly 1889, XVII., and 1911, VIII., and subscribed the formula prescribed by Act of Assembly, 1910, XIII. The said licence bears that the presbytery 'license the said to preach the Gospel of Christ and exercise his gifts as a probationer for the holy ministry.' After being licensed the licentiate, if he removes his residence from the bounds of the licensing presbytery, must report himself to the presbytery to which he has changed his residence and must produce to it his certificate of licence and a certificate of conduct, and that presbytery is required to supervise his conduct while within its bounds.

(in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that Schedule."

Part I. (*a*) of the First Schedule is in the following terms:—

"(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment."

Part II. of the First Schedule contains, *inter alia*, the following provision:—

"EXCEPTIONS.

"(*g*) Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value One hundred and sixty pounds a year, or in cases where such employment involves part-time service only, at a rate of remuneration which in the opinion of the Insurance Commissioners, is equivalent to a rate of remuneration exceeding One hundred and sixty pounds a year for whole-time service."

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"By virtue of his licence a licentiate is authorised and entitled to discharge all the duties of an ordained minister except that he cannot dispense the sacraments or solemnise marriage and cannot act as a moderator or member of a church court. He holds a status recognised by the Church.

"Assistants to ministers of the Church of Scotland are appointed by the kirk-session, or occasionally by the minister of the parish. Their duties are to assist the minister in the work of the church and parish. That work includes the conduct of religious services, superintendence of the Sunday schools and teaching of Bible classes, visitation of the sick and the poor, and general parochial work. The assistant is not subject to ecclesiastical censure or discipline in any matter at the hands of the minister or kirk-session. As regards the matter and manner of his preaching and conduct of worship, the assistant is subject to the supervision of, and answerable to, the presbytery, and is not under the control of the minister of the charge except that the minister may exclude him from the pulpit, and that he may be dismissed or his engagement may be terminated either by the minister or the kirk-session according as he has been appointed by the one or the other. In other matters the assistant receives his orders or directions from the minister of the church who is entitled to control him in the exercise of his duties. The assistant is, however, subject, like the minister, to the jurisdiction of the presbytery, who are entitled also to control him in regard to the general manner in which he discharges the duties imposed upon him by the minister.

"By Act of Assembly, 1888, XIV., it is required that (in addition to the licentiate reporting himself to the presbytery within whose bounds he comes) the appointment of an assistant must be formally notified by the minister of the charge to the presbytery having jurisdiction over the charge, with a view to the assistant being recognised as such and accounted part of the church agencies within the presbytery. The termination of the assistantship must be similarly notified. If the assistant's licence were temporarily or permanently withdrawn by the presbytery, his appointment as assistant would necessarily be terminated.

"The licentiates who become assistants do so in preparation for the ministry and with the view in every case of becoming ordained ministers. Their appointment is of a temporary nature.

"There are no general regulations of the Church applicable to the appointment of assistants to ministers, the term and conditions of their appointment being settled in the general case by the kirk-session and sometimes by the minister. They are required to devote their whole time to the duties of their office. Their remuneration consists of a fixed salary; and this salary is usually paid out of the congregational funds of the church to which they are attached. In the case of all the assistants to ministers to whom this petition relates their rate of remuneration does not exceed in value £160 a year. . . .

"(b) *Employment of Assistants to Ministers of the United Free Church of Scotland.*

"Assistants to ministers of the United Free Church must be licentiates, no one being eligible unless he has received a licence from a presbytery. The effect of a licence in the United Free Church is the same *quoad* that Church as that of a licence in the Church of Scotland, and the operative terms of the licence granted by a presbytery of the United Free Church are as quoted in paragraph (*a*) *supra*.

Prior to the granting of a licence the presbytery must be satisfied that the candidate has gone through the required course of study at a university and at a Divinity hall, and also by trials and examinations that the candidate is a suitable person for receiving a licence; and the candidate is required to answer the questions prescribed by and sign the formula laid down in Act II. of the Assembly of the United Free Church of 1900. The clerk of the presbytery furnishes the licentiate with a copy of the licence, and must send the name and address of the licentiate to the clerk of the committee of the General Assembly on the Distribution of Probationers, or in the case of Gaelic-speaking licentiates, to the Committee of the General Assembly on the Highlands and Islands. The licentiate remains under the jurisdiction of the licensing presbytery, so far as regards his character and doctrine, so long as he is resident within its bounds, and on removing to another presbytery he is required to present to it an extract of his licence and a certificate of character from his former presbytery. He then becomes subject to the jurisdiction of the presbytery to which he has removed.

"The assistants are appointed by the minister or kirk-session of the charge. The duties of an assistant, and the terms on which he holds the appointment, are the same as in the case of an assistant in the Church of Scotland; but as regards the manner in which he discharges his clerical duties, he is under the direction and supervision of the minister alone. Their engagement can be terminated by the kirk-session, but in matters of discipline they are subject to the presbytery under whose jurisdiction they are. There is no definite period of engagement; but as a general rule a month's notice of termination of the employment may be given on either side. The appointment is usually made by a formal minute of the session. The appointment of an assistant in some cases is made for a definite period, with reservation of his liberty to preach in a vacancy and to accept a call to a charge if elected.

"There is no obligation on the minister, as in the case of the Church of Scotland, to notify the appointment of an assistant or the termination of the assistantship to the presbytery.

"Assistants to ministers are required to devote their whole time to the duties of their office. Their remuneration consists of a fixed salary. In the case of all assistants to ministers, to whom this petition relates, their remuneration does not exceed in value £160. Their remuneration is paid either by the congregation or by the minister, with, in some cases, grants in aid from the central funds of the Church.

"(c) *Employment of Lay Missionaries of the Church of Scotland.*

"Lay missionaries in the Church of Scotland are appointed by the minister or by the kirk-session of the parish. Their duties are to assist the minister in the work of the church and parish. Not being licentiates they have no authority to discharge the spiritual duties of the ministry. They cannot preach at the regular services in church, but they may conduct services in mission halls. Their work includes, besides this assistance, the superintendence of Sunday schools, the teaching of Bible classes, the visitation of the sick and poor, and general parochial work. They are not eligible for election as ministers of a parish.

"They receive their instructions from the minister of the parish, who is entitled to control them in the exercise of their duties, with

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reference to the time, place, and mode of performing these duties. Their appointments are not reported to the presbytery, as is the case with licentiates. They hold their appointments at the will of the minister or kirk-session. The usual arrangement is one month's notice. There are no general regulations of the Church applicable to the appointment of lay missionaries. Each kirk-session follows its own rules. Lay missionaries are required to devote their whole time to the duties of their office, and are paid a fixed salary ranging from £80 to £100 a year. The money to pay lay missionaries is found partly by the congregation and partly by a special fund of the Church raised for the purpose.

"(d) *Employment of Student Missionaries of the Church of Scotland.*

"In several parishes student missionaries are employed between the months of May and September, that is, during the course of the University summer vacation. These men are appointed by the minister or kirk-session of the parish, and their duties are controlled in the same way as are those of lay missionaries. Their duties are very seldom so onerous that their whole time is required. The appointments are desired by the young men because opportunity is afforded for study and preparation for the next session's work, while experience is gained in the practical work of the ministry. The remuneration varies from 23s. to 40s. per week, and is equivalent to a rate of remuneration not exceeding £160 a year for whole-time service.

"(e) *Employment of Lay Missionaries of the United Free Church of Scotland.*

"The Highlands and Islands Committee of the United Free Church of Scotland employ about forty lay missionaries, including catechists, the great majority of whom are Gaelic-speaking. These missionaries are appointed by the Committee usually after a two years' preparatory course of training in the Bible Training Institute, Glasgow. Their duties are the same as are set forth in paragraph (c), *supra*. Their salaries are in every case under £160.

"(f) *Employment of Student Missionaries of the United Free Church of Scotland.*

"The Highlands and Islands Committee, by a joint arrangement with the minister and kirk-session of certain congregations, send students for short periods in the summer to assist in the work of the district. The remuneration paid them is of the nature of an honorarium, the appointment running from three to five months, the special object in view being that the students may obtain some experience in the conduct of public services, pastoral visitation, and generally in the practical work of the ministry. They maintain their regular studies during those months, so that their full time is not devoted to those duties. They are allowed from 20s. to 25s. per week, their remuneration being equivalent to a rate of remuneration not exceeding £160 a year for whole-time service. Students frequently make arrangements whereby the duties are divided between two of them, either by each taking several weeks in turn, or in some cases living together and sharing the work and the honorarium allowed."

The case was heard before the First Division (consisting of Lord Kinnear, Lord Johnston, and Lord Mackenzie) on 15th October 1913.

Argued for the petitioners;—(1) The essentials of employment were power of appointment, power of dismissal, and power of control, and with regard to assistant ministers, all these powers were exercised by the kirk-session or the minister. Further, such assistant

ministers had to give their whole time to their duties, and were paid, out of funds controlled by the kirk-session, fixed salaries of less than £160 a year. Accordingly, there was present in their case all the essentials of a contract of service that were necessary to make insurance obligatory for them. The distinction between a contract of service and a contract for services was in every case a question of fact, and the facts here entirely supported the view that the contract entered into by assistant ministers was a contract of service.[1] The decisions with regard to the contracts on which curates of the Church of England and ministers of the United Methodist Church were employed did not apply here, as, owing to the nature of the duties they performed and the tenure of their offices, their contracts differed entirely from the contracts now in question. (2) Lay missionaries should clearly be held to be employed under a contract of service, because they held no ecclesiastical office, were not professional men, and were employed subject to the control of the minister, and subject to a month's notice. (3) Student missionaries were in the same position as lay missionaries except that their period of employment was limited. While it lasted, however, their employment was under a contract of service.

Argued for the respondents;—(1) In the case of assistant ministers no powers of appointment, or of dismissal, or of control, could be exercised by a minister or a kirk-session independently of the licence of the presbytery. When the presbytery granted a licence the licentiate was not the servant of any particular minister, but was licensed to exercise his gifts professionally, and his employment was merely to give his services in accordance with that licence.[2] In so doing he was not acting under a contract of service,[3] but under an ecclesiastical commission to assist a minister in the discharge of his duties. The method in which he performed that charge was not under the control of the minister or kirk-session who appointed him, but under the control of the presbytery. (2) The only distinction in the case of lay missionaries was that they did not hold any ecclesiastical office. They had, however, a recognised status in which, like assistant ministers, they were not under a contract of service, but merely gave services. (3) Student missionaries also had a recognised status, and were in the same position as assistant ministers. They acted under no contract upon which they could sue for an honorarium, and further, their employment was only casual.

At advising on 18th October 1913,—

Lord Kinnear.—This petition raises a question between the Scottish

[1] *In re* National Insurance Act, 1911, Church of England Curates, [1912] 2 Ch. 563, Parker, J., at p. 568; *Re* Employment of Ministers of the United Methodist Church, (1912) 28 T. L. R. 539; Simmons v. Heath Laundry, [1910] 1 K. B. 543, Fletcher Moulton, L.J., at pp. 549-50; Scottish Insurance Commissioners v. Edinburgh Royal Infirmary, 1913 S. C. 751, Lord President Dunedin, at p. 756 (and Hillyer v. Governors of St Bartholomew's Hospital, [1909] 2 K. B. 820, therein referred to); Yewens v. Noakes, (1880) 6 Q. B. D. 530.

[2] Simmons v. Heath Laundry Co., [1910] 1 K. B. 543, Buckley, L.J., at p. 553.

[3] *In re* National Insurance Act, 1911, Church of England Curates, [1912] 2 Ch. 563; *Re* Employment of Ministers of the United Methodist Church, 28 L. T. R. 539.

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Insurance Commissioners and the Church of Scotland and the United Free Church as to the position of certain classes of persons under the provisions of the Insurance Act. The petition is presented by the Insurance Commissioners, who must, of course, maintain that the persons whom they have specified in their application do fall within the provisions of the statute; but it has been explained to us that the position which the Commissioners desire to assume in this case is not by any means that of litigants pressing a claim against recalcitrant debtors, but is merely that of persons who, having a public duty to discharge, come to this Court for advice, as they are entitled to do under the provisions of the Act of Parliament. That being the professed intention of the Commissioners, I only add that I think the case they have raised was one which they were clearly entitled to raise, and that it was argued with great fairness and moderation on both sides. Although I think the question was quite a right one to raise, I cannot say that, as regards the most important of the three classes to which it relates, I myself have seen any sufficient reason to suppose that they are within the Act.

The statement is that a question has arisen as to the employment of assistant ministers of the Church of Scotland and of the United Free Church of Scotland, of lay missionaries of these two Churches, and of student missionaries of these two Churches—the question whether the employments of these ecclesiastical persons respectively are or are not within the Insurance Act.

I begin by saying that I see no difference in relation to this question between the position of the Established Church and that of the United Free Church. The status of the classes of persons in question seems to me to depend upon the same considerations in both Churches, and I do not think that from either side of the bar it was suggested that any sound distinction could be taken between them.

The question, therefore, is,—to begin with the first of the three classes of persons,—whether assistants to ministers of these two Churches are within the Act or not; and that depends upon whether they satisfy the conditions of Part I. of the First Schedule to the Act, by which it is provided that employment in the United Kingdom, under any contract of service or apprenticeship, whether the employed person is paid by the employer or someone else, and whether under one or more employers, shall be one of the cases included in the operative part of the Act, which refers to all persons who are to be brought within its operations as persons who are engaged in any of the employments specified in the Schedule, and in particular in the part of the Schedule I have read.

Now that raises the question whether assistants to ministers of these two Churches are employed under a contract of service or not. That, I think, must be determined with reference to the ordinary and popular use of the term "servant." As that word is used in the ordinary affairs of life it means the kind of relationship which subsists between a master and a domestic servant. It is certainly not to be read in the metaphorical sense in which it may be said that public officers and Ministers of State are servants of the Crown or servants of the country. Now, what constitutes a contract of service, if the word is used in the ordinary and

popular sense, is a question which has been frequently discussed in the Courts both of this country and of England, and I apprehend that the general rule is quite clearly established. It has been chiefly discussed in cases where it was indispensable to determine whether particular persons were servants of those by whom they were employed or not, in order to decide whether an employer was liable for the acts or defaults of a person in his employment or not; and the general rule is stated very clearly by a distinguished writer, Sir Frederick Pollock, when he says [1]:—"The relation of master and servant exists only between persons of whom one has the order and control of the work done by the other." In the series of cases to which the learned author refers in support of that definition I think it will be found that the true force and meaning of the words "order and control of the work" is just what is said by Bramwell, L.J., in one of the cases (*Yewens* v. *Noakes* [2]):—"A servant is a person subject to the command of his master as to the manner in which he shall do his work." In a contract by which one undertakes to produce a given result, but so that in the actual execution of the work he is not under the direction of the person for whom it is done, but may use his own discretion in things which are not specifically fixed by the contract itself, the relation of master and servant does not exist. The employer, in cases of that kind, is not liable for the acts and defaults of the person employed, just because, although he may take benefit from the work and pay for it, he is not in the position of an employer of a servant, entitled to interfere in the direction and control of his work.

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If that is the meaning of a contract of service, we have to see whether there is any such contract between the assistant ministers in question and the kirk-session or anybody else, and I confess to thinking very clearly that there is not. I think the position of an assistant minister in these Churches is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs and not subject to the control and direction of any particular master. We are told that these gentlemen are probationers, and we know that a probationer, in the ordinary sense of the word, is a person so placed that he may give proof of his qualifications for a certain status or place. The probationers who are appointed to the position of assistant ministers are students of divinity who have obtained a licence to preach from the presbytery, and that is a licence which is only given to them on the production of certificates from professors of theology in the universities of their good morals and qualifications, and upon their showing that they have gone through a certain course of theological study, and thereafter upon their passing certain trials to the satisfaction of the presbytery. When these things are done, then the presbytery issues its licence. Now, we are told in this case what the terms of the licence are. The licence bears that the presbytery licenses the person named to preach the Gospel of Christ and to exercise his gifts as a probationer for the holy ministry. When a person so licensed is appointed to be assistant to a minister, I think

[1] The Law of Torts, 8th ed., p. 79. [2] 6 Q. B. D. 530, at p. 532.

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that his authority to perform the duties that belong to that office does not arise from any contract between himself and the minister, or himself and the kirk-session or anybody else, but arises from the licence given to him by the presbytery to exercise his gifts. He is, therefore, in my opinion a person who is in no sense performing duties fixed and defined by a contract of service.

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I should have come to that conclusion, I confess, without much hesitation apart altogether from authority. But it is very satisfactory to find that a question which, if not exactly the same as the present, is at all events substantially the same, has been decided in the Chancery Division of the Court in England by a very eminent Judge. I refer to the case of the Church of England curates—*In re National Insurance Act*.[1] The question that was raised there was whether curates of the Church of England were or were not within the terms of the Act as being persons employed in the sense of the statute. The learned Judge, who was Mr Justice Parker (now Lord Parker), says[2]:—"It appears quite clear on the construction of the Act that, in order to make insurance obligatory under Part I., there must be something in the nature of a contract of service, and in the particular case before me, unless I can say that there exists between a curate and someone else some contract which can properly be called a contract of service, the curate can in no sense be a person on whom insurance is obligatory, though he may possibly come in as a voluntary contributor. I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all." And then he goes on to say that there is no pretence in reality, in his opinion, for arguing that the relation between a curate and his vicar, or between a curate and the bishop, is the relation of employer and servant. I do not think it necessary to read or follow out the argument in all its details upon that particular question. Although the relation between an assistant minister and the parish minister more or less resembles that between a vicar and his curate, there are many points of detail in which they differ. But I think that in substance the reasoning of the learned Judge in that case applies directly to the case we have to consider. And so far as these gentlemen are concerned, therefore, I have come to the opinion that they are not within the obligatory provisions of the statute.

I only add that I think the learned counsel who maintained the contrary had some difficulty in explaining exactly who was to be held to be the employer if assistant ministers were servants employed in terms of the Act at all. Whether it was the minister or whether it was the kirk-session, I think, seemed to him to be a question of considerable difficulty; but ultimately, as I understood the argument, the position assumed was that the kirk-session was the master and the assistant minister the employee. I think that position is completely excluded by the statement of facts contained in the admissions before us, from which I infer that the kirk-session has no power at all to control or direct the assistant minister

[1] [1912] 2 Ch. 563. [2] *Ibid*, at p. 568.

either in his preaching of the Gospel or in his visitation of the sick and poor or in his general parochial work. These are duties which he has undertaken in accepting the charge, and his authority for performing them is that of a licentiate of the Church, derived from the presbytery and not derived from a contract either with the kirk-session or with the minister. It is manifest that the kirk-session can have no pretention to control a minister in the exercise of his religious office, and if he is, in some sense, subject to the control or superintendence of the minister of the parish, it is by reason of the duty which a junior owes to a superior clergyman, and not by force of the contractual obligations of a servant to a master.

The other classes of persons with regard to whom the question has arisen are in a somewhat different position, and I think it may be convenient to deal with the third class first, because that resembles the first more nearly than the second. The third class is described as being that of student missionaries who are employed between the months of May and September—that is, of course, during the university summer vacation. The appointments are desired by young men who are studying for the Church, because they get opportunity for study and preparation, and also for gaining experience in the practical work of the ministry. It is said in the statement with reference to the United Free Church student missionaries that the special object in view is that students may obtain experience in the conduct of public service, pastoral visitation, and, generally, in the practical work of the ministry. They maintain their regular studies during the months in which they are acting as student missionaries, and must return to the ordinary course of theological study when the university opens again, which they can do under the supervision of the presbytery. Now, I think there is a distinction between students and persons who are licensed to preach. There is a very obvious ecclesiastical distinction, but I do not think it is enough to differentiate the one class from the other with reference to this particular question. As I understand the statement, the student missionaries are really engaged in this work as work incidental to their studies and probation for the office of the ministry, and I think they are no more subjects of a contract of service between them and any other person than the assistant ministers are.

The remaining class is that of lay missionaries, and I have come to a different conclusion so far as regards these persons. Lay missionaries, we are told, are appointed by the minister or by the kirk-session. Not being licentiates, they have no authority to discharge the spiritual duties of the ministry. Their work includes assistance in regular services or in services in mission halls, the superintendence of Sunday schools, the teaching of Bible classes, and general parochial work. It is added that they receive their instructions from the minister, who is entitled to control them in the exercise of their duties with reference to the time, place, and mode of performing these duties. Their appointments do not come before the presbytery as those of licentiates must do, and they hold their appointments at the will either of the minister or the kirk-session. Now, that appears to me to describe not the status of an ecclesiastical person but the position of a person who, under a contract, undertakes to do certain work for remuneration, and who is under the control and direc-

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tion of the person by whom he is employed. It appears to me, therefore, that these gentlemen do fall within the definition of the statute. Whether in any particular case they are to be held as in the employment of the minister or in the employment of the kirk-session is a question which we, I think, are not in a position to answer. If they are employed under contract, then every contract must depend upon its own terms; but whether the kirk-session or the minister is to be regarded as employer, I think there is enough before us to show that there is a contract of employment, and that is sufficient for the disposal of the only question which it is possible for this Court to determine. The application of the general doctrine to particular cases will remain for the consideration of the Insurance Commissioners.

LORD JOHNSTON,—The question submitted to the Court by the Scottish Insurance Commissioners is whether the employment as (*a*) assistant minister, (*b*) lay missionary, and (*c*) student missionary in the Established and United Free Churches of Scotland respectively is employment in the sense of Part I. of the National Insurance Act.

There are distinctions between those classes, but none between the Churches. I take therefore the case of the assistant ministers first. The statute (First Schedule, I. (*a*)) says merely that the employment must be under a contract of service. A contract of service assumes an employer and a servant. It assumes the power of appointment and dismissal in the employer, the right of control over the servant in the employer, and the duty or obligation of service to the employer in the servant. I state it thus generally, because the fact that the employer's powers of appointment and dismissal and his right of control may be exercised by delegation does not affect the question.

So regarding the contract of service, the employment of an assistant minister does not appear to me to fall under the category of employment under such contract in the sense of the Act. In the first place, the assistant must be a probationer for the ministry, and a probationer for the ministry must be a licentiate. Shortly, a probationer is a candidate for the ministry, licensed to preach and exercise his gifts but not yet ordained to a charge. He receives his licence from the presbytery. So far back as 1694 the General Assembly enacted "That when such persons are first licensed to be probationers, they shall oblige themselves to preach only within the bounds, or by the directions of that presbytery which did licence them." Subject to provision for transfer from presbytery to presbytery, this still holds, and to the jurisdiction of the presbytery of the bounds the probationer is subject as much as the minister, and therefore the presbytery have general control over him in the discharge of his duties and may withdraw his licence. If his licence is withdrawn by the presbytery, his appointment as assistant necessarily falls. Accordingly, it is admitted that "he holds a status recognised by the Church." Allowing for the difference between the ecclesiastical system of the Established Church of England and that of both branches of the Presbyterian Church in Scotland, there is very substantial similarity between the assistant minister in Scotland and the

curate in England, and the judgment of Parker, J., in *In re Employment of Church of England Curates*[1] appears to apply, *mutatis mutandis*, to the case under consideration. In the case of the assistant minister there is no one who occupies the position of employer in the sense of a contract of service. The presbytery does not appoint; even though its licence is necessary, it is a general licence and not a licence *ad hoc*. The kirk-session generally appoints; sometimes the minister. The kirk-session has no control over the discharge of duties. That control is divided between the presbytery and the minister. The power of terminating the appointment is with the minister or kirk-session according as the appointment has been made by the minister or kirk-session, yet the appointment may be terminated by the act of the presbytery in withdrawing the licence. In fact, the contract in which the assistant minister is engaged is, as in the *Royal Infirmary* case,[2] more a contract for services than a contract of service. Accordingly, I agree with your Lordship that assistant ministers are not employed persons in the sense of Part I. of the Act.

The lay missionaries are in a different position. They enjoy no ecclesiastical status. They are not licentiates, and have no relation to the presbytery. They are entirely under the control of the minister of the parish, and accordingly they must, I think, be held to be employed persons in the sense of the Act.

The student missionaries, on the other hand, who merely receive vacation appointments, cannot properly be said to be employed at all. They are appointed, in the course of their university career, for their own benefit rather than for that of the parish, that they may have some practical experience of parish work as part of their education. They are, as it were, given the opportunity of seeing what I may call clinical parochial work. And their position is therefore clearly distinguished from that of the lay missionaries, whose employment is regular and permanent and a means of livelihood. They are therefore not employed persons in the sense of Part I. of the Act.

Lord Mackenzie.—I am of the same opinion, and for the reasons which have been already explained. As regards the assistants, I think insurance is not obligatory because they are under no contract of service. The joint minute which has been adjusted by the parties defines, so far as possible, the relation of the assistant to the minister and kirk-session. I think that the fact that the definition is left in very general terms shows how much liberty there must necessarily be to the assistant in the execution of his duties. To a certain extent there may be control as regards the objects of the work; but, as it appears to me, there is no definite control as regards the method in which the work is to be done. The case of the assistant is really the case of one who is discharging the duties of an office, and whatever authority is exercised over him is in virtue of an ecclesiastical jurisdiction, and is not in virtue of rights which arise out of a contract of service. That, I think, is sufficient to show that the case of the assistants is outside the scope of the Act.

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[1] [1912] 2 Ch. 563.

[2] 1913 S. C. 751.

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As regards the student missionaries, there, I think, the contract may be described as one for services. The students take up this work for the purpose of better fitting them, when their education is completed, for discharging the duties appertaining to an office in the Church.

As regards lay missionaries, I agree that their position is different, but I desire distinctly for myself to say that my opinion in regard to lay missionaries is confined to those to whom the adjusted statement of facts is applicable, because it is impossible to shut one's eyes to the fact that there may be lay missionaries to whom these statements are not applicable, and who, therefore, would not come within the scope of the Act.

LORD KINNEAR.—I should like to add that I quite agree with what Lord Mackenzie has last said; but I conceive that our answer, which may be framed simply in terms of the concluding question, must necessarily, in all cases, be applicable to the persons who are described in the minute of admissions. What we answer is that the classes of employment specified under the letters (*a*) (*b*) (*d*) and (*f*) are not employments within the meaning of the Act, but that the classes of employment described under the letters (*c*) and (*e*) are within the Act.

THE COURT pronounced an interlocutor deciding that the employment of assistants to ministers, and of student missionaries, in the Church of Scotland and the United Free Church of Scotland (designated in the petition by the letters (*a*) (*b*) (*d*) and (*f*)), was not employment within the meaning of Part I. of the National Insurance Act, 1911, and that the employment of lay missionaries in these Churches (designated in the petition by the letters (*c*) and (*e*)) was employment within the meaning of Part I. of the Act.

JAMES WATT, W.S.—MENZIES & THOMSON, W.S.—JOHN COWAN, W.S.—Agents.

No. 5.

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Dempsey v. Caldwell & Co., Limited.

JAMES DEMPSEY, Appellant.—*Chisholm, K.C.*—*A. A. Fraser.*
CALDWELL & COMPANY, LIMITED, Respondents.—*Wilton.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (1) (*b*) *and* (16)—*Incapacity—Cessation of incapacity—Possibility of supervening incapacity—Suspensory order—Competency.*

A workman, who had suffered injuries which necessitated the amputation of portions of three fingers of the right hand, after recovering from the operation obtained work at higher wages in the district where he had been employed, and where, owing to the construction of public works, there was a large demand for labour. In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator, while finding that the workman's injuries were permanent, found also that he was no longer incapacitated owing to the accident from earning his former wages, and ended the compensation that was being paid to him.

In an appeal at the instance of the workman the Court *hoc statu remitted* the case to the arbitrator to consider and decide whether the ending of the payment of compensation should be permanent or temporary.

Opinion (*per* the Lord President, *dub.* Lord Johnston) that a suspensory order was the proper judgment for the arbitrator to pronounce, looking to the possible adverse effect of a change in the condition of the

labour market on the future wage-earning capacity of a permanently damaged workman.

Rosie v. *Mackay*, 1910 S. C. 714, and *Taylor* v. *London and North-Western Railway Company*, [1912] A. C. 242, *considered*, and the former case *held* overruled by the latter.

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Dempsey v. Caldwell & Co., Limited.

1st Division. Sheriff of Fife and Kinross.

In an application under the Workmen's Compensation Act, 1906, for warrant to record a memorandum of agreement with reference to compensation payable to James Dempsey by Caldwell & Company, Limited, papermakers, Inverkeithing, the Sheriff-substitute (Umpherston) refused the application and ended the compensation, and, at the request of the workman, stated a case for appeal.

The case set forth:—

"This is an arbitration in which the claimant, who is eighteen years of age, claimed compensation from the respondents for injuries sustained by him while in their employment on 21st August 1912.

"The claimant's right hand was severely crushed and burned between the hot steel rollers of a papermaking machine. Parts of the third and fourth fingers and the end of the second finger were amputated. The injuries are permanent.

"The claimant's average weekly earnings prior to the accident were 14s. per week.

"The claimant was paid 14s. per week by the respondents from the date of the accident to 23rd November 1912. On 14th December the claimant was offered light work which he was willing to try, but did not in fact try, on account of a dispute about signing receipts for compensation, the claimant thinking that the respondents wanted him to sign off, while the respondents say they only wanted him to sign receipts for the money he had received up to 23rd November, the claimant not having given any receipts for such money.

"On 24th December 1912 the claimant applied for a warrant to record a memorandum of agreement, under which it was alleged the respondents agreed to pay him 14s. a week during incapacity. On 4th April 1913 a minute of objections was lodged by the respondents in which they disputed the genuineness of said agreement, but admitted liability for the accident to claimant which happened on 21st August 1912. They narrated the said offer of work and claimant's earnings since 14th January 1913, and asked me to terminate the claimant's right to compensation as at 23rd November 1912, or at such other date as I might determine.

"After evidence was led the respondents' agent, without prejudice to his contention that claimant's right to compensation ceased on 23rd November 1912, consented to an award of compensation at the rate of 10s. per week from 23rd November 1912 to 14th January 1913.

"On 14th January 1913 the claimant obtained employment with the contractors for Rosyth Naval Base as a drill carrier, being paid at the rate of 4d. per hour. Between said date and 28th January 1913 he earned the sum of £1, 4s. 10d. On three days he did not work full time, and on four days he did not work at all, but his absence from work was not due to his injuries or to any stoppage of the works.

"From 5th February 1913 to 20th March 1913 the claimant was employed by Messrs William Arrol & Company, North Queensferry. His earnings for this period amounted to £6.

"On 23rd March the claimant was employed by the Rosyth Naval

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Base contractors. His work was to stand on the top of a monolith and give the signal to a crane driver when to raise and lower the crane. About midnight on 29th April 1913 the claimant was injured in the employment of Messrs Easton, Gibb, & Son, and for the injuries he thus sustained claimant received compensation at the rate of 13s. per week, being half his average weekly wages since 23rd March.

"Claimant has since been employed at similar work at the rate of 4s. 2d. per day.

"Owing to the construction of the Naval Base and the Dunfermline main sewer, and other works, there is at present a large demand for labour, including boy labour, in the district. The demand for labour in Inverkeithing and district is likely to remain good for many years.

"In these circumstances I found (1) that at said 14th January 1913 the claimant was no longer incapacitated owing to the accident from earning his former wages, and that incapacity from said cause has not recurred. (2) That claimant is no longer incapacitated from said cause from earning his former wages. (3) That the claimant has failed to prove an agreement to pay compensation in the terms contained in his application. I therefore refused the application to record the memorandum of agreement, but found the respondents liable to the claimant in compensation at the rate of 10s. per week from 23rd November 1912 to 14th January 1913, and I ended his right to compensation at 14th January 1913."

The question of law on which the claimant desired the decision of the Court was:—"Was I entitled, in the circumstances above stated, to end the claimant's right to compensation?"

The case was heard before the First Division on 18th and 21st October 1913.

Argued for the appellant;—Owing to the physical defect in his right hand, which had resulted from his accident, the appellant's capacity for manual labour could not be regarded as unaffected, and it was a question of law how far his wage-earning capacity should be determined by the extent to which he had been able to get work. The arbitrator apparently considered that the fact that he had obtained employment at higher wages than before the accident was proof *per se* that he was physically fit, and that his capacity was unimpaired, but he had omitted to notice that wage-earning capacity must be judged of not merely by the physical condition of the workman, but also by the state of the labour market at the time. He had not considered the possibility of the man being unable to find employment when the extra demand for labour in the district had come to an end, and he had not realised that he was not, in making his award, restricted to continuing or ending the compensation, but that it was open to him to pronounce a suspensory order. The case, accordingly, should be sent back to him for consideration of these questions, because the mere fact that the appellant had been able to earn temporarily, and in a hazardous occupation, more than he was earning before his accident did not necessarily exclude all claim for compensation for permanent incapacity, though it might for a time warrant a suspension of payment thereof.[1] The arbitrator should

[1] Freeland v. Macfarlane, Lang, & Co., (1900) 2 F. 832; Taylor v. London and North-Western Railway Co., [1912] A. C. 242; Weir v. North British Railway Co., 1912 S. C. 1073.

accordingly be directed to pronounce an order having such temporary effect. In any event the payment should not have been ended till 4th April 1913, the date of the respondents' application for review.

Argued for the respondents;—There being no recorded memorandum of agreement, payment of compensation had been competently terminated at a date fixed, in his discretion, by the arbitrator.[1] No motion had been made before the arbitrator for a suspensory order, but from the facts stated it was clear that he had had in view all considerations affecting the question of present and future earning capacity. If in the view of the Court the case left that point in doubt, the respondents did not seek to oppose its being sent back to the arbitrator with directions to pronounce a suspensory order. The case of *Freland* v. *Macfarlane, Lang, & Company*[2] should be regarded as overruled, having been decided prior to the Workmen's Compensation Act, 1906. The question of the appellant's earning capacity was one of fact only, upon which the arbitrator was final,[3] and it could not be determined upon considerations of prejudice so remote as those apprehended by the appellant.[4]

Lord President.—The only question which we are asked here to consider and decide is whether or no the arbitrator in a case under the Workmen's Compensation Act ought or ought not to have pronounced a finding by which he permanently terminated the payment of compensation to a workman for injuries sustained by him in the course of his employment. There were two subsidiary questions mentioned to us by Mr Chisholm for the appellant, but, quite properly, not pressed upon our attention.

It is conceded that, if the finding of the arbitrator stands, then it will be impossible in the future for the workman to revive his claim, even although a material change of circumstances takes place.

The circumstances of the case are these:—The accident which befel the workman occurred on the 21st August 1912. His right hand was severely injured; parts of three of his fingers had to be amputated, and the finding of the arbitrator is that the injuries are permanent. He is a labouring man, therefore, with a permanently maimed right hand. The employers admitted liability to pay compensation, and did pay compensation at the full rate down to 23rd November 1912, and they consented to make a payment at a reduced rate down to 14th January 1913, but they maintained that the workman's incapacity for work had ceased at 23rd November 1912, and craved the arbitrator to make a finding permanently terminating his right to compensation. The arbitrator having considered the claim thus urged, found that at 14th January 1913 "the claimant was no longer incapacitated owing to the accident from earning his former wages, and that incapacity from said cause has not recurred. That claimant is no longer incapacitated from said cause from earning his former

[1] Nelson v. Summerlee Iron Co., Limited, 1910 S. C. 360; Southhook Fireclay Co., Limited, v. Laughland, 1908 S. C. 831; Malcolm v. Bowhill Coal Co., Limited, 1909 S. C. 426.

[2] 2 F. 832.

[3] Anderson v. Darngavil Coal Co., 1910 S. C. 456; Cunningham v. M'Naughton & Sinclair, 1910 S. C. 980.

[4] Taylor v. London and North-Western Railway Co., [1912] A. C. 242; Ball v. William Hunt & Sons, Limited, [1912] A. C. 496.

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wages." And accordingly he says,—"I ended his right to compensation at 14th January 1913."

Now it is certain that, during the months of February and March 1913 and I think subsequently, the appellant was able to engage in employment for which he was quite fit, and to earn a substantial wage, a wage, indeed, which I observe was greater than the wage he was earning prior to the date of the accident. That, it is explained by the arbitrator, was due to the fact that there is a large demand for labour of the kind for which he was fit in the district where he lived and worked, and the arbitrator adds—not a finding in fact, but an expression of anticipation—that these good times will continue for many years.

In these circumstances it is conceded that the arbitrator did right to terminate the payment of compensation; but it is urged that, although payment of compensation was quite properly discontinued, the arbitrator ought not to have gone on to find, as he did, that the right to compensation ended at 14th January 1913; that he ought not, in short, to have closed the door against the workman's application for a reconsideration of his case and a reviving of his claim in the event of a change of circumstances taking place. He was then a damaged man, permanently injured in his right hand, and would, of course, be compelled to seek for employment in a narrower and more circumscribed area than was formerly open to him, and inside that circumscribed area he would be handicapped, more or less severely, by competitors for similar work who were absolutely sound in wind and limb. Naturally employers prefer, unless the demand for labour is great and the supply limited, to employ men who are physically intact rather than men who are physically damaged. And in judging of wage-earning capacity—that is really the inquiry to be prosecuted—in judging of wage-earning capacity or incapacity, physical fitness to work is not of itself decisive, nor are the conditions of the labour market to be taken in isolation. Both must be had in view in judging of the wage-earning capacity of the workman.

In saying so I am announcing no novel doctrine for, after some judicial fluctuation both in opinion and in decision, it was finally decided in the House of Lords in two cases—one of them, I think, referred to in the debate: *Duris* v. *Wilsons & Clyde Coal Company, Limited*,[1] and *Ball* v. *Hunt & Sons*,[2] that wage-earning capacity must be judged of not merely by the physical condition of the man but also by the condition of the labour market at the time. In short, when the labour market is buoyant, the injured man may be able to find full employment at full wages; but, on the other hand, when the labour market becomes stagnant, the injured man, in consequence of the injuries sustained in the course of his employment, might find his labour absolutely unsaleable or saleable only at a reduced figure; and accordingly these two elements must be taken into consideration.

When I turn to the stated case here, I cannot find any indication that the arbitrator considered the possibility of there being a change of circum-

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[1] 1912 S. C. (H. L.) 74.

[2] [1912] A. C. 496, and footnote 1912 S. C. (H. L.), at p. 77.

stances, or considered the possibility of this damaged man being, under different economic conditions, either unable to earn his living at all or else compelled to accept a diminished wage for his work. Nor can I find any indication in the stated case that the arbitrator considered and had present to his mind any other than the two courses which he indicates were open to him—either to continue the payment or else to terminate absolutely, as he did, the workman's right to compensation.

Now, in my opinion, there is a *via media*, and that *via media* is very clearly indicated in the opinion delivered by Lord Low in the seven Judges case of *Rosie* v. *Mackay*,[1] where his Lordship said that, in order to leave questions such as this open in the event of a change of circumstances taking place, it is a competent course to sist procedure or to continue the case with leave to either party to renew the application in the event of a change of circumstances occurring, with, of course, a finding that the injury had taken place, but that weekly payments must, in the meantime, be discontinued. With that opinion Lord Skerrington agreed. It may be said—and it is true—that Lord Low and Lord Skerrington were in a minority in that case; but there was, subsequently, a decision pronounced in the House of Lords in *Taylor* v. *London and North Western Railway Company*[2]—to which we were referred in the debate—in which all the noble and learned Lords who took part in the judgment clearly indicated that a suspensory order—such as Lord Low and Lord Skerrington suggested in *Rosie* v. *Mackay*[1]—was a proper course of procedure to adopt in circumstances such as the present.

It has been said that the case of *Rosie* v. *Mackay*[1] was not cited to their Lordships in the House of Lords in *Taylor* v. *London and North Western Railway Company*,[2] and that we are not entitled to assume that they deliberately overruled that case, and that the law may still be regarded as in doubt. I cannot think so. It may be, and no doubt is the fact, that *Rosie* v. *Mackay*[1] was not cited in the House of Lords; but I cannot read their Lordships' judgments otherwise than as coming in direct conflict with the opinions of the majority in the case of *Rosie* v. *Mackay*[1]; and, wittingly or unwittingly, I think their Lordships adopted the reasoning of Lord Low and Lord Skerrington in that case. When I examine Lord Low's opinion, I find, I must say, no ground upon which it can be assailed. It would, indeed, be a sorry thing if our forms of process were not adequate to enable us to continue consideration of a case where a change of circumstances might occur which might alter the whole situation. The penny-a-week device (or subterfuge as my brother Lord Johnston has not inaptly called it) has been resorted to in England; it may also have been resorted to in Scotland. But, in my opinion, that device was not only unnecessary, but was erroneous. If no compensation ought to be paid, then no order for a payment should be made however small that payment may be, and if there are forms of process which enable us to suspend judgment until it is seen whether a change of circumstances takes place or no, then I think that is the proper course to follow.

The course which I suggest to your Lordships that we should take in

[1] 1910 S. C. 714. [2] [1912] A. C. 242.

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this case is substantially the same as was taken by the Second Division in the case of *Weir* v. *North British Railway Company*.[1] I propose to your Lordships that we should remit to the learned arbitrator to reconsider his opinion, having in view the fact, as he himself has found, that permanent injury has been suffered by this man in consequence of the accident which befell him, and to consider whether or no, in view of that finding, he should pronounce a suspensory order, as I have called it, or, if he thinks proper, repeat the finding which he has already given.

Speaking for myself, and for myself alone, I cannot doubt, in the first place, that a suspensory order is a competent form of process, and that, in the next place, it is the proper judgment to pronounce in this case where no one can, at the present moment, foretell what the condition of the labour market may be in the near future. If the learned arbitrator's anticipations are fulfilled, no doubt some time may elapse before reconsideration of his judgment would be called for. But, on the other hand, stagnation may come, and will come, sooner or later. When that period arrives, then, it seems to me, it is not open to doubt that a labouring man with a permanently damaged right hand will find himself confronted with this situation—either he will be unable, in competition with sound men, to obtain employment, or else he will be compelled to accept employment at a reduced rate of remuneration.

It is only right that I should add that counsel for the respondents in this case, very frankly and very properly, announced to us his willingness that the course which I now propose to your Lordships should be adopted.

LORD KINNEAR concurred.

LORD JOHNSTON.—I have had much greater difficulty than, I think, your Lordships have had in disposing of this case, and I regret that I cannot, as at present advised, accept without a certain hesitation the views which have been expressed by your Lordship in the chair as to the effect, in a case of this sort, of changes occurring in the labour market at a period distant I do not know how far.

There has certainly, up to this point, been a difference of practice in workmen's compensation cases, where there is recovery but the permanency of recovery is disputed, between the Courts of England and Scotland. That is now, I fully admit, brought to an end by the dicta of their Lordships in the House of Lords in the case of *Taylor*.[2] But we are placed in this unfortunate position, that the practice, as it arose and exists in England, has never been explained with any detailed reasons as to how it was adopted, and within what limits it applies. On the other hand, in the case of *Clelland*,[3] a very reasoned opinion was given by Lord President Dunedin, founding the practice which has, since that date, ruled in Scotland. That opinion was repeated in the case of *Rosie*,[4] and adopted by the majority of the Court; for I am bound to say that—although in my opinion the case should not have been sent to seven Judges, because I

[1] 1912 S. C. 1073.
[2] [1912] A. C. 242.
[3] 7 F. 975.
[4] 1910 S. C. 714.

did not think it raised the question which it was supposed to raise—I did not in any way dissent from the views expressed by Lord Dunedin.

In the case of *Taylor*,[1] again, we get no explanation of the reasons for subverting our practice, and, as I conceive, some explanation of the reasons is required in order that we may understand, not merely that we must adopt a different practice, but the limit and scope of the practice which we must now adopt. We must now accept that it is competent to suspend the payment of compensation, and not merely either to continue, to vary, or to end it. But it is evident that discrimination in application is required, and did we know the reasons against our practice, as we know the reasons for it, we would the better know how to make that discrimination. I accept therefore that, while it is open to the Sheriff-substitute here to end the compensation, it is also open to him to suspend it. Reading his statement of the case, I should have been inclined to gather that he had, with full intention, ended it; but I agree with your Lordship that it is desirable that there should be no dubiety about the Sheriff-substitute's meaning, and therefore that such a remit should be made as your Lordship proposes.

But I desire, at the same time, to reserve entirely my opinion as to the effect which will have to be given to the dicta of their Lordships in *Taylor's* case,[1] and they must now have the effect of more than mere dicta, having regard to the statement made by the late Lord Chancellor in the course of the argument in the case of *Hargreaves*.[2]

Where I have difficulty in following your Lordship is that I am by no means clear that, given a case such as we have here,—a case where the injury is a definite injury which has developed a permanent result, and which has no ulterior potentialities about it, as many injuries have, possibilities of recrudescence, possibilities of subsequent effects which do not at present appear; where it is a definite injury which has run its course and done its worst, and where, notwithstanding, the injured man is in the position of earning as good wages as he has earned before,—we are to suspend his claim in order that he may have the opportunity to come back upon his employer at some future time, not because he is again suffering actively from the consequences of his injury, but because, from economic circumstances, there may not be so much work as there is just now, and therefore not so much opportunity for a man who has once been injured getting work. It seems to me that the result of your Lordship's view will be that in every case in which a man has received an injury of the permanent class to which I have referred, you must suspend, and cannot possibly end, his compensation, whatever his present wage-earning capacity may be. Now, I do not think that that was the intention of the statute at all; and, in consequence, I desire to dissociate myself, as at present advised—for we have not had the matter fully argued yet—from the views which your Lordship has expressed. Had there not been room for discrimination I do not think that *Hargreaves's* case[3] could have resulted as it did. I do not desire to add more at present, because I feel satisfied

[1] [1912] A. C. 242. [2] 1912 S. C. (H. L.), at p. 72.
[3] 1912 S. C. (H. L.) 70.

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that subsequently the question will have to be further argued, either in this or in some other case.

LORD MACKENZIE.—In view of the findings of fact in this case, and of the judgment in the House of Lords in the case of *Taylor* v. *London and North Western Railway Company*,[1] I am of opinion that the case should be remitted back to the Sheriff-substitute in the terms proposed.

THE COURT pronounced an interlocutor in the following terms:—"*Hoc statu* recall the determination of the Sheriff-substitute as arbitrator appealed against, and remit to him in view of the finding that the claimant had sustained permanent injuries to his right hand to consider and decide whether the ending of the payment of compensation should be permanent or temporary."

STERLING CRAIG, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

No. 6.

Oct. 24, 1913.

DENIS SCULLION, Pursuer (Appellant).—*Munro, K.C.*—*Fenton.*
CADZOW COAL COMPANY, LIMITED, Defenders (Respondents).—*Horne K.C.*—*Strain.*

Scullion v. Cadzow Coal Co., Limited.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 8 (1) (2), *and Third Schedule—Industrial disease—Process of "mining"—Surface labour.*

Held that a man employed at the pithead of a colliery as a surface labourer was not employed in the process of "mining" in the sense in which that expression is used in relation to industrial diseases in the Workmen's Compensation Act, 1906.

1ST DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906,* between Denis Scullion and the Cadzow Coal Company, Limited, the

[1] [1912] A. C. 242.

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Sec. 8. "(1) Where (i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed, certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act, and is thereby disabled from earning full wages at the work at which he was employed . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, . . . he or his dependants shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment . . .

"(2) If the workman at or immediately before the date of the disablement . . . was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary."

By Order in Council, dated 22nd May 1907, the lists of processes and diseases contained in the Third Schedule to the Act was extended to include, *inter alia*:—

Description of Disease or Injury.	Description of Process.
Nystagmus.	Mining.

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Sheriff-substitute at Hamilton (Shennan) refused to award compensation, and, at the request of the workman, stated a case for appeal.

The case set forth :—

"(1) The appellant worked as a miner in the respondents' employment at Cadzow Colliery, Hamilton, from October 1911 to 1st May 1912, when his right eye was injured by a spark from a pick and he became totally incapacitated for work. The respondents paid the appellant compensation down to 4th January 1913, when payment was stopped on the ground that the appellant was then fit to resume work. No claim is made in the present arbitration in respect of this accident. (2) On payment of compensation being stopped the appellant obtained work as a surface labourer at the respondents' pithead and wrought there on 7th and 8th January 1913, but he had to give up work on account of pain in his forehead and dizziness. (3) On 23rd January 1913 the appellant obtained a certificate from the certifying surgeon that he was suffering from nystagmus, and was thereby disabled from earning full wages, and that the disablement commenced on 9th January 1913. The respondents appealed to one of the medical referees under the Act, but their appeal was dismissed on 8th February 1913. (4) During the twelve months previous to the date of the appellant's disablement (9th January 1913) he worked with the respondents as a miner below ground from 9th January 1912 to 1st May 1912, and as a surface labourer on 8th and 9th January 1913. During the period intervening between those periods of employment he was off work owing to the accident of 1st May 1912. (5) It is not proved that the appellant suffered from nystagmus either between 9th January 1912 and 1st May 1912 or at any previous period. (6) The Cadzow pit in which the appellant was employed is a safety lamp pit. (7) The appellant has not proved that the nystagmus from which he suffers was due to the nature of his employment during the twelve months previous to the date of his disablement. (8) The respondents have not proved that the appellant's nystagmus was not due to the nature of his employment during the twelve months preceding the date of disablement. (9) Nystagmus is a disease of insidious growth. A man with incipient nystagmus may work for long undergrouud without being aware that he is suffering from it. Miners' nystagmus is caused by working in bad illumination. It occurs almost invariably in miners who work in safety lamp pits, being frequently called the 'Glennie blink' from the name of a safety lamp in common use. Nystagmus is not in fact associated with, or found to be caused by, surface labouring work. (10) The certifying surgeon in the present case did not certify that the disease was not due to the nature of the appellant's employment.

"On the above facts I held that the question of liability depended on the onus of proof; that the appellant was not at or immediately before the date of disablement employed in mining in the sense in which mining is used to denote the process to which nystagmus is related; and that therefore the onus lay on him to prove that his nystagmus was due to the nature of his employment with the respondents between 9th January 1912 and 9th January 1913. As he had failed to discharge this onus I refused his claim for compensation. If I had held that the onus lay on the respondents to prove that the appellant's nystagmus was not due to such employment, I should have awarded the appellant compensation of 7s. per week in respect of partial incapacity.

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"I held that 'mining' as related to nystagmus means miner's work underground, and does not include all work on, in, or about a mine, and in particular does not include the surface labouring work at which the appellant was employed on 8th and 9th January 1913. Accordingly, in my opinion, the appellant had not the advantage of the presumption established by section 8, subsection 2, of the Workmen's Compensation Act, 1906."

The questions of law for the opinion of the Court were:—"(1) On the facts above stated was the onus on the appellant to prove that the nystagmus from which he suffered was due to the nature of his employment with the respondents? or (2) Was the onus on the respondents to prove that the appellant's nystagmus was not due to the nature of his employment with them? (3) Ought the Sheriff-substitute to have awarded compensation to the appellant?"

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Mackenzie) on 21st October 1913.

Argued for the appellant;—It was not necessary for the appellant to prove that the disease from which he suffered was due to the nature of his employment, because the fact that at the date of his disablement he was engaged in the process of mining raised *per se* a statutory presumption that it was so due,[1] a presumption which had not been rebutted by the respondents. It was argued by the respondents that he was not engaged in "mining," and accordingly had not the benefit of the presumption, because he was employed solely upon the surface; but "mines" were not necessarily limited to underground workings,[2] and for the purposes of the Third Schedule to the Workmen's Compensation Act, 1906, the word "mining" had a meaning corresponding to the definition of "mine" contained in the Coal Mines Act, 1911,[3] and included any "process ancillary to the getting, dressing or preparation for sale of minerals," a definition wide enough to include not only work performed underground but also such ancillary work as was done by surface labourers at the pithead. Wherever the Legislature intended, in statutes dealing with mines, to draw a distinction between underground and surface work it did so expressly. Moreover, the view that mining was limited to underground employment was quite inconsistent with the Third Schedule and the subsequent additions to it. The diseases specified in relation to mining were in several instances diseases incidental to employment above ground, and this clearly showed that the description of the process used in the Schedule, viz., "mining," was a general one intended to apply to and include the processes above ground which gave rise to the specified diseases.[4] The onus accordingly was on the respondents, and not, as the arbitrator thought, on the appellant, and that onus could only be discharged by their obtaining the certificate of a certifying surgeon that the disease was not due to the employment, or by their bringing positive proof to that effect,[5] and they had done neither. Even, how-

[1] Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 8 (1), (2), Third Schedule.

[2] Magistrates of Glasgow v. Farie, (1888) 15 R. (H. L.) 94, Lord Watson, at p. 101.

[3] 1 and 2 Geo. V. cap. 50, sec. 122.

[4] Adshead Elliot, Workmen's Compensation Act, 6th ed. 530, 531; Lawes, Compensation for Industrial Diseases, 257, 278, 283, and 137.

[5] Workmen's Compensation Act, 1906, sec. 8 (2); M'Ginn v. Udston Coal Co., Limited, 1912 S. C. 668.

ever, if the onus were on the appellant to prove that the nystagmus was due to the nature of his employment within the twelve months previous to the date of his disablement, he had, on the facts found proved, discharged the onus, and the arbitrator's decision to the contrary, being unsupported by evidence and, further, depending upon considerations of law, was open to review and should be recalled.[1]

Argued for the respondents;—In the case of the appellant there was no presumption that the disease was due to the nature of his employment, because at the date of his disablement he was not engaged in the process of mining. The only persons who could properly be said to be engaged in that process were those who were winning the minerals or bringing them up to the surface, and if the appellant were engaged in mining so also must all those persons be who were employed in connection with the mine as clerks or otherwise. The expression "Employment on, or in, or about a mine," which occurred in sec. 7 of the Workmen's Compensation Act of 1897, showed clearly that, where the Legislature intended to include not only the work of the miner proper but also the work of the numerous classes of persons who were merely ancillary to him, it did so in express terms. Further, miners' nystagmus, and the other mining diseases, were characteristic of mining work below ground, and it was clearly the object of these provisions of the Act to give protection to those classes of workmen only who were exposed to special risks. The appellant, accordingly, was not engaged in mining at the date of his disablement and there was therefore no presumption in his favour, and if he was to succeed he had to establish that the disease was due to the nature of his employment within the previous twelve months. This he had entirely failed to do. The mere fact that he was suffering from nystagmus was *per se* insufficient, because there were other types of nystagmus besides miners' nystagmus,[2] and the appellant had shown no symptoms of the disease for eight months after he had been working below ground. On the facts of the case, which did not exclude the existence of alternative causes, constitutional or other, to which the disease might be attributed, the arbitrator's conclusion could not be held to be unwarranted, and the Court were not entitled to interfere with his decision.

At advising on 24th October 1913,—

Lord President.—We are asked here to consider and decide whether a man at work on the surface of the ground above a coal mine was engaged in the process of mining. I am of opinion that he was not. The circumstances under which the question arises were as follows: On the 8th and 9th January 1913, the appellant was engaged at the pithead of Cadzow Colliery, near Hamilton, as a surface labourer. On 9th January 1913 he was attacked by a severe pain in the head and dizziness, and was compelled to cease work. Subsequently, in the month of January, he obtained from the certifying surgeon a certificate to the effect (first), that he was suffering from nystagmus; (second), that in consequence he was disabled

[1] Vaughan v. Nicoll, (1906) 8 F. 464, Lord President Dunedin, at p. 466. M'Ginn v. Udston Coal Co., Limited, 1912 S. C. 668, Lord President Dunedin, at p. 674, was also referred to.

[2] M'Ginn v. Udston Coal Co., Limited, 1912 S. C. 668, Lord President Dunedin, at p. 675; Luson & Hyde, Diseases of Workmen, 91-93.

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from earning full wages; and (third), that the date of the commencement of his disablement was 9th January 1913. An attempt to challenge the surgeon's certificate was unsuccessful, and accordingly this appellant, armed with a certificate in the terms which I have mentioned, was in a position to say, subject to certain conditions, that the disease which he had contracted must be deemed to have been due to the nature of the employment in which he was engaged, provided that employment was the process of mining, for the 8th section and second subsection of the statute of 1906 provides: "If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary."

Now, at the date of the disablement this man was, as I have said, engaged at work on the surface of the mine and was not engaged, in my opinion, in the process of mining. It is acknowledged that there is no statutory definition of the "process of mining," that the expression is not used in any technical or artificial or secondary sense, but is to be construed according to the plain ordinary signification of the words. What then is, in plain ordinary language, the meaning of the expression "the process of mining"? I think there can be no doubt the meaning of that expression is the obtaining of mineral from an excavation in the earth, which necessarily implies two things—(first) the actual cutting or hewing of the mineral, and (second) its removal to the surface. In no part of that operation was the appellant engaged. Indeed, it was stated in argument that, in order to entitle him to succeed in his appeal, it would be necessary for him to show that "the process of mining" was equivalent to and interchangeable with the expression "employment on, or in, or about a mine." Now, the latter expression is familiar in this chapter of law. It is to be found in the 7th section and 1st subsection of the Workmen's Compensation Act of 1897, and has been frequently the subject of judicial construction. And I cannot doubt that, if the Legislature had intended that the expression "the process of mining" should be equivalent to the expression "employment on, or in, or about a mine," the latter expression would have been used, being, as I have said, perfectly familiar in this branch and chapter of law. That it was not so used is clearly decisive, in my mind, of the meaning of the Legislature, and demonstrates that it was intended, in using the expression "the process of mining," to signify something entirely different.

That is exactly what one would naturally have expected, because it would be strange indeed if a statutory presumption were to be set up that a man who had contracted a certain disease should be deemed to have contracted it because of the nature of the employment in which he was engaged at the time, if that disease was one which was neither necessarily nor naturally connected with the particular work in which the man was engaged.

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Such is the case before us here, because the arbitrator has found, as a matter of fact, that "nystagmus is not in fact associated with or found to be caused by surface labouring work," and if that is so, then inasmuch as this man was not engaged in the "process of mining" at the date of his disablement, I am of opinion, agreeing with the arbitrator, that he is not entitled to have the advantage of the presumption.

Another topic was raised but was only faintly argued to us. It appears that for a period of a little over eight months prior to the date of his disablement the appellant was not engaged in any work at all. He was suffering from the effects of an accident which befell him on 1st May 1912. But for some time prior to that date, he had been engaged as an ordinary miner working underground at the same colliery, all within a period of twelve months prior to the date of his disablement, and it is contended that, if he be not entitled to the benefit of the statutory presumption, nevertheless he may show by evidence that *de facto* the disease which he contracted on 9th January 1913 was due to the nature of the employment in which he had been engaged prior to the date of his accident on 1st May 1912.

That is no doubt so, but the appellant, having the opportunity, attempted to show that his disease was due to the nature of the prior employment, and, in the opinion of the arbitrator, failed. That is a pure question of fact upon which the arbitrator is final Judge. It was no doubt argued to us that, if there were no facts upon which the arbitrator could come to the conclusion he has reached, it would be within our power to disturb his finding. That may be so, but I am very clearly of opinion that the arbitrator here had evidence before him upon which he was entitled to form the conclusions he did. And even if I thought—which I certainly do not—that he had come to a wrong conclusion, I am clearly of opinion that we could not disturb it.

I propose to your Lordships, therefore, that we should answer the first question put to us in the affirmative, the second question in the negative, and the third question in the negative.

Lord Johnston.—The claimant has obtained a certificate that he was, at 9th January 1913, suffering from an industrial disease, viz., nystagmus. He has therefore cleared his way to a claim as if he had met with a physical accident. But before he can make good his right to compensation he must establish that the disease is due to the nature of the employment in which he was engaged within the twelve months previous to the said date. In proceeding to establish that fact he has, under section 8 (2) of the Act of 1906, the benefit of a presumption that the disease "shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." But the benefit of the presumption depends upon the condition that the workman was at or immediately before the date fixed by the certificate employed in the industrial process to which in the schedule the disease is appropriated. That industrial process is, in the case of the disease nystagmus, the process of mining.

Now the claimant was unquestionably engaged in the work of mining from October 1911 to 1st May 1912. But that period of employment

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ceased more than seven months before the certified date, and cannot be regarded as having been at or immediately before the certified date. Again, he was engaged at the pithead for two days immediately previous to the certified date, in surface work, viz., as we are informed, hauling hutches to the scree. I do not think that it would be safe in this case to determine precisely and exhaustively what is included in the term "mining" as used in the statutory Schedule. That it involves underground work I think is sufficiently clear. But whether it is limited to the work of getting the coal, and does not also include the drawing and other incidental work which is involved in bringing the coal got to the surface, may be a question. It is enough for this case that it does not include the class of surface labour at which the claimant was employed for two days prior to the certified date. The claimant has not therefore the benefit of the presumption of section 8 (2). The onus of establishing that the disease from which he suffers was due to the nature of his employment in the service of the respondents during the earlier part of the twelve months preceding the certified date lies with him and, in the opinion of the Sheriff, he has not on the facts discharged that onus. The Sheriff has therefore come to the only logical conclusion, and I therefore agree with your Lordship in answering the questions in the manner your Lordship proposes.

At first sight the case is one of hardship. But it must be remembered that the inclusion of industrial disease as an equivalent of physical accident, by the Act of 1906, is accompanied by a provision which may often bear with great hardship on the employer, in respect that though an industrial disease may have its origin in previous years and be of insidious growth, once it is developed to the point of certification, the whole responsibility for compensation is cast upon the shoulders of the employer or employers of the last twelve months. Such employer or employers are therefore justified in requiring that the onus of proof be clearly discharged by the claimant.

Lord Mackenzie.—I am of the same opinion. In order to have the benefit of the presumption established by the statute, the nystagmus from which the workman was suffering must have been contracted in the process of mining, and he must have been engaged in the process of mining at or immediately before the date of disablement caused by the nystagmus. Therefore the question in the case is, In what sense is the term "mining" used in the Schedule to the Act? In my opinion "mining" so used is to be construed in its ordinary acceptation. It is impossible to say that a man engaged as a surface labourer can be described as engaged in the process of mining.

That view is confirmed when one considers the description of the diseases which are described in the original Schedule to the Act, and those contained in the order which extends the Schedule. These diseases, in so far as they apply to miners, are those which affect members of the organisation underground, and are not such as affect those who are employed on the surface. In the present case we have a distinct finding by the arbitrator that "nystagmus is not in fact associated with, or found to be caused by, surface labouring work."

It follows that the workman in question can take no benefit from the presumption established by statute, and, unless he has proved that the disease is due to the nature of his employment, he cannot succeed. That, of course, is a pure question of fact and one for the arbitrator to decide, and we cannot, according to all the principles laid down in previous cases, interfere with what the arbitrator has done unless we find there is no evidence upon which his conclusion can be based. I am unable to take that view upon the facts as stated in the present appeal, and, accordingly, I am of opinion that the conclusion reached by the learned Sheriff-substitute is correct.

Oct. 24, 1913.
Scullion v. Cadzow Coal Co., Limited.
Lord Mackenzie.

THE COURT answered the first question of law in the affirmative, and the second and third questions in the negative.

SIMPSON & MARWICK, W.S.—W. & J. BURNESS, W.S.—Agents.

No. 7.

MRS CATHERINE GAUNT, Pursuer (Appellant).—*Johnston, K.C.*—*M. P. Fraser.*
MALCOLM M'INTYRE, Defender (Respondent).—*Munro, K.C.*—*Lippe.*

Oct. 30, 1913.
Gaunt v. M'Intyre.

Reparation — Negligence — Property — Defective condition of premises — Lighting of common stair — Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. celxxiii.*), *sec.* 361.

The Glasgow Police Act, 1866, sec. 361, enacts that the owner of heritable property having an access by a common stair shall provide and maintain suitable gas fittings in the stair to the satisfaction of the inspector of lighting, placed as the inspector may direct, and that the magistrates shall cause them to be supplied with gas and lighted during the same hours as the public street lamps, and shall recover the cost from the owner.

In an action of damages for personal injuries, brought against the proprietor of a tenement in Glasgow, the pursuer averred that she received the injuries through falling on the common stair while on her way after dark to visit the tenant of one of the houses in the tenement. The fault on the part of the defender which she alleged was that the stair was not sufficiently lighted.

Held that, as the duty of the defender consisted in lighting the stair to the satisfaction of the inspector of lighting, and as it was not averred that he had failed in that duty, the action was irrelevant.

Observed (*per* Lord Salvesen) that there is no duty at common law on the part of the proprietor of a tenement to light a common stair.

2D DIVISION. Sheriff of Lanarkshire.

IN March 1913 Mrs Catherine Gaunt with the consent of her husband brought an action in the Sheriff Court at Glasgow against Malcolm M'Intyre, the owner of the property No. 456 Gairbraid Street, Maryhill, Glasgow, concluding for damages for personal injury.

The pursuer averred;—(Cond. 3) "The said property 456 Gairbraid Street, Maryhill, the property of the defender, is four storeys in height. The ground floor is occupied by shops and the upper flats are occupied as dwelling-houses. To get to the dwelling-houses there is first the entrance by the common close forming 456 Gairbraid Street; then by three flights of stairs to the various landings; the first stair leading to the first landing, upon which landing there are entrances to three dwelling-houses; the second flight of stairs leading to the second landing, upon which landing there are also entrances to three dwelling-

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houses; and the third flight of stairs leading to the top landing, upon which landing there are also entrances to three dwelling-houses." (Cond. 4) "These stairs leading to the various landings are lighted after dark by one gas jet of light upon each landing, but such gas jets are situated in an obscure corner, recess, or angle of the stair landing and never gave a proper light. At the time of the accident aftermentioned the gas burners in the jets were so worn and done that they gave no light, or at least such an obscure faint light as failed to shew the true position and nature of the stairs to be ascended or descended, or to guide a person having necessity or business to ascend or descend the said stairs with safety. The said jets, gas-pipes and burners are the property of the defender, who is bound to maintain and renew them from time to time as may be required. It was the duty of the defender to see that the said pipes and burners were sufficient, and were in a proper state to give reasonable and sufficient light to enable members of the public requiring to ascend or descend said stair to do so in safety. The defender failed in this duty as stated. The section of the Act mentioned in answer is referred to." (Cond. 5) "On the 3rd day of January last 1913, between 10 and 11 o'clock at night, the pursuer, who stays at 484 Gairbraid Street, a few doors west of the tenement belonging to the defender at 456 Gairbraid Street, went to visit an old friend of hers, a Mrs Brookmire, wife of and residing with Robert Brookmire, who resides in a house on the top flat of the tenement 456 Gairbraid Street, and is a tenant of the defenders in the said property. For this purpose, and with this object in view, pursuer entered by the common close, and ascended the stairs, reaching the top flat in safety." (Cond. 6) "After knocking at Mrs Brookmire's door and satisfying herself that Mrs Brookmire was not at home she returned to descend the stairs. The stairs were very dark, but she descended the top stair safely. When descending the second stair to reach the first landing from the street floor, she tripped and fell down three steps on to the first landing, sustaining a severe shock to her sytem, fracturing the bones of her ankle and leg, and sustaining other injuries to her person." (Cond. 7) "The second stair where she slipped and fell consists of thirteen steps, each about 4 feet in length between perpendicular walls, with a breadth (excepting the three lowermost steps) of about one foot. The three lowermost steps where the accident occurred are known as wheeling steps, having a breadth on the one side of 12 inches or thereby, and tapering to about 4 or 5 inches on the right-hand side coming down. The light of the said stair was so obscure, and the burner in the jet, which was intended to light said stair at this place, was so old and defective and gave so little light, that it was quite impossible to see clearly the state of the steps of the stair which the pursuer was descending." (Cond. 8) "The wall into which the stair was built on the left-hand side formed the gable of the property and descended all the way to the first landing, while the wall on the opposite or right-hand side, when approaching the first landing, only descended a part of the length of the stair, leaving the lowermost two wheeling steps of that stair, unprotected either by the wall or by any railing or other protection of any kind whatever." (Cond 9.) "When the pursuer was descending the said stair she found her way down cautiously, guiding herself down by the wall on her right hand, so far as it went, but the wall ceased before she was at the bottom of the stair approaching the first landing. She put her foot down the next step, being the first

wheeling step, in the belief that it was of the same breadth as the other broad steps she had descended, when the heel of her boot caught the narrow end of the step and she tripped and was thrown on to the landing, sustaining the damages above set forth." [In Cond. 10 the pursuer described the nature of the injuries she received through this fall.] (Cond. 11) "The said stair, at the place where pursuer tripped and fell, was of a very dangerous design and construction. The three wheeling steps, which were the only kind of that description in the property, tapering as they did towards the right-hand side in descending the stair, were dangerous to persons having reason to ascend or descend them, and such steps were not protected by handrailings or banisters of any kind, and were unlighted, or so obscurely lighted as to be a danger specially to strangers in the dark, which the pursuer was. The defender was in fault in not having the said wheeling steps protected by railings or banisters, and he or his factors were also in fault in not having such dangerous stairs and steps properly lighted, and the gas jets and burners renewed from time to time, so that the said stairs and landing would have been properly lighted. The peculiar design and construction of the stairs, the fact that no railings or banisters were provided, and the defective light on the stair and landing, for all which the defender is responsible, were, or one or other of them was, the cause of the pursuer's accident. In reference to the statement in answer, the only occasions on which the pursuer had previously visited the property were during the daytime." (Cond. 12) "Before the accident to the pursuer occurred, the defender's factors, for whom the defender is responsible, were repeatedly warned of the obscurity of and defectiveness of the light on the stair landing, and they promised, but failed, to have it looked into and put right. Since the accident to the pursuer the lights on the stair landings have been put right." During the hearing before the Second Division the pursuer lodged a minute of amendment, and was allowed to amend the record by adding the following words in Cond. 12:—"In particular Mrs Ann M'Leod or M'Millan and Mrs Jessie Forsyth or Lawson, both tenants of the defender and residing on the landing at which the accident occurred, and Elizabeth Lawson, the daughter of the last-named tenant, on several occasions during the six months preceding 3rd January 1913, the date of the accident, complained to a clerk in the employment of the defender's said house factors, Messrs Graham, Primrose, & Todd, of the defective nature of the stair lighting at the place where said accident occurred, and also warned him that if such defect were not remedied an accident would take place. The name of the clerk referred to is unknown to the said Mrs M'Millan, Mrs Lawson, and Elizabeth Lawson. He was, at the time when such complaints were made and warning given, collecting rents in said property on behalf of the defender and acting as the representative and on behalf of the defender. Said clerk was in the habit of collecting such rents at the end of each month and said complaints were made regularly on each call. On or about the month of December 1912 the said Elizabeth Lawson was sent by her mother to report to the said factors that a friend of theirs had fallen on the said stair at the same place as the pursuer as a result of the defective lighting, and to request that such defect should be remedied. No attention was paid to these complaints or warnings until after the accident condescended upon."

The defender lodged defences in which he averred, *inter alia*;—

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(Ans. 4) "Denied. The duty of lighting the stair in question is not upon the defender, but upon the Corporation of Glasgow, in terms of section 361 of the Glasgow Police Act, 1866."* In Ans. 11 it was averred that the stair was well known to the pursuer, who had repeatedly gone to visit Mrs Brookmire.

The defender pleaded, *inter alia*;—(1) The pursuer has no title to sue. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action.

On 9th June 1913 the Sheriff-substitute (Boyd) pronounced an interlocutor sustaining the second plea in law for the defender, and dismissing the action.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division on 29th and 30th October 1913.

Argued for the appellant;—The respondent, as proprietor of the tenement, was bound to keep the stair reasonably safe for the tenants and those who might have occasion to visit the tenants' houses.[1] As, through his failure to light the stair properly, he had not discharged this duty, he was liable in damages. He was liable on two grounds. In the first place, the common stair constituted an invitation to the public to make use of it.[2] In *Milne* v. *Smith*[3] Lord Eldon likened such stairs to common highways. In the second place, the defect here was of the nature of a trap; there was enough light to induce persons to believe that they might safely use the stair, but not enough light to ensure safety. The present case was not within the rule of *Cameron* v. *Young*[4] as (*a*) the defender had invited the public to use the stair,[2] and (*b*) the defender had the control of the stair.[5] The cases that had apparently influenced the Sheriff-substitute were distinguishable. In *Driscoll* v. *Commissioners of Burgh of Partick*[6] the gas on the stair had not been lighted, and the pursuer was tenant of one of the houses and might have lighted the gas herself, but took the risk of going down in the dark. Here the case was that the light was treacherous. In *Fleming* v. *Eadie & Son*[7] the premises were under reconstruction. In *Gautret* v. *Egerton*[8] the plaintiff was merely a licensee, whereas the pursuer here was entitled to be on the stair,

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* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), enacts:—Sec. 361. "The proprietor or proprietors of every land or heritage having an access by a common stair shall provide and maintain suitable gas pipes and brackets, lamps and burners, in such common stair to the satisfaction of the inspector of lighting . . . and placed as the said inspector . . . may direct . . . and the magistrates and council shall cause them to be supplied with gas and lighted during the same hours as the public street lamps, and for each burner the proprietor or proprietors shall pay to the magistrates and council such sum not exceeding ten shillings per annum as the magistrates and council may from time to time direct, and the said sum shall be recoverable by the proprietor from the occupiers in proportion to their respective rents, and be deemed to be a debt recoverable as and in the same way as rent."

[1] M'Martin v. Hannay, (1872) 10 Macph. 411; Miller v. Hancock, [1893] 2 Q. B. 177.

[2] Kennedy v. Shotts Iron Co., Limited, 1913 S. C. 1143, at p. 1154.

[3] (1814) 2 Dow, 390, at p. 396; Beven on Negligence, (3rd ed.) vol. i. p. 449.

[4] 1908 S. C. (H. L.) 7.

[5] Mellon v. Henderson, 1913 S. C. 1207.

[6] (1900) 2 F. 368.

[7] (1898) 25 R. 500.

[8] (1867) L. R., 2 C. P. 371.

and could not have been interdicted from being on it. *Davidson* v. *Sprengel*[1] was decided on the ground of personal bar. The Glasgow Police Act might raise a difficulty at a later stage of the case, but could not exclude the appellant's claim at the present stage. In any event the respondent under the Act was bound to supply the gas-fittings, and those on this stair were defective.

Argued for the respondent;—[Counsel were called on to reply only with regard to the lighting of the stair]—There was no relevant averment of fault on the part of the respondent. At common law he was not bound to light the stair. His only duty was statutory, viz., to provide and maintain lights to the satisfaction of the inspector of lighting. As there were no averments to the contrary, it must be assumed that he had fulfilled this duty and, if so, he was not in fault. Even if there was a defect in the lighting, the respondent could not be made liable unless he had the control of the stair; but when the houses were let the respondent parted with the control of the stair, for it was not thereafter within his power to exclude the public from it.[2] The respondent would not be liable to a tenant[3] for injuries through a defect in the stair; much less could he be made liable to a visitor to a tenant. The appellant was a mere licensee who must take the premises as they were,[4] and to whom the respondent would be liable only if there were, what was not here averred, a danger of the nature of a trap. The appellant was in a dilemma. If the stair was dangerous she must have ascertained this on her previous visits to Mrs Brookmire, and must be held to have known and taken the risk of any dangerous defect in the stair[5]; if the stair was not dangerous, then *cadit quæstio*.

Lord Dundas.—This is an action of damages for personal injury. It appears that the pursuer met with an accident in a common stair in the property of the defender while coming down from an upper storey of the tenement, where she had gone to visit one of the tenants. The question we have to decide is whether the pursuer has stated a relevant case against the defender. The Sheriff-substitute has held that the pursuer's averments are irrelevant, and I have come to the conclusion that he is right.

There was not at our bar any serious argument to the effect that the stair was defective in structure. It was conceded, and I think rightly, that "wheeling steps" are not uncommon, and are not in themselves a source of danger. Similarly, the absence of a handrail, as a structural defect, was not in itself made much of at the bar. The kind of case that was made for the pursuer in argument was that the fault lay in some deficiency in the lighting, having regard to the surrounding circumstances which I have mentioned. When I consider the pursuer's averments carefully, as one is bound to do, I do not find them satisfactory. Even at

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[1] 1909 S. C. 566.

[2] Cavalier v. Pope, [1906] A. C. 428, *per* Lord Atkinson, at p. 433.

[3] Davidson v. Sprengel, 1909 S. C. 566, *per* Lord President Dunedin, at p. 570.

[4] Gautret v. Egerton, L. R., 2 C. P. 371.

[5] Fleming v. Eadie & Son, 25 R. 500; Driscoll v. Commissioners of Burgh of Partick, 2 F. 368.

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the end of the excellent argument we have heard I do not quite know what is the precise defect attributed to the lighting. The first part of condescendence 4 rather points to this, that the light was from the beginning insufficient, either because the lights were badly placed, or because the burners were defective. That, however, is met by section 361 of the Glasgow Police Act, alluded to on record, because it is provided by that section that the lighting appliances have to be provided and maintained, and the lights placed, to the satisfaction of the inspector of lighting of the Corporation of Glasgow. Then, again, so far as complaint is intended to be made about some emerging defect, we are told that the burners were "worn and done," and "gave no light, or at least" only "an obscure faint light." But there is no explanation at all of the kind of wearing-out that is meant, or why there was less light than there should have been; and none of the details are given which one would have liked to know. One notices that the last words of condescendence 12 inform us that "Since the accident to the pursuer the lights on the stair landings have been put right." But there again a mysterious silence is maintained as to how they were "put right." One cannot help thinking that, if the pursuer knew exactly what the case was that she wanted to present, she would in her allegation of fault have set forth something of what required to be done, and was done, to put these things right which were wrong before. But nothing of that sort is said.

Apart, however, from the mere matter of the form of averment, when we come to consider the question of fault which lies at the root of the action, we must ask, What is the duty of the landlord here? because it must depend upon that whether there is fault on his part or not. I do not think it can be said to be any duty of this landlord to keep a full light always there during the hours of darkness,—a light up to the standard, perhaps, desired by his tenants, or something of that sort,—when one recollects that he is, by the terms of the section of the Police Act to which I have referred, bound to maintain the lighting of the stair to the satisfaction of the Corporation. That is the standard of his duty. He is bound to keep this stair lighted to the satisfaction of the Corporation's inspector. Now, the inspector or his men, one must assume, were about this stair continually, and were about the stair no doubt upon the very night in question. The presumption surely is that the lighting as it existed was in conformity, and not in disconformity, with the legal requirement; and there is nothing said or suggested to the contrary here. That seems to dispose of the question of the landlord's duty, and his alleged violation of it or fault.

It appears to me that a person in the position of the pursuer, going into a stair of this kind, must take it as she finds it, and goes there subject to the risk of the condition of the stair; unless, of course, a case could be averred of something of the nature of an invitation into a "trap," as it is sometimes called in the cases. Here I do not think there is any suggestion, at all events any effective suggestion, of anything like a trap. It is true that condescendence 12, as amended, contains some definite averments of complaints made by tenants to the defender's factor, but one has to consider whether that amendment has in any way bettered the pursuer's situation.

I do not myself think that it has. There is a very vague, and I think insufficient, statement about an alleged report, through the medium of a child, of some sort of accident that had occurred. I do not attach any importance to that; it is too vague. But it is said with some specification that complaints were made by the tenants to the factor. That might be in the ordinary case a very important averment; but here it seems to me to lose all its importance when one refers to the consideration that the standard of this landlord's duty in regard to lighting was that which I have indicated, namely, lighting to the satisfaction of the Corporation of Glasgow. There is here no suggestion that that standard was not maintained, and that that duty was not performed. It is not said or suggested that any complaint was made by or on behalf of the inspector of lighting to the defender or his factor.

I think that is all one need say about this case. I agree with the result at which the Sheriff-substitute has arrived; and I think we should affirm his interlocutor.

Lord Salvesen.—I am of the same opinion. Reading this record as favourably as I can for the pursuer in the light of the argument submitted by her counsel, I think it comes to this, that her complaint is that a burner in this particular stair had become so obstructed or otherwise defective that the light which the gas jet gave was less than it had previously given, and was not sufficient properly to light the part of the stair on which the pursuer fell.

I apprehend there is no duty at common law on the part of the proprietor of a tenement to light the stair which is the access of his tenants to their respective houses. They may lawfully take a house on a stair which there is no means of lighting at night, and they cannot complain if, when passing up and down the stair in the dark, they meet with an accident for no other reason than that in the dark it is more difficult for a person to maintain his footing. For public reasons, however, Parliament has enacted that in a large city such as Glasgow there shall be imposed upon the proprietor of every tenement in which there is a common stair the duty of providing and maintaining gas-pipes and burners which are to be placed there under the instructions of the inspector of lighting, and are to be maintained by the proprietor to the inspector's satisfaction. For the failure in that statutory duty—which is no doubt enacted for the benefit of the tenants, who have to pay, as I understand, for the gas consumed in the common stair—I think the proprietor might be liable, even to a person like the pursuer who was not a tenant but merely a visitor to one of the tenants. She had a perfect right to go up and down that stair in order to visit her friend, and a proprietor who lets a house at the top of a stair is bound to assume that other people besides his tenants will use it.

But then I think it is not sufficient to aver that the light was defective in the opinion of the tenants, or that the tenants complained that the light was defective. To make a relevant case it is necessary to aver that the appliances were not to the satisfaction of the inspector who is the statutory judge of their sufficiency, and for a very obvious reason. The

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Corporation of Glasgow can only charge 10s. per annum for the gas consumed by each of these jets, and they have an interest in seeing that no more gas passes through a particular burner than will leave them a reasonable profit on the gas supplied. If it were left to the individual discretion of the landlord or the tenants to fix the size of the burners no doubt they would adopt the largest burner which could be fitted on to the particular pipe, and would have the largest amount of light in the common stair that they could get. I think that is a very good reason why the statute has enacted that the appliances shall be supplied and maintained to the satisfaction of the inspector of lighting.

In these circumstances—the landlord having, as we must assume in the absence of any averment to the contrary, fulfilled his initial duty of putting pipes in the places directed by the inspector of lighting, and of supplying burners to his satisfaction—I think the landlord is entitled to assume that all is well with his appliances, unless he receives some complaint, not from the tenants, but from the person to whose satisfaction the appliances are to be maintained, to wit, the inspector. One of the inspector's men must daily visit the house to light the jets, and I should imagine it to be one of his duties to report to the inspector if, in his opinion, the lighting is inadequate in any particular stair. Now, there is no suggestion of anything of that kind having occurred here—no suggestion of any failure to comply with the statutory duty imposed by the section of the Act to which we were referred. In these circumstances, I think the pursuer's case is absolutely irrelevant.

Lord Guthrie.—I concur. The pursuer and the defender have raised a number of general questions. But I shall assume in favour of the pursuer a possible liability against the landlord in connection with such an accident as this; and I shall also assume that she is not personally barred by her previous knowledge and use of the stair. It seems to me sufficient to advert, as your Lordships have done, to the terms of section 361 of the Glasgow Police Act, 1866, which I think disposes of the case made on inadequate lighting. It is admitted that no independent case can be made on the absence of a handrail and on faulty construction of the stair.

The Glasgow Act might have been expressed in one of two ways. It might have said that the landlord shall adequately light the stair. In that case it might have been sufficient for the pursuer to say that the stair was inadequately lighted, first, because the light was in an improper place, and second, because it was not large enough or bright enough properly to light the stair. But, by contrast, this Act says that the landlord's duty is to conform to the instructions of the inspector of lighting, first in respect to the position of the lights, second in respect to the kind of burners that are to be provided, and third in respect of the way in which these are to be maintained.

The pursuer might have countered that case and averred herself out of the Act by alleging that the provisions of the Act had not been followed. But all that she says is, "the section of the Act mentioned in answer is referred to," thereby, I think, justifying the assumption that the Act was complied with. The pursuer's case is quite consistent with the inspector

having been there that morning, or the night before when the burners were lighted, and having passed everything as in his opinion sufficient in the particular circumstances. I therefore think the Sheriff-substitute has taken the right course in dismissing the action. Oct. 30, 1913. Gaunt v. M'Intyre.

The LORD JUSTICE-CLERK concurred.

THE COURT affirmed the interlocutor of the Sheriff-substitute, and dismissed the appeal.

OLIPHANT & MURRAY, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

ROBERT CAIRNS AND OTHERS, Pursuers (Respondents).—*Horne, K.C.*—*Lippe.*
HARRY WALKER, LIMITED, AND ANOTHER, Defenders (Reclaimers).—*J. R. Christie*—*A. M. Stuart.*

No. 8.
Nov. 19, 1913.
Cairns v. Harry Walker, Limited.

Reparation—Ship—Illegal use of ship—Smuggling—Steward supplied with articles to be smuggled—Fine imposed on ship—Liability of supplier of articles to repay fine.

A British ship, trading between Grangemouth and South America, was fined, on arriving at Buenos Ayres, by the Customs authorities in respect that certain dutiable articles on board had not, as required by Argentine law, been declared in the ship's manifest and had been found concealed in the steward's cabin. These articles had, unknown to the shipowners but with the connivance of the captain, been supplied to the steward by a firm of merchants at Grangemouth in the knowledge that they were to be carried on board the ship and traded with by him, and that, for the purpose of successful trading, they would have to be smuggled into the port of destination. They were supplied on credit, and were to be paid for by the steward out of the proceeds of the trading.

The shipowners having brought an action against the merchants to recover in name of damages the amount of the fine levied on the ship—

Held that the merchants, having been accessory to the wrongful and illegal use of the vessel for carrying goods on a smuggling adventure, were liable for the loss and damage thereby occasioned to the owners; and decree pronounced against them.

1ST DIVISION. Lord Skerrington

ON 22nd August 1911 Robert Cairns and others, the owners of the steamship "Cairngorm" of Leith, brought an action against Harry Walker, Limited, drapers and outfitters, Grangemouth, and Harry Walker, the managing director of that Company, concluding for payment of £89, 2s. 6d. in name of damages.

The pursuers averred that on 22nd December 1910 the "Cairngorm" sailed with a cargo of coal from Grangemouth for South American ports. On the arrival of the ship at Buenos Ayres on 28th January 1911 the captain delivered to the Customs authorities the ship's manifest, in which, according to Argentine law, it was necessary to declare all the goods on board which were liable to import duty. A few days afterwards the Customs authorities came on board and discovered a number of dutiable articles which had been concealed by the steward (William Post), and which should have been declared in the manifest. In consequence of the failure to declare these articles a fine amounting to £89, 2s. 6d. was imposed on, and paid by, the

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pursuers' agents at Buenos Ayres. The pursuers also averred:—"The said articles in respect of which the said fine was paid were put on board the pursuers' ship by Post under an agreement between Post and the defenders, entered into by Post and the defender Harry Walker, acting on behalf of his said Company, and for his own profit as the person having the whole substantial interest in the said Company, whereby Post and the defender Harry Walker conspired together to use the pursuers' ship for the purpose of smuggling goods into the Argentine without payment of duty. The said defender was well aware that in so acting he was subjecting the pursuers to a penalty if the goods were discovered; nevertheless he carried through the scheme in concert with Post, and thus brought upon the pursuers the loss in respect of which they now sue. The loss and damage sustained by the pursuers through the enforced payment of the said fine was the direct result of the said actings. The defenders' business largely consists in supplying seamen with goods, and the said Harry Walker was well aware that the articles supplied to the said William Post were not intended for his own personal use or for sale on board the ship. The said William Post was a domiciled Englishman, but a German by birth, and a stranger to the defenders, and was without means to pay for goods purchased in the ordinary course of business. In these circumstances the said agreement was entered into between Post and the defender Harry Walker, that the sale of the said articles should be for the mutual benefit of the parties, and that accounts should be settled after the success of the venture on the said William Post's return to the United Kingdom. Further, it was essential to the success of the said William Post's venture that no disclosure of the goods being on board should be made by the defenders to the pursuers. If such disclosure had been made to the pursuers the goods would have been returned to the defenders, or otherwise would have been duly declared in the ship's manifest. The defenders, in supplying the said goods, were well aware that it was Post's intention to trade with them by smuggling. Further, it was the duty of the defenders and of the said Harry Walker to disclose the transaction with Post to the pursuers; but they failed to do so, in consequence of which the said loss and damage occurred. The pursuers have requested the defenders to relieve them of the said fine, but they have refused or at least delayed to do so."

The pursuers pleaded;—(1) The defenders having conspired with the said William Post to use the pursuers' ship for the purpose of concealing dutiable goods on board, and smuggling them ashore at Buenos Ayres, for the mutual benefit of the said William Post and the defenders, and the pursuers having suffered loss and damage thereby to the amount sued for, decree ought to be granted as craved. (2) The defenders are liable for the loss and damage sustained by the pursuers, in respect that they supplied the said goods in the knowledge that the same were to be smuggled. (3) *Separatim*, the defenders, being aware of the destination of the ship, and that the said goods could not be introduced into Buenos Ayres without payment of duty, and having, as unpaid sellers, an interest in the goods, were bound to disclose to the pursuers that the said goods were on board the said vessel, in order that duty might be paid on them, and not having done so, are liable in damages.

The defenders pleaded, *inter alia*;—(4) Any goods furnished by the defenders to the said William Post having been sold and delivered

by them in the ordinary way of trade, they, as sellers, are not responsible for the actings of Post which are complained of, and they should be assoilzied.

A proof was allowed and led, the import of which is set forth in the opinions of the Lord Ordinary and Lord Salvesen.

On 26th November 1912 the Lord Ordinary (Skerrington) pronounced the following interlocutor:—"Finds that the defender Harry Walker having been accessory to the wrongful and illegal use of the pursuers' ship 'Cairngorm' for carrying goods from Grangemouth to the Argentine on a smuggling adventure, the defenders are liable, jointly and severally, to the pursuers in damages: Assesses the amount of said damages at £89, 2s. 6d., with interest thereon at 5 per centum from 7th March 1911 till payment, and decerns against the defenders, jointly and severally, for payment to the pursuers of said sum of £89, 2s. 6d., with interest thereon as aforesaid till payment . . ."*

* "OPINION.—The pursuers are the owners of the steamship 'Cairngorm' of Leith, which in December 1910 sailed from Grangemouth to Montevideo for orders, under a charter-party which named (Articles 1 and 17) Montevideo, Buenos Ayres, and certain other places on the River Plate as the port or ports of discharge. On reaching Montevideo the steamer was ordered to Buenos Ayres, and she there discharged her cargo. While she was lying in that harbour the Custom House officers found concealed in the steward's cabin and pantry a number of articles which were liable to duty according to Argentine law. These articles were seized, and the ship was condemned to pay a fine equivalent in our currency to £89, 2s. 6d. The receipt given by the Custom House treasurer bears (as translated) that the fine was imposed upon the steamer 'for failing to declare the goods found concealed in the steward's cabin.' The steward deserted the ship and has disappeared. The articles seized formed part of a large assortment which the defenders had sold to the steward on credit, and which they had delivered to him at the ship's side before she left Grangemouth. The pursuers claim damages from the defenders, whom they allege to have been accessories along with the steward in the wrongful and illegal use of their ship for the purpose of smuggling. The defenders first called are a limited company which carries on business as general drapers, clothiers, hatters, and outfitters, at Grangemouth, and the individual defender, Mr Harry Walker, is their managing director. The defenders' counsel expresely admitted that if Mr Walker had made himself personally liable to the pursuers, the limited company was also liable, jointly and severally. Accordingly I do not need to consider whether it was within the scope of Mr Walker's authority to act in the manner alleged by the pursuers.

"Mr Walker acting for his firm and afterwards for the limited company has, for a number of years, sold what are called 'slopchests' to the masters of sailing ships and tramp steamers, and occasionally to stewards, but in the latter case only if the master knew and approved. According to its original and proper meaning a slopchest is an assortment of slops, *i.e.*, of articles such as clothing, soap, &c., which are likely to be required by seamen while absent from a home port. In the days of sailing ships, when voyages were lengthy, a slopchest was usually carried. It is now much less common, but it is carried on some tramp steamers, and the defenders still sell some in every year. Sometimes, if a slopchest is carried, the master or steward as the case may be, orders some goods which are not intended to be sold to the ship's company, but which are intended to be sold to the inhabitants of any port where the ship may happen to touch. Presumably in such cases the shipmaster acts upon the assumption that his owners would not object to petty trade of this kind. At any rate no one could blame a shopkeeper merely because he did not communicate with the owners before

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The defenders reclaimed, and the case was heard before the Second Division on 18th and 19th November 1913. At the hearing counsel for the reclaimers cited Macdonald's Criminal Law, (3rd ed.) p. 6. Counsel for the respondents were not called on.

LORD SALVESEN.—In this case I have come to the conclusion that the Lord Ordinary is right, and that in the finding in the interlocutor under review he has put his judgment upon the right ground.

The facts, so far as material, are that the defenders seem for many years to have carried on a business of supplying to shipmasters and members of crews of ships which are going on long voyages what are known to them as "speculative slopchests." The meaning of "slopchest," when slopchests were in general use, was quite well known amongst persons in

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supplying a shipmaster with a few trade goods as distinguished from slops. But if the shopkeeper knew that the goods were intended to be smuggled into a foreign country by means of a particular ship, and if he delivered the goods on board that ship or contracted that they should be carried by it, and that he should be paid the price out of the proceeds of the sale, he would, in my opinion, be an accessory to the commission by the master of a wrongful and illegal act, unless, of course, he in fact believed that the owners approved of such a use of their ship. I refer to the summary of the criminal law as to accession given in Macdonald's Criminal Law (3rd ed.), p. 6, and I see no reason why a different rule should apply in the case of a civil delict. A servant who, for his own purposes, and without permission, makes use of his master's property in a manner calculated to cause him serious loss or even inconvenience, is guilty of a breach of contract and also of a positive delict, because he is certainly in no better position than if he had been a mere stranger who used the property of another without permission. According to Bell (sec. 479) it is barratry on the part of a shipmaster if he 'enters into any smuggling concern or evades duties to the loss of the ship.' In the present case the only question in my view is whether the pursuers have proved that the defender, Mr Walker, knew that the steward intended to smuggle into the Argentine a portion of the contents of the so-called slopchest. Though it is not necessary for me to decide the point, I am disposed to think that it would be enough for the pursuers to prove that Mr Walker did not in fact believe that the steward intended to pay or arrange for the payment of duty upon any of the dutiable goods which he might sell in a foreign port to persons other than members of the ship's company.

"The price of the slopchest which the defenders sold to the steward amounted to £96, 3s. 8½d., and I think that both the value and the quantity of the goods were greatly in excess of what is usual. Further, the quantity was out of all proportion to what could have been required by a company of twenty-four during a voyage which was to last little more than a month. The largest items in the invoice were for waterproof coats, which are not the same as the oilskins used by seamen. The items are :—'13 mens w. p. coats, 21s., £13, 13s.; 30 ladies w. p. coats, 15s., £22, 10s.; 20 old w. p. coats, 5s., £5." In addition to the articles which the defenders stock, Mr Walker, by special request, procured from Glasgow a quantity of cheap watches and jewellery, which he invoiced as follows :—"36 watches, 3s. 6d., £6, 6s.; 12 bracelets, 4s., £2, 8s.; 12 chain bracelets, 5s. 6d., £3, 6s.; 12 silver alberts, 3s., £1, 16s.; 11 mirrors, 3s. 6d., £1, 18s. 6d.; 7 rings, 4s., £1, 8s.; 17 rings, 7s. 6d., £6, 7s. 6d." Such articles are not usually included in a slopchest, and it was out of the defenders' ordinary course of business to procure and sell them. As regards the nature of the contract between the defenders and the steward, there is no evidence to

the seafaring profession. The slopchest contained a number of articles which were likely to be used by the crew on the voyage, and with which they might not have adequately supplied themselves before the voyage commenced, and in order to prevent inconvenience to the crew it was customary for the captain, with his owners' consent, to purchase a slop-chest from which the crew's wants were supplied from time to time. But it is clear, indeed it was not seriously disputed, that the so-called speculative slopchest that was supplied to the steward in this case was not a slopchest of that kind. It consisted of a great many articles which could in no sense be regarded as reasonably required by the crew in the course of the voyage, but was professedly a collection of articles to be used by the steward in trading. The defenders say that they have frequently supplied similar articles for trading purposes to masters of ships going on

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support the pursuers' averment of joint adventure. I am disposed to think that the contract was really one of sale and return, such as is often made by a wholesale dealer when he provides a small shopkeeper with a certain quantity of stock. In the absence, however, of any notice on record or of any questions to Mr Walker at the proof as to the time at which he intended that the property in the goods should be transferred to the buyer, it would not be legitimate for me to decide that the goods when seized at Buenos Ayres were the property of the defenders. Even on that assumption the steward's possession of the goods would have been as prospective purchaser and not as the defenders' agent, so that the pursuers would still have required to prove guilty knowledge on the part of Mr Walker. I assume, however, that the property in the goods was transferred to the steward as soon as the articles had been selected and purchased. None the less the contract was peculiar in respect that the steward was to have credit until the ship returned to her first English port—the object being to enable him to pay for the goods out of the proceeds of the trading. Miss Mackenzie, who was one of the defenders' saleswomen, deponed:—"(Q.) Was it the understanding that Post should pay for these goods when he had traded with them? (A.) I understand on the arrival of the ship, or else when the ship came back to an English port. Mr Walker said that at the time the slopchest was made up. He said it was to be paid for with the proceeds of the trading. It was the understanding that when Post had sold these goods and made his profit, he was to pay us with the proceeds of these goods." The important point about this evidence is that the credit was given upon the footing that the goods should leave Grangemouth in the pursuers' ship, and I regard that as a term of the contract. Though I decide the case on the assumption that the steward had no legal right to return any goods which he had been unable to sell, Mr Walker deponed that he would probably have been willing to take back any such goods. Obviously, Mr Walker, though not technically a partner in the adventure, had a direct interest in its success. He deponed that the shipmaster verbally guaranteed to see him paid, but that meant nothing more than that the master promised not to allow the steward to be paid off without seeing that the debt to the defenders had been provided for. Accordingly Mr Walker arranged with the master that he was to be informed of the date and port of the ship's arrival in England, in time to enable him to travel there and get payment of his money. Newport, Mon., was mentioned by the master as being probably the first home port. It will be noticed that the master knew that the steward was buying a slopchest, and that is a strong point in favour of Mr Walker, as he was entitled to trust that the master would restrain any smuggling propensities which the servant might develop in the course of the voyage, and that the master would also personally see that all

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long voyages, and that in these transactions they treat the master as if he were the owner, and do not concern themselves with the question whether the owners consent to their master being a trader as well as a navigator. I think the clear implication of that is that the defenders are perfectly well aware that in the ordinary case the owners of a vessel would not sanction their master buying quantities of goods in this country for disposal at the ports to which the vessel may be destined, on the footing that these are to be carried on the ship free of freight for the master's benefit, still less would they sanction their master purchasing such goods if they could only be advantageously disposed of on the footing that they must be smuggled into a port where there is a duty upon them. If that applies to the master it applies with all the greater force to the steward of a vessel like this. The defenders in this case seem to have taken the

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legal requirements were complied with, so as to protect the goods from seizure and the vessel from being fined in a foreign port. On the other hand, if there is evidence to prove complicity between Mr Walker and the steward, one must assume that the latter informed the former of his reasons for believing that there was a fair prospect of success in smuggling the goods into the Argentine. For this purpose it was necessary either to deceive the master into believing that the bulk of the articles had been sold to the crew before the arrival of the ship in the Argentine, or alternatively, it was necessary to make the master an accomplice. In point of fact, out of the whole contents of the slopchest, the manifest declared only twenty waterproofs. It ought to have declared in addition the articles detailed in the list annexed to the receipt by the Custom House treasurer, and also a number of other articles which the steward sold to persons who came on to the ship at Buenos Ayres during the few days between the first visit of the Custom House officers and their second visit when the seizure was made. I do not express any opinion as to how it came about that the master signed a false manifest. He deponed that he was deceived by the steward, and as he had no opportunity of cross-examining the witnesses it would be unfair on my part to express any opinion to the contrary. In any case the procuring of a false manifest was a natural incident to the smuggling adventure initiated by the steward. If Mr Walker was a party to that adventure, the pursuers are, in my judgment, entitled by way of damages to the sum sued for, £89, 2s. 6d.

"Apart from some hearsay evidence of statements by the steward, which, of course, are inadmissible as evidence of complicity on the part of Mr Walker, there is no direct evidence that he knew that the steward intended to smuggle any of the contents of the slopchest, and one must start with a strong presumption in favour of his innocence. But this presumption may be, and in my opinion has been, completely rebutted by the inferences to be drawn from the character of the mercantile adventure, from Mr Walker's conduct when he was first charged with having smuggled, and from his testimony and demeanour in the witness-box. Of course he is not to be found guilty of using the pursuers' ship for the purpose of smuggling merely because he entered upon a speculation which, if it was innocent, was unbusinesslike and foolish or because he wrote an uncandid letter to the pursuers' solicitors. Business men do occasionally make foolish speculations, and innocent men have not always the moral courage to speak the truth. After seeing Mr Walker and hearing his explanations I am quite satisfied that he was not innocent, but that, on the contrary, he was aware of the steward's scheme, and that the sale would not have taken place unless he had known that the steward saw his way to open a profitable market for a large part of the goods by smuggling them into the Argentine. It is proved

master into their confidence too, and I think for a very obvious reason. Unless the master sanctioned the carrying of these goods by the steward the whole adventure would be frustrated, because he would in all probability come to know of such goods having been brought on board and could interfere with the steward in disposing of them. Accordingly, as I read the evidence here, I think it is plain that the master from the first was conniving at the scheme of the steward to purchase the goods on credit from the defenders with the intention of smuggling them into a port and there disposing of them for his own benefit.

Now, perhaps, that by itself would not be sufficient to attach liability to the defenders, but I think that they throughout had an interest in this adventure. They could not have got the goods sold unless they had supplied them upon credit, because the steward was a person of no means.

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that the steward could speak Spanish, and that he boasted after the ship had sailed that he knew the officials at Buenos Ayres and how to bribe them. According to Mr Walker's evidence he himself neither inquired, nor knew, nor cared when, where, or how the steward intended to dispose of the goods. He knew nothing as to the steamer's destination except that he understood that she was going to Las Palmas for orders after which she might be absent for an indefinite time sailing from port to port as the owners might arrange. He explained that if she was away for a long time the bulk of the goods might be sold to the crew; or again she might touch at a duty-free port, or if she touched at a tariff port the steward might get an advance from the master in order to pay the duties on any goods which he wanted to sell on shore, or he might arrange with a purchaser to pay the duties. All these were matters as to which Mr Walker felt no interest or even curiosity at the time when he handed over goods to the value of £100 to a complete stranger upon credit. In cross-examination, when confronted with the letter quoted below, Mr Walker had to admit that the steward had said that he had a friend out at the River Plate who could do with some ladies' mackintoshes if the steward could take them out. The letter which was addressed to pursuers' London agents in reply to their letter intimating the present claim was as follows:—'Yours to hand *re* "Cairngorm." The steward, as customary in deep water steamers, bought certain goods as a slopchest to supply crew on voyage and never mentioned the word smuggling. He also bought some mackintoshes which he said were for a friend of his in the Argentine. I have no arrangement or connection with it in any shape or form. It was purely a business transaction, same as we have had for over 20 years, and I will be sorry to hear that either the owners or anyone else should lose through him. I have a balance of account to get as he had not sufficient cash to pay all when here. I repudiate any liability.' This letter falsely suggests that apart from the mackintoshes the goods were all of the kind which it is customary to supply to a crew on voyage, and it falsely states that the transaction, so far as concerned the writer, was of an ordinary character. It also falsely suggests that the steward had made a payment to account of the slopchest. Mr Walker's explanations as to this letter were unsatisfactory. As my decision depends upon considerations of credibility, I do not refer to the evidence in greater detail.

"The defenders having been parties to the wrongful and illegal use of the pursuers' ship for carrying goods from Grangemouth to the Argentine, have infringed the pursuers' legal right and must pay damages. Even if no fine had been imposed on the ship the case would not have been one for merely nominal damages—('*The Mediana*,' [1900] A. C. 113). I have already stated that in my view the imposition of a fine upon the ship was a natural consequence of Mr Walker's wrongdoing. The defenders' counsel

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He was also a person whom they so little trusted that they had in their mind from the first that they would have to go and meet him at the first port at which he arrived in this country, in order to make sure that he paid them the price of the goods with which they had supplied him. That does not indicate that they had any exuberant confidence in his honesty. But the goods would not have been supplied without their intervention, because apparently the steward could only get credit from them or from somebody who was prepared to take the same risk as they were. Their interest, therefore, in the transaction was this, that they were supplying goods on a large scale to a man of no means at cash prices—no doubt without giving him the discount that is generally given on such a large order for cash—and they expected that the steward, having realised the goods at prices largely beyond the sale price, would account to them for the price at which he had bought them. In all this the defenders seem to have taken no account of the persons who were mainly interested, to wit, the pursuers. They were putting goods on board the vessel of these pursuers, as I hold, in the knowledge that they were to be traded with by the steward, and in the knowledge that, in order that the trade might be successful, the goods would have to be smuggled into the port to which the vessel was destined. I find, therefore, no fault with the Lord Ordinary's view that the defender, Harry Walker, was accessory to the wrongful and illegal use of the pursuers' ship "Cairngorm" for carrying goods from Grangemouth to Argentina in a smuggling adventure. That is the inference that I think may be legitimately drawn from all the facts that are proved in this case; and the inference is not displaced by the denial of Mr Walker, because the Lord Ordinary thinks that reliance cannot be placed upon his evidence, and he gives reasons for the conclusion at which he arrives on that subject.

If that be the true inference to be drawn from the facts as a whole, then, I think, the legal result is clear. Mr Mackenzie Stuart had to admit that the steward would have been liable for the sum sued for, and

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argued that even assuming Mr Walker to have been privy to the steward's scheme, he committed no wrong, or at least no wrong inferring liability to compensate the pursuers for the imposition of the fine. He argued that there was no competent evidence of the existence of a tariff at Buenos Ayres or of the goods being dutiable. The alleged Custom House officers might have been briganda. Again, the ship was fined not for attempted smuggling, but in respect of the master's failure to declare the goods. It was the master's duty to enter all dutiable articles in the manifest of stores, and his failure, whether innocent or wilful, to perform this duty, was the proximate cause of the ship being fined. Counsel further argued that the natural method of smuggling goods into Buenos Ayres was not to conceal them, as was done by the steward, but to declare them in the manifest. The receptacle containing the goods would then be sealed by the Custom House officers, but a single officer might break this seal when stores were required for use. In return for a bribe the goods might be smuggled ashore without risk to the ship, though the actual smuggler might be punished if he was caught. I have mentioned these arguments in order to show that I have considered them, but I do not think it necessary to answer them.

"I give decree for the sum sued for, with interest, as part of the damages."

if the defenders were accessory to his illegal and unwarrantable actings, they incurred the same liability. They were not merely accessories in the ordinary sense, but without them the adventure could not have been embarked upon at all. It was the goods which they supplied at the steward's request which, not having been entered in the manifest, were discovered at Buenos Ayres, with the result that a fine was imposed upon the vessel; and I think the reason why the goods did not enter the manifest was that the captain from the first was a party to the whole scheme, no doubt having a promise of some consideration from the steward in the event of the adventure being successfully carried through. I cannot otherwise understand the evidence of the first mate, who was examined on commission, and who speaks in great detail to what passed at Buenos Ayres when the seizure was made. The captain did make a partial disclosure in the manifest of the goods. I think the fact that he made that partial disclosure, looking to the other evidence that we have from the defenders' witnesses—*e.g.* that he had been himself engaged in the selection of the goods—is extremely significant, as showing his complicity in the matter from the first.

That being the view which I take, and which the Lord Ordinary has also taken, of the evidence I think the defenders must bear the consequence. It is perfectly true that it is not illegal to sell goods to a customer who informs the seller at the time that he intends to smuggle them; but it is a totally different thing if the seller sends goods on board a vessel belonging to the employer of the person who has conveyed to him the information that he intends to smuggle them and to use the vessel for that purpose. The seller thereupon makes himself a party to the wrongful use of the pursuers' vessel; and, as the defenders acted in this way and continued to have an interest in the adventure up to the end, it is but just that they should suffer the consequences that through their means have been brought upon the pursuers.—[His Lordship then dealt with a question with which this report is not concerned, deciding that a deduction of £3, 12s. should be made from the Lord Ordinary's award for certain goods declared in the manifest and left on board the vessel.]

Accordingly I think we should adhere to the interlocutor reclaimed against, with the small variation as to the sum to which I have referred.

Lord Dundas.—I entirely agree with the opinion which has been delivered, and do not desire to say anything more.

Lord Guthrie.—I am of the same opinion. The Lord Ordinary has found in fact that the defender has been accessory to the wrongful and illegal use of the pursuers' ship "Cairngorm" for carrying goods from Grangemouth to the Argentine on a smuggling adventure; and he has held in law that in those circumstances the defenders are liable, jointly and severally, to the pursuers in damages. The interlocutor is traversed by the defenders both in fact and in law. They argued that the Lord Ordinary's finding in fact was not well founded, and that, even if it were well founded in fact, the Lord Ordinary's conclusion in law does not follow, because it would only be if there were a known form of joint-

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adventure that the defenders would be liable. I think the reclaimers are wrong on both points.

The Lord Ordinary starts with the ordinary presumption in favour of the defender Harry Walker's innocence. He thinks, however, that this presumption is rebutted from (1) the character of the mercantile adventure; (2) Walker's conduct when first charged with smuggling; and (3) his testimony and demeanour in the witness-box. The Lord Ordinary says—"My decision depends upon considerations of credibility." I prefer to put my opinion on the lines suggested by Lord Salvesen in the course of the argument, namely, on what the Lord Ordinary calls "the character of the mercantile adventure," and the irresistible inference therefrom unless displaced by the reclaimers by their witnesses and documents. So far from the inference being rebutted, it seems to me to be confirmed by the oral evidence of the reclaimers and their witnesses and by the documents produced. As to the character of the adventure, it is noticeable that, although the reclaimers have been for years engaged in trade similar to the trade in question in this case, no evidence of merchants has been brought to show that this is an ordinary kind of trade. It is on the face of it a very curious kind of trade. The person to whom the goods are sold for trade purposes is the steward of the ship. So far as trade on board is concerned, that is natural. But so far as the trade on shore is concerned, it is clear that he is in an exceptionally favourable position for smuggling. He is a member of the crew who sticks to the ship throughout the length of the voyage, and he is a man who can go backwards and forwards to the shore in the way that an ordinary seaman cannot do. In this particular case the steward was a man who knew the Spanish language and he knew some of the officials at the port of Buenos Ayres. Then it appeared from the nature of the goods that a very large proportion of them would be sold not on board but on shore. The ship was known to be going to what I think we must assume were duty-charging ports. The captain of the ship was interested in the result, and therefore had a direct motive to omit the goods from the manifest and thus to evade the payment of duty. Mr Walker himself says:—"What I suppose is that the captain and the steward share their slopchest as a rule." Lastly, the sale was on credit and credit of a very curious kind. It is said that the voyage might have lasted more than a year, so that it came to this that the steward was getting goods at cash prices on a credit of possibly two years. If that is so, then Mr Walker had a very direct interest in the adventure, and I think the result of the whole case is to lead to an inference from the nature of the transaction which the defenders have failed to rebut. Perhaps a key to the whole case may be found in Mr Walker's view to the effect that "we look upon the captain as owner, and we never think of the owner." Clearly the captain's mandate could never bind the owners in a transaction of this kind.

Lord Justice-Clerk.—I agree with the opinion which your Lordships have expressed. I came very early in the course of the speech of Mr Mackenzie Stuart to the conclusion that, unless something more was shown, it must be held that Captain M'Gub, the master of the vessel, and

Mr Walker, had both come here not as candid witnesses, but, as I venture to say, untruthful witnesses. If we wish to be sure that there is no mistake about that—because sometimes witnesses express themselves badly and do not say exactly what they mean, although I do not think this is a case of that kind—I think it is only necessary to refer to two of the letters produced. In one, Captain M'Gub writes to his owners upon the footing that he never knew that the stuff was on board his vessel:—"It appears that a man by the name of Walker"—indicating that he wishes it to be understood that he knew nothing about him—"who has a tailor's shop in Grangemouth, let him have all this stuff." If anything is conclusively proved in this case it is that Captain M'Gub was himself a party to the stuff being got at Walker's and put on board his vessel. He writes:—"I thought all my papers were in order, little thinking I had such a rogue on board." I am afraid there was more than one rogue on board. Then as regards Messrs Walker we have this letter from H. Walker:—"The steward, as customary in deep-water steamers, bought certain goods as a slopchest to supply the crew on voyage,"—the slopchest consisting among other things of 84 shirts and 82 pieces of jewellery, the value coming to about £100, in the case of a crew which only numbered 24—"and never mentioned the word smuggling." I have no doubt that this is about the most true statement in the whole letter; it was quite unnecessary to mention the word in order that it might be understood what was being done. He goes on to say:—"It was purely a business transaction, same as we have had for over twenty years, and I will be sorry to hear that either the owners or anyone else should lose through him. I have a balance of a/c to get, as he had not sufficient cash to pay all when here." In point of fact there is not the slightest doubt that he never paid a penny for these goods before the voyage began, and the very fact that the defenders applied to the captain to let them know at what home port they would arrive is proof positive that no money had been paid for these goods. I need not go further into the matter. I agree with all that Lord Salvesen has said; but I wished to state my reasons for thinking we have not a truthful statement on the part of the defenders. That throws considerable light on the question whether the defenders were accessories to what was done. As to that I have no doubt, and I am of opinion that they are liable in terms of the conclusions of the summons.

THE COURT pronounced the following interlocutor:—" . . . Refuse the reclaiming note; vary the said interlocutor (of the Lord Ordinary) by finding that the damages found due amount only to £85, 10s. 6d; *quoad ultra* adhere to the said interlocutor, and decern. . . ."

BOYD, JAMESON, & YOUNG, W.S.—C. STRANG WATSON, Solicitor—Agents.

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Colville's Judicial Factor v. Nicoll.

ALEXANDER YOUNG ADAM (John Colville's Judicial Factor), Pursuer and Real Raiser.—*Chree, K.C.—J. R. Christie.*
MRS ANNIE BRUCE YOUNG ADAM OR NICOLL, Claimant (Reclaimer).—*Chree, K.C.—J. R. Christie.*
ROBERT ADAM, Claimant (Respondent).—*Moncrieff, K.C.—A. R. Brown.*
MRS ANNIE ADAM OR LISTER AND OTHERS, Claimants (Respondents). *Moncrieff, K.C.—A. R. Brown.*

Succession—Intestacy—Representation in moveables—Collation—Intestate Moveable Succession Act, 1855 (18 *Vict. cap.* 23), *secs.* 1 *and* 2.

The Intestate Moveable Succession (Scotland) Act, 1855, which introduces representation in moveable succession, enacts, sec. 1, that "where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased the intestate," his issue shall have right to the share of moveable estate which he would have taken; but contains this proviso, "provided always that no representation shall be admitted among collaterals after brothers and sisters descendants." Sec. 2 enacts, "where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate," his child, being the heir in heritage, shall be entitled, on collating the heritage, to claim for himself and any other issue of his parent such share of the moveable estate as would have fallen to his parent on collation.

Held that sec. 1 and sec. 2 must be read together, and accordingly that the proviso contained in sec. 1 also applied to sec. 2, and excluded a deceased cousin's son, who was the heir in heritage of an intestate, from collating the heritage and claiming from a surviving cousin, who was the sole next of kin, a share of the moveable succession.

Jamieson v. *Walker*, (1896) 23 R. 547, *overruled.*

Observed (*per* the Lord President) "(1) that the first and second sections of this statute are not to be regarded as separate and independent enactments, but are to be read together as comprehending the whole scheme of representation in moveables introduced by the Act of Parliament; (2) that the proviso in the first section is applicable to the whole scheme of representation in moveables introduced by the statute; and (3) that the object of the second section of the statute is to apply, in the case of mixed successions, the rule of representation which is applied by the first section to estates consisting of moveables alone."

1st DIVISION with three consulted Judges. Ld. Ormidale.

ON 16th November 1912 Alexander Young Adam, judicial factor on the estate of the late John Colville, brought an action of multiplepoinding and exoneration for the distribution of the estate under his administration. The estate, which consisted of heritable property to the approximate value of £800 and of moveables estimated to amount to between £8000 and £9000, formed the fund *in medio*.

The late John Colville died intestate on 13th October 1911 at the age of over eighty. He was an only child and was unmarried, and his sole next of kin was his only surviving first cousin, Mrs Annie Bruce Young Adam or Nicoll, while his heir-at-law was Robert Adam, the son of a predeceasing first cousin.

The history of the family was as follows:—The intestate's paternal grandfather, David Colville, had (besides other issue, all of whom predeceased the intestate without surviving issue) a son, John Colville senior, the intestate's father, and a daughter, Barbara, who married

James Adam. This Mrs Barbara Colville or Adam had six sons, who predeceased the intestate, and one daughter, who survived him, namely, the said Mrs Annie Bruce Young Adam or Nicoll, his sole next of kin. Mrs Adam's eldest son, David Adam, left a family of whom five survived the intestate—viz., one son, the said Robert Adam, the heir at law, and four daughters, Mrs Lister, Mrs Butchart, Mrs Stark, and Mrs M'Leish—and two sons who predeceased the intestate, one of whom, Charles, left a son and a daughter, William Robertson Adam and Agnes Milne Adam. Two of Mrs Adam's younger sons also left families who survived the intestate.

The following claims were considered in the action:—

I. For Mrs Annie Bruce Young Adam or Nicoll, who averred that she was sole next of kin to the intestate and claimed to be ranked and preferred to the whole of his free moveable estate.

II. For Robert Adam, who averred, *inter alia*;—"The claimant is the eldest son of the said David Adam, power loom tenter, and is thus the heir in heritage of the intestate. The said David Adam died on 27th May 1909, survived by the claimant and also by four daughters and the son and daughter of a predeceasing son, all of whom survived the intestate. The said David Adam would have been the heir in heritage of the intestate had he survived. The claimant being his son and the heir in heritage of the intestate is entitled to claim along with his sisters and his nephew and niece the share of the moveable estate of the intestate which might have been claimed by the said David Adam upon collation if he had survived the intestate"; and claimed—"To be ranked and preferred (1) to the whole heritable estate which belonged to the said John Colville at the date of his death, and (2) to one-sixth of the share of the moveable estate of the said deceased John Colville which might have been claimed by the said David Adam upon collation if he had survived the intestate."

III. For (1) Mrs Lister, (2) Mrs Butchart, (3) Mrs Stark, (4) Mrs M'Leish, and (5) William Robertson Adam and Agnes Milne Adam, who averred, *inter alia*;—"The said David Adam, if he had survived, would have been the heir in heritage of the said deceased John Colville the intestate. As before mentioned the said Robert Adam is the heir in heritage of the intestate, and he and the claimants are entitled among them to the share of the moveable estate of the intestate which might have been claimed by the said David Adam on collation if he had survived the intestate"; and claimed—"To be ranked and preferred to the following proportions of the share of the moveable estate of the said deceased John Colville which might have been claimed by the said David Adam on collation if he had survived the intestate, namely, each of the said Mrs Annie Adam or Lister, Mrs Elizabeth Adam or Butchart, Mrs Mary Adam or Stark, and Mrs Jessie Adam or M'Leish, to one-sixth thereof, and each of the said William Robertson Adam and Agnes Milne Adam to one-twelfth thereof."

On 24th June 1913 the Lord Ordinary (Ormidale), without delivering an opinion, pronounced the following interlocutor:—"Finds that the claimant Mrs Annie Bruce Adam or Nicoll is the daughter of a sister of the father of the deceased John Colville, who died intestate on 13th October 1911, and that she was at the date of his death the sole surviving next of kin of the said John Colville: Finds that the claimant Robert Adam is the eldest son, and that the claimants Mrs Annie Adam or Lister, Mrs Elizabeth Adam or Butchart, Mrs Mary

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Adam or Stark, and Mrs Jessie Adam or M'Leish are children, and the claimants William Robertson Adam and Agnes Milne Adam are grandchildren, all of the late David Adam, who was the son of a sister of the father of the said John Colville, and predeceased the said John Colville, and who would, had he survived the said John Colville, have been his heir-at-law and one of his next of kin along with the claimant Mrs Annie Bruce Adam or Nicoll: Finds that the claimant Robert Adam is the heir in heritage of the deceased John Colville the intestate, and is entitled as such to be ranked and preferred in terms of the first branch of his claim, No. 24 of process: Finds also that the said Robert Adam is entitled to participate in the moveable estate of the intestate, and to be ranked and preferred in terms of the second branch of his said claim, No. 24 of process: Finds that the claimants Mrs Annie Adam or Lister, Mrs Elizabeth Adam or Butchart, Mrs Mary Adam or Stark, and Mrs Jessie Adam or M'Leish, and William Robertson Adam and Agnes Milne Adam are also entitled to participate in the moveable estate of the said intestate, and to be ranked and preferred in terms of their claim, No. 25 of process: Finds that the claimant Mrs Annie Bruce Adam or Nicoll is entitled, as next of kin foresaid, to receive and to be ranked and preferred upon the balance of the fund *in medio;* and with those findings appoints the cause to be enrolled for further procedure: Grants leave to reclaim."

Mrs Nicoll reclaimed against this interlocutor, and the case was first heard before the First Division on 31st October 1913, when it was ordered to be heard before a Court of seven Judges.

The case was accordingly reheard on 14th November 1913 before a Court consisting of the Lord President, Lord Johnston, Lord Dundas, Lord Salvesen, Lord Mackenzie, Lord Guthrie, and Lord Skerrington.

Argued for the reclaimer;—At common law and up to the date of the Intestate Moveable Succession Act, 1855,* there was no represen-

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* The Intestate Moveable Succession (Scotland) Act, 1855 (18 and 19 Vict. cap. 23), enacts:—

Sec. 1. "In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled; provided always that no representation shall be admitted among collaterals after brothers and sisters descendants. . . ."

Sec. 2. "Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall

tation in moveables in intestate succession; the rule was equal division among the surviving next of kin, the nearer in degree excluding the more remote. The heir took no share in the moveable succession, unless he happened also to be one of the next of kin. In that case he might avail himself of the privilege of collation, and remove his disability to share in the moveable succession by sharing the heritage with the other next of kin. But the privilege was open to the heir only when he was also one of the next of kin. This general rule of law was established by decision,[1] although a certain modification of it was suggested by Erskine.[2] The effect of section 1 of the Intestate Moveable Succession Act was to allow representation in moveables amongst a certain limited class, *i.e.*, persons not more remote than brothers' or sisters' descendants.[3] So far, therefore, as the provisions of this section were concerned there was no authority for the admission of representation among the class claiming in this case, viz., the issue of first cousins. But it was argued that the wider class was admitted when circumstances arose for the application of section 2. Section 2 did not admit of that construction.[4] Its opening words confined its application to a case where "the person predeceasing" would have been heir in heritage. To discover who "the person" was it was necessary to refer to section 1, and from section 1 it was clear that "the person" was one of the limited class. The respondents sought to construe the section as if it contained the words "a person" or "any person" predeceasing; but it was neither necessary nor admissible to construe the section otherwise than according to its terms, and these terms clearly implied that the two sections must be read together. The respondents' argument involved the inclusion of the family of David in the moveable succession, and the exclusion of the families of his brothers; an absurd result which could never have been intended by the Legislature. The case of *Jamieson* v. *Walker*,[5] on which the respondents relied, was wrongly decided and should be overruled. No support for that decision was to be found in *Innes* v. *Coghill*,[6] nor had it been followed except in the Outer House.[7]

Argued for the respondents;—The provisions of the first and second sections of the Act were separate and distinct, both according to the scheme of the sections and as regards the rights which they respectively conferred or dealt with, and each should be read alone and independently of the other. Section 1 introduced into moveable succession a new rule of statutory representation, by admitting the issue of predeceasing next of kin, who were excluded at common law. The object of section 2 was not primarily to deal with representation.

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not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent had he survived the intestate would have taken on collation."

[1] M'Caw v. M'Caw, (1787) M. 2383; Anstruther v. Anstruther, (1836) 14 S. 272, at p. 282.

[2] Inst. iii. 9, 3.

[3] Ormiston v. Broad, (1862) 1 Macph. 10; Turner and Others, (1869) 8 Macph. 222.

[4] M'Laren on Wills, (3rd ed.) vol. i., pp. 120 and 152.

[5] (1896) 23 R. 547.

[6] (1897) 25 R. 23.

[7] Robertson v. Robertson, (1907) 15 S. L. T. 249.

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It dealt with collation and with the rights of the heir-at-law in a mixed succession. It selected a beneficiary, qualified by descent and by the possession of the character of heir-at-law, and conferred on him, in unambiguous words, the right to collate the heritage to the effect of admitting himself and his brothers and sisters to the limited share in the moveable succession which would have been open to the ancestor through whom he derived his right. There was nothing anomalous in thus favouring the heir, who had always been a favoured person in Scots law. The right to collate, even when he was not one of the next of kin, had been attributed to him by Erskine.[1] If this view of the statute and its construction was sound, then the respondents' case was clear. This view was the ground of the decision in *Jamieson* v. *Walker*,[2] which was rightly decided and should be followed. But—assuming that section 2 could not be construed by itself, and that reference must be made to section 1 for a definition of the phrase "the person predeceasing"—that person was sufficiently identified as one who, had he survived the intestate, would have combined the qualifications of being (*a*) heir-at-law, and (*b*) one of the next of kin, as David Adam did here. To get a meaning for these words it was quite unnecessary to drag in the further qualification of the proviso limiting the class within which representation might take place in moveable succession. That class had in fact been extended, when a mixed succession and the question of collation fell to be dealt with, by the words of section 2.

At advising on 21st November 1913,—

Lord President.—We have had the advantage of a singularly able argument from both sides of the bar in this case, but I do not suppose that any of your Lordships at any time entertained any doubt as to what our ultimate judgment should be. But inasmuch as we were asked, and are about, to overrule a decision pronounced by the other Division of the Court some eighteen years ago, it was deemed necessary to summon seven Judges to the consideration of the case. The question relates to the scope and meaning of the Intestate Moveable Succession Act of 1855. The rival views presented of that statute are these: One side maintains that, in the case of all estates where you are dealing with collaterals, the scheme of representation in moveables introduced by the statute is confined exclusively to brothers and sisters of the intestate and their descendants. The other side maintains that, while that may be so where you are dealing with an estate consisting exclusively of moveables, it is otherwise where there is a mixed succession, and that in the latter case the heir-at-law, howsoever remote, is entitled, on condition of collating the heritage, to participate along with his brothers and sisters, if he has any, in the moveable succession.

The case before us relates to a mixed succession, heritable estate of the value of some £800 and moveable estate of the value of between £8000 and £9000. The intestate, an only child, died unmarried survived by one cousin, his next of kin, a Mrs Nicoll, who claims the whole moveable succession. The heir-at-law is to be found in the family of a deceased cousin, and the heir-at-law has four sisters. He claims, on collating the

[1] Inst. iii. 9, 3.

[2] 23 R. 547.

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heritage, to participate along with his four sisters in the moveable succession. His claim rests exclusively upon the statute, because it is conceded that not being one of the next of kin he would not be entitled, by the common law of Scotland, on collating the heritage to participate in the moveable succession. There are two families of deceased cousins who make no claim. It is conceded that the statute does not admit the latter families to a right to participate in the moveable succession, and that it is only the family which has the good fortune to number among its members the heir-at-law which enjoys this privilege. That would be a fantastic result to which we should be led. If we were shut up by the plain words of the statute to that conclusion, I presume we would give effect to it. But I am of opinion that we are not.

The whole controversy turns upon the meaning to be attached to the expression in the opening words of the second section of the Act, "the person predeceasing." In my judgment "the person predeceasing" means exactly what it says and does not mean "any person predeceasing." When the statute means "any person predeceasing" it says so, and these very words will be found at the opening of the third section. If, then, we are to interpret these words "the person predeceasing" as meaning what they say, we must look for that person in the first section of the Act. We there find "the person predeceasing" either amongst the ascendants or the descendants or the brothers and sisters of the intestate or the descendants of brothers and sisters of the intestate. But the father of the family in which the heir-at-law in the present case is a member is not to be found in any one of these categories; and, therefore, the claim of that family fails.

I have only now stated shortly what might, in other language, be expressed in three propositions:—(First) that the first and second sections of this statute are not to be regarded as separate and independent enactments, but are to be read together as comprehending the whole scheme of representation in moveables introduced by the Act of Parliament; (Second) that the proviso in the first section is applicable to the whole scheme of representation in moveables introduced by the statute; and (third) that the object of the second section of the statute is to apply, in the case of mixed successions, the rule of representation which is applied by the first section to estates consisting of moveables alone.

These propositions I regard as sound in law. All of them were disregarded in the judgment of the Second Division in the case of *Jamieson* v. *Walker*.[1] That decision must now be regarded as overruled; and I move your Lordships, therefore, to recall the interlocutor of the Lord Ordinary, which I may say in passing he could not do otherwise than pronounce, to rank and prefer Mrs Nicoll to the whole of the moveable estate, to rank and prefer the heir-at-law to the heritable estate, and deny his claim and the claims of his sisters to participate in any part of the moveable succession.

Lord Dundas.—I am of the same opinion. This action of multiple-

[1] 23 R. 547.

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poinding raises a question of law under the Intestate Moveable Succession (Scotland) Act, 1855. Mr John Colville, the intestate, died on 13th October 1911, leaving heritable estate to the value of about £800, and free moveable estate amounting to between £8000 and £9000. At the date of his death he left no brothers or sisters, or descendants of brothers or sisters; and his sole next of kin was the claimant, Mrs Nicoll, his cousin, who was the only then surviving child of Mrs Barbara Adam, a sister of his father. Mrs Nicoll's brother, David Adam, predeceased the intestate, leaving issue who survived the intestate, viz., the claimants Mrs Lister, Mrs Butchart, Mrs Stark, Mrs M'Leish, and Robert Adam; and Charles Adam, a son of David, predeceased the intestate, but left issue, a son and a daughter, who are also claimants. Mrs Nicoll claims to be ranked and preferred to the whole moveable estate of the intestate, as being his sole next of kin. Robert Adam is the intestate's heir-at-law, and is entitled, as such, to the heritage. But he claims, in respect that his father would, if he had survived the intestate, have been his heir-at-law, to be entitled, upon collating the heritage, to participate, along with his sisters and his nephew and niece, in the share of the moveable estate of the intestate which might have been claimed by his father David (upon collation), if he had survived the intestate. The other claimants, upon a similar basis, claim to participate in the share of the moveable estate referred to. The parties are agreed that the case is ruled by that of *Jamieson* v. *Walker*.[1] The Lord Ordinary, in deference to the authority of that decision, and without expressing any opinion of his own, gave effect to the claims of Robert Adam and of his sisters and his nephew and niece. The present Court of seven judges has been convened to reconsider the judgment of the Second Division in *Jamieson* v. *Walker*.[1] I am of opinion that that case was wrongly decided. I am unable to see that Robert Adam, who is the intestate's heir-at-law, but not one of the next of kin nor a descendant of a brother or sister of the intestate, has any right to collate, to the effect of taking for himself or for his sisters or his nephew and niece the share of the moveable estate which his father would have taken if he had survived the intestate.

At common law, before the passing of the Act of 1855, representation in heritage was fully recognised, without limit; but there was no representation in moveables. The heir, if he was himself one of the next of kin, was entitled to claim his share of the moveable estate with the other next of kin, on condition of collating the heritage; but, if he was not one of the next of kin, he had no right of collation. This last proposition seems to have been doubted by Mr Erskine[2]; but the law was laid down in the sense I have indicated in *M'Caw*,[3] which has always been followed, *e.g.*, *Anstruther*.[4] But Mr Moncrieff for the respondents contended, in the course of an able argument, that the Act of 1855, section 2, had in effect made law by statute that which Mr Erskine thought might be, or ought to be, common law in regard to collation. I observe that Mr Erskine's doctrine is carefully restricted to a case where the heir, as well

[1] 23 R. 547.

[2] Inst. iii. 9, 3.

[3] M. 2383.

[4] 14 S. 272, 282.

as the next of kin, is a descendant of the intestate. So far I agree with Mr Moncrieff that section 2 has restored Mr Erskine's doctrine; and indeed it goes somewhat further, for it provides that an heir descended from a brother or sister of the intestate may collate with those whom the statute designates as the intestate's heirs *in mobilibus*. But if Mr Moncrieff's clients are to succeed, a much greater change in the common law must have been effected than the restoration of Mr Erskine's doctrine, even with the extension I have indicated. In order to succeed they must, I apprehend, show that, under the statute, an heir, not related to the intestate within the degree specified in the first section, may nevertheless, under the second section, claim to share in the moveable estate on condition of collation. I am unable so to read the Act. As matter of construction, I think the plain meaning of its words negatives the respondents' argument.

The first section of the statute introduced representation in moveables, but only within narrow and well-defined limits. It expressly provides that "in all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin shall have predeceased the intestate, the lawful child or children of such person so predeceasing shall come in place of such person," and so forth; but the section ends with the important and quite unqualified words, "provided always that no representation shall be admitted among collaterals after brothers and sisters descendants." The second section by its initial phrase makes it, to my mind, clear that it is intended to follow as a direct sequence of section 1, and cannot be read as a substantive provision independent of it. The opening words are, "Where the person predeceasing," &c. I think the word "the" is precisely equivalent to "such"; and so one is taken back to section 1, and to its proviso as regards the extent and degree to which representation in moveables is intended to be introduced by the Act. I need not quote the words of the second section. It is, to my mind, clear that they must all be read subject to the scope of section 1 and its proviso. If this be so, it seems to follow that Robert Adam, the heir-at-law, not being within the class of persons entitled to share in the moveable estate, has no right of collation either for himself or for the benefit of his sisters or his nephew and niece.[1]

For these reasons I think that the Lord Ordinary's interlocutor, pronounced by him solely upon the authority of *Jamieson* v. *Walker*,[2] ought to be recalled, and that Mrs Nicoll should be ranked and preferred to the whole moveable estate of the intestate, Robert Adam being found entitled to the heritage.

Lord Johnston.—We are called upon in this case to reconsider the judgment of the other Division pronounced in 1896 in the case of *Jamieson* v. *Walker*,[2] regarding the application of the second section of the Moveable Succession Act, 1855. I think that that case was wrongly

[1] See M'Laren on Wills and Succession, (3rd ed.) vol. i., p. 152, sec. 299.
[2] 23 R. 547.

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decided, and mainly by reason of the fallacy which is expressed in the leading judgment thus:—Sections 1 and 2 of the Act "are independent of each other. They deal with separate matters, and are intended to effect changes in our law quite distinct from one another." I think that the opposite is the sound view and leads to an opposite conclusion. These sections are dependent on one another. They deal, indeed, in one sense with different matters, but so that the latter section is the complement of the former, and is intended to complete and perfect the change in our law effected by it.

The Act in its entire purview was remedial, its object being to alter certain anomalies and defects in the Scots law of intestate succession. As pointed out by Lord President Inglis in *Turner's* case[1] the particular purpose of the first section of the Act was "to take away the hardship which arose when, of several persons who would have been all equally next of kin of an intestate, one or more had predeceased the intestate, leaving children." By the common law the children of the particular predeceaser would have been excluded from all share in the moveable succession of the intestate, though their parent, had he survived, would have taken an equal share with the other next of kin, and though they being left orphans are more likely to be the most necessitous. To remedy this hardship the statute introduced representation in moveable succession. But it introduced it with the limitations, first, that of the predecessor it must be possible to predicate that had he lived he would have been among the actual next of kin—*Turner's* case[1]; and second, that representation among collaterals shall be confined to the descendants of brothers and sisters of the intestate. Thus in the present case, the next of kin of the intestate being one cousin out of a family of seven, the other six having predeceased the intestate, the statute did not go the length of bringing in the children of those of the six who left issue—and in particular the children of the predeceaser with whom we are concerned—to share by reason of the statutory introduction of representation in moveables, because they are outside the category of those to whom the benefit of representation is accorded by the statute.[2]

But then how was the common law of collation to be reconciled with this limited statutory recognition of representation? Was section 2 of the Act added as a complement of section 1 to avoid a new or further anomaly, which might—I think, would—have been created by that section had it stood alone, or as an entirely separate and detached provision, not remedial of any hardship which can be suggested, or of any existing defect in the law of succession, but occasioning what indeed would have called for remedy? Adapting the expression of Lord Justice-Clerk Inglis in *Ormiston's* case[2]—If in answering this question "we incline to that which shall give the statute consistency and effect, we are at once led to the conclusion" that section 2 was added for the former purpose.

The second section commences with the words—"Where the person predeceasing would have been the heir in heritage of an intestate." If this is treated as an independent provision, then it must apply to every case,

[1] 8 Macph. 222.

[2] Ormiston v. Broad, 1 Macph. 10.

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without limitation, of the predecease of a person who would have been heir in heritage of an intestate. I do not think that I should detain the Court by exposing the anomalies which would be created, and the confusion which would result from the combination of the limited introduction of representation of predeceasing next of kin by section 1 with the assumed universal introduction of representative collation by section 2. But the statute does not say "where a person predeceasing," but "where the person predeceasing," and the definite article is, I think, used with meaning and intent. It indicates that, to find the person referred to, the reader is sent back to something preceding, viz., to section 1. When he turns to that section he finds that "the predeceaser" is not any predeceaser, but a predeceaser of a class limited by two conditions. If the person who has predeceased—and who would, had he survived, have been heir in heritage of an intestate—would have been (1) among his next of kin, and (2) within the limited class of collaterals specified in the proviso of section 1, then it at once becomes clear that, to complete the remeid of the common law, not only must his issue be given the benefit of representation in moveables, but provision must be made for reconciling the law of collation with this introduction of limited representation in the law of moveable succession. And this, and this only, is provided for by section 2, and it is provided for in a manner which exactly meets the case. It must be kept in mind that no heir at law who is not one of the next of kin can collate at common law.[1] If then by representation he acquires right to share in the moveables, and as a condition of taking that share is not required to collate, injustice to others would be done. To remedy that possible result of section 1 section 2 was required. But to that purpose section 2 is, I think, limited. If the predeceaser does not come within the above category there is no suggestion of any reason for the provision of section 2 regarded as an independent provision. And I am satisfied that it was not intended to give a right to collate, and to share in the benefit of collation (as would be the result of the judgment in *Jamieson's* case[2]), to a stirps which otherwise would have no right at common law as next of kin, and no right by statute as representing next of kin, to any share in the moveable succession at all.

The Lord Ordinary had no alternative but to follow the precedent in *Jamieson's* case.[2] But for the above reasons I think that that decision was unsound, and that the interlocutor reclaimed against must therefore be recalled.

Lord Salvesen.—The difficulty in this case, and I think it is a real difficulty, arises from the imperfect way in which the statute is expressed. If sections 1 and 2 are to be read as dealing with separate matters, then I think the reasoning of Lord Trayner in *Jamieson* v. *Walker*[2] cannot be impugned. It would have been very easy for the draughtsman of the Act to have commenced the second section by such words as "Subject to the provisions of the preceding section" or in some other way to have correlated it to the preceding section; and probably it would have been

[1] M'Caw, M. 2383. [2] 23 R. 547.

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a still better way of making the meaning of the Legislature clear if the second section had simply been made an additional proviso of the first.

According to the mode in which the statute is expressed I think the *prima facie* view is that section 2 deals with a different set of circumstances from those dealt with in section 1; but to read it in that way is to make the two sections inconsistent with each other; and, therefore, I agree with your Lordship in the chair that we must read them together. So reading them, I am of opinion that the result at which the Second Division arrived cannot be sustained.

LORD MACKENZIE.—In my opinion section 2 of the Intestate Moveable Succession Act, 1855, is not independent of section 1, but must be read along with it. Section 1 introduced the doctrine of representation as regards all cases of intestate moveable succession. The proviso at the end of the section is expressed in very plain terms and provides that no representation shall be admitted among collaterals after brothers' and sisters' descendants. Accordingly, in the present case, the families of John and William, deceased brothers of Mrs Nicoll, cannot make any claim to share in the moveable succession along with her. She is the first cousin of the intestate and his sole next of kin. The respondents are the family of David, another deceased brother of Mrs Nicoll. It is a fortuitous circumstance that the intestate left some heritable property. The effect, however, of this, according to the respondents' construction of section 2, is that, as the heir in heritage, Robert, is a son of David, this gives him, or failing him the other members of David's family, a right to a share of the moveables. Robert is not one of the next of kin, nor one who has a statutory right of representation under section 1. It is said he has an independent right as heir to collate and claim for himself and his brothers and sisters a share of the moveable estate, and that, if he does not collate, his brothers and sisters may come in and claim in their own right. The result of this is startling, for it makes the right of these descendants to claim a share of the moveables along with the next of kin depend entirely upon whether there is any heritage, however trifling in amount. If there is, then they, though of the same degree as their cousins who are entirely cut out, are to be held entitled to a share of the moveables, otherwise they are not. This does not appear to me a reasonable construction to put upon section 2. It is, in my opinion, an enactment, consequent upon section 1, for the purpose of obviating any questions as to the extent of the rights of an heir in heritage, who, also in virtue of the provisions of section 1, was made one of the heirs *in mobilibus* of the intestate. If and when the heir in heritage is clothed with the character of one of the next of kin as defined by section 1, then section 2 will operate but not otherwise. The provisions of section 1 including the proviso must, in my opinion, be read into section 2.

If sections 1 and 2 are read together then I think the argument of the respondents is untenable. I am, accordingly, unable to agree with the judgment in *Jamieson* v. *Walker*[1] upon which the Lord Ordinary has proceeded.

[1] 23 R. 547.

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LORD GUTHRIE.—I agree with your Lordship in the chair.

LORD SKERRINGTON.—I agree with your Lordships.

THE COURT pronounced this interlocutor:—"Adhere to the said interlocutor except in so far as it finds the various claimants entitled to be ranked and preferred on the moveable estate of the deceased: Recall said findings, and in lieu thereof find that the said Mrs Annie Bruce Adam or Nicoll is entitled, as sole next of kin of the deceased, to be ranked and preferred in terms of her claim: Remit to the Lord Ordinary for further procedure, and decern."

MORTON, SMART, MACDONALD, & PROSSER, W.S.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

No. 10.

Oct. 29, 1913.

The Lamson Paragon Supply Co., Limited, v. MacPhail.

THE LAMSON PARAGON SUPPLY COMPANY, LIMITED, Pursuers (Respondents).—*Horne, K.C.—Lippe.*
CAMPBELL D. MACPHAIL, Defender (Reclaimer).—*Macgregor—Macquisten.*

Contract—Pactum illicitum—Agreement to refrain from prosecution.

In an action brought by a firm against a former employee to recover a sum which he was alleged to have embezzled, the pursuers founded on a promissory-note granted by him to them for this sum, and on a letter from him admitting that he had used the firm's money and acknowledging their kindness in not prosecuting him. The defender averred that the pursuers had induced him to sign these documents by threatening that otherwise they would prosecute him; and pleaded that this was a *pactum illicitum*, and, accordingly, that the documents could not be founded on against him.

Held that, even if an agreement to refrain from prosecuting the defender would have been unlawful, no such agreement had been relevantly averred; and defences *repelled.*

Opinions reserved as to whether such an agreement would be a *pactum illicitum.*

2D DIVISION. Lord Hunter.

ON 24th January 1912 the Lamson Paragon Supply Company, Limited, brought an action against Campbell D. MacPhail, commercial traveller, Glasgow, concluding for payment of the sum of £110, 8s. 8d.

The pursuers averred that the defender was in their employment as a commercial traveller for a number of years prior to 1908; that in that year he was sent to the West Indies to collect accounts due to the pursuers from certain customers, and that, without authority, he retained and used for his own purposes the money so collected and failed to pay it to the pursuers.* (Cond. 2) "On account of this the pursuers proposed, in November 1908, to discharge the defender from their employment, but, on his granting to the managing director of the pursuers a letter, acknowledging that he had so acted, and had so appropriated to his own uses money belonging to the pursuers to the extent foresaid, and on his agreeing to make repayment thereof,

* The agreement under which the defender was employed to travel in the West Indies provided that his remuneration should be "by way of commission entirely"; and that the pursuers should advance to him £50 towards his expenses, this sum to be debited against his commission account.

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the pursuers retained him in their employment. The letter above referred to, which will be produced at the calling hereof, is in the following terms:—

'Avoca, Silverdale Avenue,
'Westcliff-on-Sea, Essex, 19th November 1908.

'Robert Clark, Esq.,
'Messrs The Lamson Paragon Supply Co., Ltd.,
'Canning Town, London, E.

'Dear Sir,—I beg to acknowledge the fact that I have used the Company's money in my recent journey to the West Indies to the extent of £110, 8s. 8d., having collected the accounts enumerated hereunder on behalf of the Company. [Here followed a note of the accounts collected.] I beg to assure you that the foregoing names and amounts cover all the accounts collected, and that I have not pledged the Company's credit in any way; nor personally have I borrowed any sum or sums from customers or others. I now appreciate the seriousness of my conduct in collecting this money and using it for my own purposes without your authority; and I beg to express to the directors my gratitude for their kindness in not prosecuting me. I agree to pay back the sum owing as quickly as possible out of my commission account, and you are at liberty to so apply commissions to such extent as you consider proper.—Yours faithfully, C. D. MacPhail.'" (Cond. 3) "On the day following that on which the said letter was granted, namely, on 20th November 1908, the defender further granted to the pursuers a document of debt in the following terms, namely, 'London, 20th November 1908.—I promise to pay on demand to The Lamson Paragon Supply Company, Limited, or order, the sum of one hundred and ten pounds eight shillings and eightpence value received. C. D. MacPhail, Avoca, Silverdale Avenue, Westcliff-on-Sea.'"

In answer to these averments the defender admitted that he had signed the letter and promissory-note, and explained that his necessary expenses on his journey to the West Indies exceeded, by the sum of £112, 10s., the allowance made to him for expenses by the pursuers. "When defender returned after a five months' journey he advised pursuers of the extra expense incurred by him on pursuers' behalf, and explained that no sum was due by him to them. The pursuers, however, without making any inquiries, refused to accept his explanations and declined to admit liability for his expenses, and charged the defender with embezzlement, and threatened him with a criminal prosecution and imprisonment, unless he would (first) sign an agreement to remain in their service, and in the event of his leaving their service not to engage in the service of other firms in Great Britain for three years thereafter; (second) an acknowledgment that he had embezzled; and (third) a promissory-note for £110, 8s. 8d. sterling. The defender protested, but the pursuers repeated their threats of a criminal prosecution and imprisonment, and induced the defender through fear thereof to sign (1) a memorandum of agreement, dated 20th November 1908, a copy of which is produced; (2) the alleged letter of 19th November 1908; and (3) the alleged promissory-note. The defender was terrorised by the threat of a criminal prosecution and imprisonment, and his signature to the said documents was extorted from him by fear, and accordingly said documents fall to be reduced *ope exceptionis*. Further, the alleged promissory-note is unstamped, and cannot be founded on. No consideration was

given by the pursuers for said documents, but the pursuers hoped to obtain the advantage of retaining him permanently in their service by endeavouring to exclude him, if he should leave their employment, from following the only occupation with which he was acquainted." The agreement of 20th November 1908 provided, *inter alia*, that the pursuers should employ the defender as traveller in London for the term of one year from the date of the agreement at a weekly salary and commission on the orders obtained; and bound the defender not to solicit orders from customers of the pursuers for goods of the kind manufactured or sold by them, and not to engage, alone or in partnership, in any business similar to that carried on by the pursuers, for the term of three years after he should have left the pursuers' employment.

The pursuers pleaded, *inter alia*;—(1) The defences being irrelevant, should be repelled.

The defender pleaded, *inter alia*;—(6) The said alleged documents of debt having been granted for an illegal consideration, or without any consideration, the defender is not liable in respect of any liability alleged to be constituted thereby.

On 18th October 1912 the Lord Ordinary (Hunter), after hearing counsel in the Procedure-roll, decerned against the defender in terms of the conclusions of the summons.*

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* "OPINION.—[After summarising the pursuers' averments and dealing with certain pleas by the defender with which this report is not concerned]—The other way the case was presented was this. Mr Jamieson said, assume that my client embezzled the money, this letter is an agreement to compound a felony, and you cannot, therefore, sue upon it, because the agreement is in the nature of a *pactum illicitum*. In the course of his argument he cited certain English cases. Mr Lippe referred me to three cases which I think have a bearing upon this matter. In the first place there is a case of *Ferrier* v. *Mackenzie*, 1 F. 597, where in somewhat similar circumstances a plea that an agreement was a *pactum illicitum* was repelled and certain remarks were made with reference to what amounts to *pactum illicitum*. But in the English cases, namely, *Ward* v. *Lloyd*, 7 Scott, N. R. 499, and *Flower* v. *Sadler*, (1882) 10 Q. B. D. 572, I find statements made by the English Judges as to the circumstances in which a plea founded upon such an alleged *pactum illicitum* may be sustained, and applying what was said by the Judges there, I think it is perfectly clear that there is no relevant averment of such an agreement here.

"In the case of *Flower* Lord Coleridge said this:—'A creditor may use strong expressions and even threats; and it was held in *Ward* v. *Lloyd* that strong language is not conclusive evidence of an agreement to compound a felony or to stifle a prosecution.' He also referred to a statement made by Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber in a previous case (*Keir* v. *Leeman*, (1846) 9 Q. B. 371) where he said: 'We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit.' Looking to the pleadings of the defender, I do not think that there is any averment to the effect that there was an agreement not to prosecute. The letter itself does not bear to be an agreement not to prosecute, and the averments amount merely to this, that there was a threat to prosecute, and a repetition of the same threat. On the whole matter, I am of opinion that the averments of the defender are irrelevant, and that the pursuers are entitled to decree as concluded for, with expenses."

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The defender reclaimed, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 28th and 29th October 1913.

Argued for the reclaimer;—The averments in the defences set forth an agreement between the reclaimer and the respondents under which the latter agreed not to prosecute the reclaimer in consideration, *inter alia*, of his signing the documents in question. Such an agreement was void under both Scots[1] and English law.[2] Even if the money sued for were actually due to the respondents, which was disputed, this would not save the transaction.[3] It was not necessary to show that there was an express undertaking to refrain from prosecuting; it was enough if it appeared that this was in reality part of the arrangement although it was not explicitly stated.[4]

Counsel for the respondents were not called upon.

LORD DUNDAS.—It is not necessary to call upon the counsel for the pursuers, for we are all of one mind in thinking that the interlocutor reclaimed against is right. For my own part, the grounds of the Lord Ordinary's judgment are so fully and clearly set out in his opinion that I am not disposed to add much to what he has said. [His Lordship then proceeded to deal with certain pleas of the defender with which this report is not concerned.]

There remains the point which was most argued before us, namely, that the letter amounts really to an agreement to compound a felony, is a *pactum illicitum*, and that the pursuers cannot sue upon it. On that point I do not think any consideration has been adduced or any authority cited that is not covered by what the Lord Ordinary has said. It is sufficient to say that I look in vain in this record for an averment that there was an agreement or bargain not to prosecute. I think the Lord Ordinary is quite right when he says: "Looking to the pleadings of the defender, I do not think that there is any averment to the effect that there was an agreement not to prosecute. The letter itself does not bear to be an agreement not to prosecute, and the averments amount merely to this, that there was a threat to prosecute and a repetition of the same threat." If that is so, and I think it is so, there is no need to hazard any opinion as to what would have been the position if an averment had been made which is not made; and I shall reserve my opinion on that matter until the question requires to be decided.

There is one point of a separate nature on a matter of pleading. I am surprised to notice that the pursuers' first plea in law in this record is that the defences are irrelevant. Now that is bad pleading. We sometimes see it in records from the Sheriff Court, but I confess I am surprised to

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[1] Bell's Prin., (10th ed.) sec. 41; Ferrier v. Mackenzie, (1899) 1 F. 597; Kennedy v. Cameron, (1823) 2 S. 192.

[2] Ward v. Lloyd, (1843) 7 Scott's New Reports Common Pleas, 499; Williams v. Bailey, (1866) L. R., 1 H. L. 200, *per* Lord Westbury, at p. 220, Lord Chelmsford, at p. 216; Flower v. Sadler, (1882) 9 Q. B. D. 83, 10 Q. B. D. 572.

[3] Ferrier v. Mackenzie, 1 F. 597, *per* Lord Justice-Clerk Macdonald, at p. 599, Lord Young, at p. 600.

[4] Keir v. Leeman (1846) 9 Q. B. 371.

see it in a record presumably drawn by learned counsel. The plea of relevancy may properly be put in the forefront by a defender, but it surely cannot, in logic or in substance, form the first plea or the principal ground of judgment for a pursuer. He must state and plead a *prima facie* case, apart from anything that is to be said against it. I merely call attention to this, because I think it is bad pleading, and hope it will not become common.

I move your Lordships that the Lord Ordinary's interlocutor be adhered to.

Lord Salvesen.—I am of the same opinion. The claim in this action is for a sum of £110, 8s. 8d., with interest from the date of citation. This claim is vouched by an acknowledgment admitted to be under the hand of the defender, and unless there is some reason for setting aside that acknowledgment the pursuers are entitled to get decree in terms of it. Now I look in vain for any pointed defence to the effect that that sum was never due. The pursuers say that it represents the amount of certain accounts belonging to them which the defender uplifted and applied to his own purposes. The defence on the merits is to the effect that the defender was obliged to expend that sum—and I see no question is raised as to the amount—because he had incurred expenses in travelling on behalf of the pursuers in excess of the amount which he had in hand. But then he does not go on to say that these expenses were payable by the pursuers, and there is a probative agreement produced in process and printed as an appendix to this case which shows that he was to pay his own expenses of the journeys, and that the employers were only to advance £50 to account of these expenses, the assumption being that he would be able to earn so much commission that he would have enough to meet his expenses and a reasonable remuneration to himself. There is thus no substantial defence to the effect that this amount which the pursuers claim, and which admittedly consists of certain specified accounts which the defender collected on their behalf, was not due to them at the time the acknowledgment was given.

But then it is said, and this also involves an admission of the collection of these accounts, that in consequence of what the defender had done in appropriating these sums to his own purposes he was threatened with a criminal prosecution for embezzlement, and through fear of a criminal prosecution was induced to sign this acknowledgment. It is further said that the acknowledgment is accordingly tainted, and, being the result of a *pactum illicitum*, cannot be founded upon. Speaking for myself, I doubt very much whether it is a crime by the law of Scotland for an employer to say to an employee who has embezzled his money,—"If you will make up the amount which you have taken from me I will not prosecute you." I do not think it is reasonable to suggest that that constitutes a crime, whether you give it the name of compounding a felony or whatever name you give it. It seems to me that an employer who takes that line acts humanely; and is not acting wrongly, far less criminally. The crime that has been committed has injured the employer only, and there is no duty laid upon him in the public interest to give information to the police.

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But it is not necessary to decide that in this case. It may be a different matter if the employer, using his knowledge that a crime has been committed, gets some benefit to himself—extorts something from the employee to which he is not entitled. That would present an entirely different case to my mind, But that is not the allegation here, and such a defence, as your Lordship in the chair has pointed out, can only arise if there is a relevant averment of an agreement on the part of the employer, in respect of certain pecuniary considerations, not to prosecute at all. Now I fail to find any proper averment of such an agreement. It may be that in the present case it was the expectation of the employee, and the intention of the employer, that there would be no prosecution, but in order to make a *pactum illicitum* there must have been a definite bargain to that effect, and I do not find that there is any proper averment of such a bargain. The circumstances here averred, indeed, seem to me to fall short of what was proved in the case of *Ferrier* v. *Mackenzie*,[1] where it was held that a bargain had not been established so as to bring into operation the law which exists in England—whether it exists in Scotland or not is still an open question—with regard to compounding a felony. It is certainly a remarkable circumstance that a prosecution for the crime of compounding a felony has never, so far as we know, taken place in Scotland; and there are excellent reasons why, in a country where the conduct of the prosecution of crimes is entrusted to a public prosecutor, it should not be necessary to create a more or less artificial crime, one purpose of which in England seems to be to stimulate the activities of private prosecutors. But I say nothing further on this subject.

I agree generally with the grounds upon which the Lord Ordinary has decided the case, and with the additional observations which your Lordship in the chair has made.

Lord Guthrie.—I am of the same opinion, and I concur in thinking that the important general question which Mr Macquisten raised does not arise on the pleadings for decision. That question, as I understand it, is this—whether an agreement to refrain from criminal prosecution, in return for payment of money due, amounts to a *pactum illicitum* by the law of Scotland. At first sight it would look as if in *Ferrier's* case [1] the affirmative of that proposition was assumed by the Judges who decided it. I do not think that is so. Certainly the Sheriff-substitute and the Sheriff, holding the averments relevant—that does not appear to have been questioned—seem to have proceeded on that assumption, but when one examines the opinions in the Inner House, three of the Judges quite distinctly say they reserve their view on that question. Lord Young says:—"If we came to the conclusion that a criminal offence had been committed by Alexander, I think that it may be according to the rule of our law—although no instance of it, as far as I know, has occurred in practice—that this promissory-note cannot be a ground of action in a Court of law." Lord Trayner says:—"I abstain from saying anything on the question as to whether an engagement to refrain from criminal prosecution in return

[1] 1 F. 597.

for payment of the loss incurred through the alleged crime would amount to a *pactum illicitum*." And Lord Moncreiff says:—"I think it is sufficient for the judgment to hold that the defender has not proved that the bill was obtained in return for an agreement to abstain from a criminal prosecution against his brother." Lord Moncreiff adds a striking sentence showing how far the proof in that case went, and yet it fell short of proving an agreement. He says:—"I even think that the defender signed the bill in order to insure his brother not being prosecuted, but, as I have said, there is no proof of any bargain."

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It seems to me that the Lord Ordinary has come to the right conclusion when, without finding it necessary to decide the general question, he has held that, supposing such an agreement would have the effect contended for by Mr Macquisten, no such agreement has been relevantly averred.

THE COURT adhered.

W. & J. BURNESS, W.S.—HUME M'GREGOR & Co., S.S.C.—Agents.

No. 11.

Nov. 21, 1913.

Taylor's Executrices v. Thom.

MRS ELSIE GRANT AND ANOTHER (Executrices-dative of Jessie Taylor), Pursuers (Appellants).—*Lippe.*
ROBERT TAYLOR THOM AND OTHERS, Defenders (Respondents).—*Chree, K.C.—Mitchell.*

Writ—Holograph writing—Testament—Subscription.

A document was found in the repositories of the deceased Miss Jessie Taylor enclosed in an unsealed envelope on which was written "My will." The document, which was holograph of the deceased, was written on one side of a sheet of paper and contained a list of bequests which disposed of the whole of her estate. It was headed, "Sunnybank Alford My last Will Jessie Taylor," but was not signed by her at the end.

Held, by a Court of seven Judges (*diss.* Lord Salvesen, Lord Mackenzie, and Lord Guthrie) that, in the absence of subscription, the document could not receive effect as a valid testamentary writing.

ON 7th May 1913 Mrs Elsie Grant and another, the executrices-dative of Miss Jessie Taylor, brought an action in the Sheriff Court at Aberdeen against Robert Taylor Thom and others, in which the pursuers craved declarator that a certain holograph writing was "the valid last will of the late Jessie Taylor, who resided at Sunnybank, Alford, Aberdeenshire."

1ST DIVISION with three consulted Judges. Sheriff of Aberdeen, Kincardine, and Banff.

The writing, which was on one side of a sheet of paper, was in the following terms:—

"Sunnybank Alford
"My last Will Jessie Taylor

"I leave my fourth share of this house to Jessie Taylor Gellie (Dora) my cottage at Kemnay Lilliesleaf to Robert Grant 43 Lauderdale Street Edinburgh Sell out my shares in the N. of S. and T. & County Bank. also N. of S. & Steme Coy and Scotish Union & N. Insurance Coy also what money may be in the Bank after my funeral divide it equally between Mrs Grant 107 Warrender Park Road Mrs Gellie 110 Desswood Place Aberdeen Dr Grant, George Alford Grant Vancouver, Cara Grant, Robina Thomson Glassgreen & Isbe Thomson

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Jane Joiner and Freida Joiner let all share alike also Eleanor Thomson, King Williams Town S. Africa to Nellie Grant £5 because of her usage to me when living in her Father's house last. my clothes divided among those also my bedding linnen and the furniture, to Robert Grant my eight day or Grandfather clock what furniture is not wanted sell out and let the money go with what is in the Bank Mrs Thomson Glassgreen all my dishes or however many she want. divide the books I would not like the Bibles sold"

The defenders pleaded, *inter alia*;—(2) The alleged testamentary writing founded on not having been subscribed by the said Jessie Taylor is inoperative as her will, and decree of absolvitor should be granted accordingly with expenses.

On 12th July 1913, after a proof, the Sheriff-substitute (Young) pronounced an interlocutor in the following terms:—"Finds in fact (1) that the late Miss Jessie Taylor, whose ordinary residence was at Sunnybank, Alford, Aberdeenshire, died in a nursing home at Aberdeen on 26th February 1913; (2) that shortly after her death an examination was made of her repositories in her house at Alford, and in particular attention was directed to a locked drawer as the place in which she was accustomed to keep papers of value and importance; (3) that in that drawer, part of a chest of drawers which stood in the kitchen, there was found, along with share certificates, deposit-receipts, and titles to property, an unclosed envelope, No. 5 of process, on the back of which was written the words 'My Will,' and inside which was the document No. 5a of process; (4) that this document does not expressly bear to be written by the deceased, but it, as well as the words on the envelope, has been proved to be in her handwriting; (5) that at the beginning of the document and slightly separated from the body of it there is this heading 'Sunnybank, Alford, My last Will Jessie Taylor,' and what follows contains words of bequest, and appears to deal with every item of the deceased's estate, excepting a small sum of cash in the house and a proportion of rents current at her death; (5) that the said document is not dated, but there is evidence to the effect that in all probability it was written after September 1912; and (7) that it is not subscribed: Finds in law that the said document, not being subscribed, is not a valid and effectual testamentary writing: Therefore refuses decree of declarator as concluded for."

The pursuers appealed to the Court of Session, and the case was heard on 17th October 1913 before the First Division (consisting of Lord Kinnear, Lord Johnston, and Lord Mackenzie), the Right Honourable Alexander Ure, K.C., being present as Lord Probationer.

The Court ordered the case to be reheard before a Court of seven Judges, and it was accordingly reheard on 13th November 1913 before the First Division, with Lord Dundas, Lord Salvesen, and Lord Guthrie.

Argued for the appellants;—The declaration "my last will," which was signed by the testatrix, was an adequate equivalent for subscription of the list of bequests which followed, because what followed was declared by these words to be the writer's will. By that declaration the holograph writing, which was on the same side of the same piece of paper, had been sufficiently identified and adopted as her testament. Moreover, that it was intended as a completed expression of her testamentary wishes was evident from the fact that it disposed, in testamentary form, of the whole estate of the testatrix, and was found among documents of value in her repositories at her death. In such

circumstances it should receive effect as a valid will.[1] The mere fact that the list of bequests was unsigned was not conclusive against the appellants' contention, for an unsigned document had been held to be a valid testament where there were circumstances which excluded the presumption that, being unsigned, it was necessarily incomplete.[2] The cases in which that presumption had received effect were distinguished by the absence of any such circumstances.[3]

Argued for the respondents;—In no case within the last 300 years had a manifestly unsubscribed holograph writing been held to be a valid and effectual will, and 100 years later than the case of *Titill*,[4] relied on by the appellants, the law clearly was not regarded as being in accordance with that decision, because had it been so a question which the Court had then to consider on the subject of a holograph testamentary writing could not have arisen The circumstances here were quite different from those in the case of *Gillespie* v. *Donaldson's Trustees*,[6] where a testator was held to have successfully dispensed with certain solemnities in future writings by a clause to that effect inserted in a formal deed. What was maintained by the appellants here was that the words with which the holograph writing of the deceased opened should be read as an adoption of what followed. That was an impossible contention. It could not be suggested that they were added after the rest of the writing, and the natural, and indeed only possible, interpretation of them was that they were a declaration that the writer was about to make her will. They were in fact merely a heading; and as the writing that followed was not subscribed, and was undated and contained no appointment of executors and no residuary clause, it could in no sense be regarded as a completed testamentary writing.[7] If there was any doubt as to whether such a writing had been completed it could not receive effect. Knowledge of the difference between a subscribed and an unsubscribed document was to be presumed in the case of every testator, and the writer of a holograph will must be held to regard it as incomplete and ineffectual until subscribed.[8] In the cases in which *ex facie* unsubscribed holograph writings had been held to be valid the Court had always found them to be authenticated, at least indirectly, by subscription.[9] But where,

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[1] Titill, (1610) M. 16,959; Dunlop v. Dunlop, (1839) 1 D. 912, Lord President Hope, at p. 918, Lord Mackenzie, at pp. 918 and 920; Stair, iv. 42, 6; M'Laren, Wills and Succession, i. 289.

[2] Gillespie v. Donaldson's Trustees, (1831) 10 S. 174; Russell's Trustees v. Henderson, (1883) 11 R. 283; Murray v. Kuffel, 1910, 2 S. L. T. 388; Baird v. Jaap and Others, (1856) 18 D. 1246, Lord Benholme, at p. 1258.

[3] Dunlop v. Dunlop, 1 D. 912; Skinner v. Forbes, (1883) 11 R. 88, Lord President Inglis, at p. 91; Goldie, &c., v. Shedden, &c., (1885) 13 R. 138, Lord President Inglis, at p. 142; Foley v. Costello, (1904) 6 F. 365, Lord Trayner, at p. 369; Shiell v. Shiell, 1913, 1 S. L. T. 62.

[4] M. 16,959.

[5] Pennycuick v. Campbell, (1709) M. 16,970 (No. 223). [6] 10 S. 174.

[7] Petticrew's Trustees v. Pettigrew, (1884) 12 R. 249, Lord Craighill, at p. 252.

[8] Dunlop v. Dunlop, 1 D. 912, Lord Fullerton, at p. 921; Skinner v. Forbes, 11 R. 88.

[9] Baird v. Jaap and Others, 18 D. 1246; Speirs, &c., v. Home Speirs, &c., (1879) 6 R. 1359; Russell's Trustees v. Henderson, 11 R. 283; Hamilton v. White, (1882) 9 R. (H. L.) 53; Lamont v. Magistrates of Glasgow, (1887) 14 R. 603.

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as here, such a document was not in any sense subscribed, it could not receive effect.[1]

At advising on 21st November 1913,—

LORD PRESIDENT.—This Division of the Court has more than once expressed the opinion "(1) That they would not in the future sustain any document as a will which did not bear the subscription of the testator; and (2) that the recital of the testator's name in the commencement of a holograph writing would not be sustained as a subscription or its equivalent." I am quoting from the words of Lord M'Laren in the case of *Goldie* v. *Shedden*.[2] And the law was laid down in substantially similar terms in the other Division of the Court. I quote now from the opinion of Lord Trayner in *Foley* v. *Costello*[3]—"I think the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator. . . . In my opinion the rule is inflexible—no subscription, no will—and to admit the consideration of facts and circumstances to modify that rule would be very inexpedient and dangerous." Lord Moncreiff says in the same case—"Subscription is the test of a holograph will," and "the want of subscription cannot be supplied by parole proof."

Now, the question before us to-day is not whether these opinions express truly the law of Scotland, upon which (as I understand) all your Lordships are agreed, but whether or no the doctrines there laid down are applicable to the present case. It is what Lord Fullerton calls, in the case of *Dunlop* v. *Dunlop*,[4] a "pure" case. There are no facts and circumstances here. If there were, I presume your Lordships would agree with what was said by Lord President Inglis in the case of *Skinner* v. *Forbes*,[5] that "there are cases which give a certain countenance to sustaining unsubscribed holograph testamentary writings upon consideration of facts and circumstances indicating a purpose of the writer to treat the unsigned document as a completed act." I desire, for my own part, to add that, in my judgment, the cases there referred to can no longer be regarded as sound law.

The concrete case before us is one in which we are asked to sustain the validity of a writing which is holograph, which is testamentary in form, which was found in excellent company at the deceased's death, and which purports to dispose of the whole of her estate. It lacks a date, which is immaterial; it lacks the nomination of executors, which is also immaterial; but it lacks, as I read it, a subscription, and that is fatal, in my judgment, to its validity. For I read the paper on which the writing is found as one continuous writing, thus—"My last will, Jessie Taylor, I leave"—and so on. That, it appears to me, is the natural way in which to read the writing; for I think it would be dangerous to judge of the validity or invalidity of a testamentary writing by minute con-

[1] Goldie v. Shedden, 13 R. 138, Lord Adam, at p. 144; Skinner v. Forbes, 11 R. 88; Foley v. Costello, 6 F. 365, Lord Moncreiff, at p. 371; M'Laren, Wills and Succession, (3rd ed.) vol. i. pp. 280 and 289.

[2] 13 R. 138, at p. 141.

[3] 6 F. 365, at p. 369.

[4] 1 D. 912.

[5] 11 R. 88, at p. 91.

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sideration of the spaces between words and lines. It is now trite law that if the signature of the writer is found anywhere in the body of the writing or at its very commencement it cannot supply the place of a subscription; and if this writing is read—as I think it should be read, as it seems to me natural to read it—as one continuous writing, it is obviously invalid as a testamentary document in respect that it lacks a subscription. The cases of *Skinner*[1] and *Goldie*[2] and *Foley*[3] are directly in point. This writing may, however, be read as if the words "My last will" simply signified a title, followed by the signature of the writer. The signature would then be regarded as a superscription, and exactly the same result would follow for it is well-established law that superscription on the part of a subject cannot authenticate the writing.

The writing may, however, be regarded as really two separate and distinct writings, the first a declaration of authentication or identification of the writing which follows, as thus: "What follows is my last will, Jessie Taylor," and then you turn to the writing which follows to find out whether it has been identified by the duly subscribed declaration which precedes. The writing which follows is deliberately described by the testator as her "will." A will is a final and complete act, and the writing which follows is not a final and complete act, because it lacks a subscription. The omission to subscribe admits, in my judgment, of one interpretation and one only, and it would be dangerous to give it any other, to wit, that the writer had not finally made up her mind and desired to have a little more time for consideration with regard to the disposal of her means and estate. That I take to be the just meaning to attach to the two writings if you regard them as separate and distinct, and it appears to me that this in no way militates against the familiar doctrine of authentication or identification by reference of informal testamentary writings. That doctrine I recognise but deem it to be inapplicable to the present case. It might have been applicable to the present case if the writer had said, "the unsigned writing which follows is my last will," but she has not done so. She has, on the supposition I am now making, said it is her last will. When looked at, it obviously is not, for it is not subscribed. If she had said, "my will is to be found in an unclosed envelope," or "my will is to be found in a certain receptacle," or "my will is to be found on this paper," and if, when you turn to the envelope, the receptacle, or the paper, you find it is not subscribed, it would not be identified because it would not be a will, in respect that it lacks subscription.

Now, I hold that it is now the settled law of Scotland that the lack of a subscription indicates an intention on the part of the testator not to regard the writing as a final and complete act. As Lord Fullerton observed in the case of *Dunlop* v. *Dunlop*,[4] "the necessity of subscription to a will is a matter which depends on no technical rule . . . but is familiar to all the lieges without exception. Every man knows the difference between a deed that is signed and one that is unsigned. It appears

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[1] 11 R. 88. [2] 13 R. 138. [3] 6 F. 365.
[4] 1 D., at p. 921.

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to me, therefore, that the deceased must have believed and understood that the writing was not effectual so long as he withheld his subscription from it, and that, if we now sustained it as a valid instrument, we should be making a will, which the party died believing to be ineffectual." That being so, it seems to me plain, to use the language of Lord Deas in the case of *Skinner* v. *Forbes*,[1] that "There are no doubt advantages in holding that subscription in such cases as this is essential. That rule puts matters of this kind beyond all question, as every man then knows that so long as he does not subscribe a testamentary deed it is not completed, and that he has power to recall it whenever he likes, or not to complete it at all."

I decline for my part to weigh probabilities. I think it is dangerous for this Court to weigh probabilities in a question of this kind, and that there is one way of putting probabilities out of the question, and that is by the testator signing the deed. In short, I adhere to the doctrine expressed in the familiar passage by Lord Stair—"If we unfasten our moorings from that doctrine, there is no saying to what length we may drift."

The law of Scotland gives what I may call a latitudinarian discretion to testators in the expression of their intentions to dispose of their property. But the least thing we can demand now, I think, is a subscription, as the one and only reliable index of final and complete intention.

Lord Dundas.—I have come to the same conclusion. The general law applicable to cases of this kind appears to me to be correctly summarised in the opinion of Lord Trayner in *Foley* v. *Costello*,[2] part of which has already been quoted by your lordship in the chair. Lord Trayner said, and I respectfully adopt his words: "I think the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator. It has been so decided more than once. The cases of *Skinner*,[3] and of *Goldie*,[4] referred to at the debate, are, I think, conclusive upon this matter. In my opinion the rule is inflexible—no subscription, no will—and to admit the consideration of facts and circumstances to modify that rule would be very inexpedient and very dangerous. The case of *Russell*,[5] relied on by the pursuer, was a very special case indeed, while the case of *Burnie's Trustees*[6] was not so special. In so far as these cases conflict with the cases of *Skinner*[3] and *Goldie*,[4] I am not prepared to follow them." I may add, quoting the words of my brother Lord Skerrington in an Outer House case, to which we were referred, that "there are no equivalents which obviate the necessity for subscription"—*Shiell* v. *Shiell*.[7]

The pursuers, however, argue that, assuming the law to be as above stated, the document under consideration is a subscribed will. It is proved to be holograph of Miss Taylor, and is all written on the same side of a sheet of paper. There is no signature at the end of the writing, but it begins with the words, "Sunnybank Alford My last Will Jessie

[1] 11 R., at p. 91.
[2] 6 F. 365, at p. 369.
[3] 11 R. 88.
[4] 13 R. 138.
[5] 11 R. 283.
[6] 21 R. 1015.
[7] 1913, 1 S. L. T. 62.

Taylor." The pursuers say that Miss Taylor has in effect written, "What follows is my last will," adding her signature, and that she thereby authenticated, or adopted, or recognised, by way (so to speak) of a schedule, the remainder of the writing as containing the final expression of her testamentary intentions. The case seems to me a narrow one and near the line, but I have come to the conclusion that the document is not a subscribed will, and cannot receive effect. It is in the pursuers' favour that the document is all on one sheet of paper, and (so far as appears) may all have been written at the same time, and also that it bears to deal, as the Sheriff-substitute has found, with every item of Miss Taylor's estate, excepting a small sum of cash in the house and a proportion of rents current at her death. Nor do I attach importance to the absence of date, or of the nomination of an executor. It may be that, if one were entitled to proceed upon conjecture, one might suppose that Miss Taylor intended the document to be her last will, and imagined it to be valid and effectual; or again, one might suppose that she did not so intend or imagine. But the writing is not subscribed in the ordinary and proper way, and I am unable to hold that it is subscribed at all. It is not, to my mind, certain what is meant by the bare words "my last will," or that "Jessie Taylor" is truly meant to be a signature. The language of the document is entirely consistent with the theory that Miss Taylor had written what she proposed or intended in the way of testamentary provision, but deliberately refrained from affixing her subscription,—"the essential and only admissible evidence of a concluded expression of will" on her part to test. I do not think we are entitled to proceed upon the conjecture that Miss Taylor may have intended the document to be her valid and effectual testament. In construing wills we sometimes meet with cases where, if conjecture might be resorted to, the Court would incline to such or such a conclusion, but in these cases the Court holds itself bound to give effect to the testator's intention as it can be ascertained from what he has said, and not from what it might readily be inferred that he may have meant to express. This case, like others that occur now and again, may be a hard one, though I am not convinced that it is so, but it is our duty to maintain the established rules of law, and not to admit variations on, or exceptions to, them in view of hardship or supposed hardship in any particular case. I do not think the law imposes an undue or excessive burden upon the public in general, or intending testators in particular, in demanding that a will must be properly subscribed. For these reasons, I am for refusing the appeal, and affirming the interlocutor of the learned Sheriff-substitute.

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Lord Johnston.—I think that the learned Sheriff-substitute has come to a sound conclusion in this case. The law of the subject has I think been gradually settled by a series of cases during the last seventy years, and settled in the direction of increasing strictness in application, in the case of the execution of wills—and this I think for sound reasons, because wills, in the matter of their execution, stand in a different position from other documents. In regard to wills there can be no such thing as delivery, *rei interventus*, or homologation, to validate an unsigned

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document. On the other hand a will is required "not only to be the true writing of the deceased, but also the completed act of his will."—Lord Mackenzie in *Dunlop's* case.[1] There are, no doubt, in the cases to which I shall advert, expressions of individual Judges which would leave the law on the subject much more loose, but I think that it has now hardened into the following:—1, To validate a will there must be signature; 2, that signature must be directly or indirectly by subscription; 3, external facts and circumstances cannot be admitted to supply the want of subscription.

The case of *Gillespie*[2] in its second branch, would be an authority against the first two of these propositions. But it cannot stand in view of subsequent decisions, and Lord Balgray's idea that a document not signed could be considered "to be legally signed to all intents and purposes"[3] is one which cannot be entertained.

The pure question arose shortly after, in *Dunlop's* case,[4] and it was emphatically decided that an unsubscribed will was invalid, though holograph, though containing the testator's name *in initialibus*, and a declaration that he thereby made his last will and testament, and though purporting to be a universal settlement with residue clause. The Court felt themselves clear of all other considerations, "because the writing in dispute stands alone." But Lord Cockburn, Lord Ordinary, says,[5] where the Court has arrived at seemingly opposite results it has never been "by merely looking at the unsubscribed writing by itself, but always by incorporating it with other matter with which it has a necessary connection. This matter has generally consisted of two circumstances, one or other or both of which have been invariably required to warrant any relaxation of the strict rule. These are that the defects in the instrument have been supplied, 1st, By other unobjectionable writings connected therewith by the testator; or 2nd, By evidence of facts extrinsic of the disputed instrument, but linked to it. So that, in truth, it has never been the unsubscribed writing alone that has been sustained." I am not aware of the cases to which his Lordship refers, in which the Court are supposed to have arrived at seemingly opposite results. The only prior cases referred to at the hearing were *Titill*[6] and *Gillespie*.[2] Lord Fullerton also said[7] in agreeing in the judgment—"I do not wish to be understood as saying that there are no circumstances in which an unsubscribed deed should receive effect. There may be cases where facts and circumstances occur, sufficient to instruct that an unsubscribed holograph deed was nevertheless the last will of the deceased. But there are no such circumstances here."

I think that it must now be accepted that Lord Cockburn's second proposition, apparently concurred in by Lord Fullerton, will not hold. And I further think that his first proposition requires consideration, limitation, and definition. It is this point only I think which makes the present case of importance, and justifies its being discussed by a Court of seven Judges. Had I thought it depended on special circumstances, as

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[1] 1 D. 912, at p. 919. [2] 10 S. 174. [3] *Ibid.*, at p. 177. [4] 1 D. 912.
[5] *Ibid.*, at p. 917. [6] M. 16,959. [7] 1 D., at p. 920.

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I gather some of your Lordships do, I could hardly have consented to that course being taken. My own conclusion, after carefully considering the authorities, is that Lord Cockburn's statement that the defect of subscription can be supplied "by other unobjectionable writings connected therewith by the testator" can mean no more than that there must be subscription, but that that subscription may be *indirect*, as I have put it in the above propositions, that is, by the subscription of some other document connected by the testator with the unsubscribed will. Such other document must be unobjectionable in itself and therefore, whether holograph or tested, must be subscribed. It must be connected by the testator with the incomplete will. But what precisely is to be understood by "connected therewith" is most difficult to determine, and there is risk of derogating from the rule by the exception. I think that it must be a document so linked with the unsubscribed will as, by its own subscription, unequivocally to supply the want of a subscription to the will.

In *Skinner's* case[1] the law of *Dunlop's* case[2] was unconditionally endorsed, though the document in question bore even a greater semblance of being a completed deed than that in *Dunlop's* case.[2] Lord Deas in fact suppressed his own inclination to dissent, saying[3]: "it is most important that on this branch of the law, when a rule has once been decided, it should not be opened up again except for some very strong reason, and I look in vain here for any sufficient reason why we should reconsider the case of *Dunlop*.[2] . . . There are no doubt advantages in holding that subscription in such cases as this is essential. That rule puts matters of this kind beyond all question, as every man then knows that so long as he does not subscribe a testamentary deed it is not completed, and that he has power to recall it whenever he likes, or not to complete it at all. I think, therefore, that on the authority of the case of *Dunlop*[2] we must find that this deed is invalid." Then *Foley's* case[4] and *Goldie* v. *Shedden*[5] conclusively disposed of the suggestion, adumbrated in *Dunlop's* case,[2] that facts and circumstances might supply the want of subscription, and determined that "the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator."[4]

None of these cases, however, touch the first point put by Lord Cockburn in *Dunlop's* case,[2] viz., that defect of subscription can be cured "by other unobjectionable writings connected therewith by the testator." In this relation it is necessary to examine the case of *Russell's Trustees*,[6] where a lady left a holograph writing commencing: "I, Margaret Russell, do hereby make my last will and testament revoking all other wills." She dated, but did not subscribe it. It was found contained in a sealed packet, bearing on the outside her signature and the words "James Henderson," this Mr Henderson being Miss Russell's nephew and the executor nominated in the above writing. Attached to the packet by a string was an envelope addressed "to James Henderson from Margaret Russell," containing a letter with a date of the same month and year as

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[1] 11 R. 88. [2] 1 D. 912. [3] 11 R., at p. 91.
[4] 6 F. 365, at p. 369. [5] 13 R. 138. [6] 11 R. 283.

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the above writing, holograph of Miss Russell, stating that she had rewritten her will "for this year," and giving directions about her funeral. It was signed with her Christian name only, and there was no proof that she was in use so to sign. The whole were stated to have been delivered by Miss Russell to Mr Henderson, with the statement that her will was therein contained, and that they were not to be opened until her death. The Court held that the circumstances supplied the defect of subscription, and the writing was sustained as a valid will. As this question has been sent to seven Judges, I conceive that I am entitled, if not bound, to examine this judgment, which I should not otherwise do, and I venture to take exception to much which was stated in support of it, and even to entertain grave doubt of the result arrived at. Lord Craighill pronounced the leading judgment, and he proceeds on a view of the virtue and competency of a proof of facts and circumstances which is not consistent with the cases to which I have just referred, and in particular gives weight to the admission, for the question was raised in a special case, of what Miss Russell said in delivering the sealed packet to Mr Henderson, evidence of which, I think, would have been entirely inadmissible. But his Lordship also finds sufficient token of authentication under the hand of the lady in the envelope and its contents which was attached by a string to the sealed packet containing the alleged will, and which he held to be an appendage to the will. I should myself have thought that there was neither an intelligible subscription nor an unequivocal connection of the document bearing that subscription by the testator with the unsigned document. Lord Young, on the other hand, gives an interpretation of Stair, iv. 42, 6, which would leave the validity of all such unsubscribed holograph writings to be a question of circumstances. The sound interpretation of the passage from Stair is that given by Lord Shand in *Skinner's*[1] and *Goldie's*[2] cases.

In the present case we have an unsigned holograph writing testamentary in its nature. I think that it is irrelevant to the question of its validity that, if valid, it would have disposed of all that the writer is known to have possessed, or that it was written at any particular date, or was found in any particular repository. It depends for its validity, if it is valid, entirely upon its heading:

"Sunnybank Alford

My last Will Jessie Taylor"

I cannot regard this as an unexceptionable document connected with the alleged testamentary writing by the testator, and therefore as supplying the want of subscription of the document itself. It is at best a superscription, for presumably it preceded the making of the document which was to follow. Indeed, whether it preceded or followed the making of the document to which it is prefixed it was in effect superscription. And superscription cannot be regarded as any but a royal prerogative. Moreover, such a preliminary announcement is no unequivocal proof of the finality of what follows. But the equally fatal objection is that its meaning is inconclusive. No one can say, except as an assertion of probability,

[1] 11 R. 88. [2] 13 R. 138.

what the writer meant. It is possible that she meant "This which the reader will find below I mean to be received as my last will." If what has been referred to as the docquet, though I never heard of a docquet preceding the document assumed to be docqueted, had followed the writing, the above interpretation would have been a reasonable and natural implication. But being found where it is, it is also possible that it meant "What I am about to write I intend to be my last will." A statement which, if written *in extenso*, would not have established the finality of what was to follow. With all respect I adopt the view of Lord Shand in *Skinner's* case[1]: "There is one way of putting probabilities out of the question, and that is by the testator's signing the deed; and I think the view expressed by Lord Stair is the safe and proper view of the law on the point."

Lord Salvesen.—In this case we had a very full citation of authorities on both sides of the bar; but in the view I take it is unnecessary to consider whether the judgments pronounced in several of these cases, which have been since commented on, would now be repeated. One proposition is clear that an unsubscribed holograph will is not a valid and effectual testamentary writing even although the name of the granter is embodied in the document. The tersest and most lucid exposition of the law on this point is contained in the passage from the opinion of Lord Trayner in the case of *Foley* v. *Costello*,[2] already quoted by your Lordship in the chair. As at present advised I do not see any ground for modifying this absolute statement of the law; but the question remains whether it is applicable to the circumstances of the present case.

The writing founded upon begins with the following words:—"Sunnybank Alford My last Will Jessie Taylor". There follows a holograph statement of her testamentary wishes which, as the Sheriff-substitute has found, "appears to deal with every item of the testator's estate excepting a small sum of cash in the house and a proportion of rents current at her death." The document is not dated, but there is a finding to the effect that in all probability it was written after September 1912, while Miss Taylor's death occurred on 25th February 1913.

I apprehend that if the words "My last Will" and the signature had followed the testamentary directions no question could have been raised. The words would then have been construed as meaning "the above is my last will"; and I would have attached no importance to the fact pointed out by the respondents' counsel that the signature is in the same line with the words "my last will," and is not below it. Nor do I think it would have made any difference in such a case that the writing bore no date, and that there was no appointment of an executor. The date may be of importance when it is doubtful whether the deed was signed before or after marriage; but not generally where the will of an unmarried person is concerned. Even if it were otherwise, the fact that the property left was precisely what was disposed of by the settlement shows, apart from the parole evidence to which the Sheriff-substitute refers in the finding

[1] 11 R. 88, at p. 93. [2] 6 F. 365.

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from which I have partially quoted, that the document cannot have been executed very long before the testator's death. As regards an executor the law will appoint one if the testator has not done so; and it is probable enough that this lady who wrote her own will should be ignorant that the distribution of her estate could not be effected except through the medium of an executor. Such an omission does not tend to throw any doubt on the document as a complete expression of her testamentary wishes.

Does it then make any difference that the words "My last Will Jessie Taylor" precede and do not follow her testamentary directions? In my opinion, in the circumstances of this case, it does not. I construe the words in the position which they occupy on a single sheet of paper as being equivalent to a statement that the directions as to the distribution of her estate which immediately follow constitute her last will. This settlement is duly subscribed and, as there can be no question as to the identification of her testamentary wishes, constitutes a disposal of the whole estate of which she knew herself to be possessed. I have therefore come to the conclusion, differing from the Sheriff-substitute, that the document, taken as a whole, validly disposes of her estate. In so holding I conceive myself to be simply applying to the circumstances of this case the well-known rule stated in M'Laren on Wills, section 531. There is not the same difficulty in applying this rule in the present case as there would have been if the testamentary writings had been on different sheets of paper, as in some of the decided cases quoted in the footnote. The present case is extremely special, and can scarcely be an authority unless in circumstances which are substantially identical.

Lord Mackenzie.—I am of opinion that this is a good will.

The question is a short one, depending upon (1) the construction put upon the declaration, "My last Will"; and (2) the identification of the will therein referred to.

Two constructions are put forward. The first that "My last Will" means "This is the will I am going to make," the other that it means "This paper is my last Will." I prefer the latter as the more reasonable. To the statement so made by the testatrix is appended her signature. It is subscribed. Therefore the case is not like those where the name of the testator appeared merely *in gremio* of the writing. I recognise that the later cases settle that without subscription a writing cannot *per se* be valid as a will. The law is contained in the cases of *Skinner*,[1] *Goldie*,[2] and *Foley*[3] cited by the Sheriff-substitute, and I refer to Lord Low's and Lord Trayner's opinions in the last mentioned. There is here, in my opinion, compliance with the required formalities.

The next question is whether there is room for doubt that the document is a completed will. If it is a mere scroll from which a will was afterwards to be made, it is of course not operative. This is, as was pointed out in *Dunlop*,[4] the question to be decided. It is not necessary to recapitulate the findings in fact relating to the circumstances under which the present writing was found. The surrounding circumstances

[1] 11 R. 88. [2] 13 R. 138. [3] 6 F. 365. [4] 1 D. 912.

all point to its being, what it purports on the face of it to be, the last expression of the will of the testatrix. The fact that it was found in an envelope (though unclosed) with the indorsation "My will" is entirely consistent with this view. There is to my mind no reasonable doubt as to the identity of the will referred to. It is the universal settlement of her whole estate which, with her own hand, she wrote upon the same page of the paper. The respondents argued that there is no nomination of executors; no date; and, during the original argument, it was pointed out that there is no full stop at the end. These circumstances do not, to my mind, lead to the conclusion that the will is not a complete expression of the intentions of the testatrix. Nor was it necessary that there should be a residuary clause, for there does not appear to be any residue. The writing is not a memorandum of what was intended to be a will. It is a completed will. The subscription may or may not have been added before or after the writing which follows it upon the page. I am content to assume that it may have been written immediately after the words "My last Will." These words, with the accompanying subscription, are, I am of opinion, a sufficient recognition by the testatrix of her will. I prefer to rest my judgment upon this, rather than upon the doctrine of adoption. Suppose that the writing which follows the docquet had been on a separate sheet of paper in a sealed envelope which bore the indorsation "My last will," or "What is contained herein is my last will," with the subscription of the testatrix. In these circumstances it would have have been, in my view, impossible to refuse to give effect to it. Yet then the docquet and subscription might have been written before the will; and the identity of the will might have been more open to doubt than is the case here.

I therefore think that, consistently with established principles, effect should be given to this will.

When the foregoing was written I was of opinion that there was no difference of opinion as regards the law, but only as regards its application. As regards some of the propositions laid down by those who take a different view I am unable to concur. I reserve my opinion on these when they come up.

Lord Guthrie.—I concur in the opinions of Lord Salvesen and Lord Mackenzie. It was stated by Mr Lippe at the commencement of his argument that the object of this case being heard before seven Judges was to obtain a decision on the Sheriff-substitute's finding in law—namely, that the document in question, not being subscribed, is not a valid and effectual testamentary writing. But as the argument proceeded it appeared that the real question raised was whether, being unsubscribed, it could be shown that there were what the law would hold equivalents for subscription and that the document was truly subscribed. On the whole, but with difficulty, I think the words, "My last Will Jessie Taylor," although in the position in which they occur, amount to subscription of the document in question. At the same time, I am bound to add that the question might have arisen for consideration under more favourable conditions; and I should have felt more confidence that I was

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Lord Guthrie.

giving effect to the deceased's intention if these words had been at the very commencement of the document, if what I consider the deceased's signature had been underneath instead of alongside the words, "My last Will," if the end of the document had been less ragged, and if the envelope containing the document had been sealed or at least closed. I do not regret the result at which I understand the majority of your Lordships have arrived, as it does not seem unreasonable or contrary to public policy to require that, in every case where there is not clear adoption or recognition, testators must append their signatures at the end of their testamentary documents, if not necessarily under the last words of these writings.

LORD SKERRINGTON.—This appeal does not, in my view, raise any question either of legal principle or of general interest. On the one hand it is now settled that a holograph will is invalid unless it is subscribed by the testator. On the other hand, with very great deference to the opinion expressed by your Lordship in the chair, I had thought, and I still think, that a will which is itself either holograph and subscribed or probative may incorporate by reference unsubscribed testamentary directions which are to be found outside of itself—for example, in an unauthenticated writing sufficiently described for identification, or in a model will printed on a certain page of a legal style-book, or in the published life of some person, either real or imaginary. I refer to the case of *Crosbie* v. *Wilson*,[1] where a Court consisting of Lord Justice-Clerk Inglis, Lord Cowan, Lord Benholme, and Lord Neaves, sustained a holograph but unsubscribed testamentary writing in respect that the testatrix had directed by her formal will that any holograph writing, whether signed by her or not, should receive effect. I share the doubts expressed by Lord M'Laren[2] as to whether it is consistent with the attestation statutes that a person should be allowed to dispense with the solemnities required by law in regard to testamentary writings not in existence at the date of the will or prepared *unico contextu* therewith. But the authorities, including the opinions in the House of Lords case of *Inglis* v. *Harper*[3] do not, in my opinion, support the view that a writing cannot be adopted as a will unless it is itself subscribed by the testator.

In the present case all that we have to decide is whether the holograph writing, printed in Appendix B, ought to be read as forming two separate documents, and if so, whether the first seven words, viz., "Sunnybank Alford My last Will Jessie Taylor" ought to be construed as meaning that the writer referred to and incorporated as part of her subscribed will the holograph but unsubscribed directions written below her signature. I think that there is at least a reasonable doubt as regards both questions, and I am not prepared to answer either of them in the affirmative. I am not satisfied that the words "Jessie Taylor" were intended to authenticate the words which preceded them, or were other than descriptive of the person who was beginning to write out her will. Nor am I

[1] (1865) 3 Macph. 870.
[2] Wills and Succession, (3rd ed.) vol. i. pp. 289-290.
[3] (1831) 5 W. & S. 785.

satisfied that the writer intended the words "My last Will" to have the meaning and effect attributed to them by the appellants' counsel. The presumption that testamentary directions are incomplete and deliberative until they have been subscribed militates against the construction contended for. This presumption is founded not upon any technical rule of law but upon the ordinary understanding and practice even of rustics in this country. I am therefore of opinion that the judgment of the Sheriff-substitute should be affirmed.

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Taylor's Executrices v. Thom.

Lord Skerrington.

THE COURT dismissed the appeal.

DALGLEISH, DOBBIE, & Co., S.S.C.—HENRY BOWER, S.S.C.—Agents.

GREGOR MACGREGOR FRAME, Petitioner.—*Sol.-Gen. Morison—Lippe.*
THE CALEDONIAN RAILWAY COMPANY, Respondents.—*Clyde, K.C.—Wark.*

No. 12.

Nov. 26, 1913.

Frame v. Caledonian Railway Co.

Appeal to the House of Lords—Leave to appeal—Interlocutor appointing proof instead of jury trial.

Leave to appeal to the House of Lords against an interlocutor appointing an action of damages for personal injuries to be tried before a Lord Ordinary without a jury *refused.*

2D DIVISION. Lord Hunter.

ON 14th February 1913 Gregor Macgregor Frame, produce merchant and commission agent, London, brought an action againt the Caledonian Railway Company, concluding for £3000 as loss and damages sustained by him through illness, brought on by the defenders not having supplied artificial heat to the carriage in which he travelled from Aberdeen to London on 30th September 1911, while convalescent after an operation for appendicitis.

The pursuer's averments are summarised in the opinion of the Lord Ordinary, *infra.*

The pursuer pleaded, *inter alia;*—(1) The pursuer having been injured through the fault or breach of duty on the part of the defenders or their servants, they are liable in reparation.

The pursuer proposed this issue:—"Whether, on or about the 30th September and 1st October 1911 the pursuer, while travelling as a passenger of the defenders from Aberdeen to London, was injured through the fault of the defenders to the loss, injury and damage of the pursuer."

On 28th May 1913 the Lord Ordinary (Hunter) pronounced this interlocutor:—"The Lord Ordinary having considered the cause, finds that the same is one more suitable to be disposed of by way of proof before his Lordship than by a jury; therefore refuses the issue proposed; allows to the parties a proof of their respective averments on record."*

* "OPINION.—In this action the pursuer, who is a produce merchant and commission agent in London, sues the Caledonian Railway Company for £3000 as loss and damages sustained by him in consequence of the defenders not having supplied artificial heat to the carriage in which he travelled from Aberdeen to London on 30th September 1911. The pursuer moved for approval of an issue for trial of the case by a jury, but the defen-

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The pursuer reclaimed, and on 12th July 1913 the Second Division adhered.

On 12th November 1913 the pursuer presented a petition for authority to appeal to the House of Lords against the interlocutors of the Lord Ordinary and the Second Division, dated 28th May and 12th July 1913 respectively.

He submitted that leave to appeal should be granted "because the action being one of damages in respect of personal injury the pursuer is entitled to trial by jury, there being no special cause shown to the contrary."

The petition was heard before the Second Division on 26th November 1913.

Argued for the petitioner;—The petitioner had an absolute right to trial by jury, this being one of the enumerated causes, unless special cause were shown why proof before the Lord Ordinary should

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ders maintained that in the special circumstances of the case it would be more appropriately tried by a judge without a jury.

"According to the pursuer's plea in law and the issue of which he asked me to approve, he bases his case upon fault or failure of duty on the part of the defenders. On examining his averments I think that the foundation of his case is really breach of contract, and that a very special contract. The pursuer was recovering from an illness, and proposed to travel from Aberdeen to London. In the fourth article of his condescendence he says: 'The defenders advertise that the corridor sleeping saloons run by their route are specially built with the view of ensuring comfort and privacy during the journey, and that each saloon is comfortably warmed by special heating apparatus during the winter months. The pursuer proposed to leave Aberdeen by the defenders' night express corridor train, starting from Aberdeen on Saturday, 30th September 1911, at 7.55 P.M., provided the berth was heated as advertised.' I do not think the terms of the advertisement necessarily justify the suggestion which the pursuer makes that the berth would be heated in September. That is not usually considered a winter month. The pursuer, however, avers that Mr William Smith Gill, his brother-in-law, arranged with the defenders' passenger agent that the berth would be heated. This is admitted by the defenders. The pursuer then goes on to say that on 'arriving at the defenders' railway station in Aberdeen a few minutes before the said train started it was discovered that the sleeping berth was not heated. The night was bitterly cold. The said William Smith Gill (*i.e.* his brother-in-law) on the pursuer's behalf, spoke to the defenders' car attendant about this matter, and the latter stated that the heat would be turned on directly the train started. Had this assurance not been given the pursuer would not have travelled.' This alleged conversation, which is really the basis of the pursuer's case, is denied by the defenders. So far as the averments involve a possible conflict of testimony there is no reason for refusing a jury trial. I think, however, a difficult and delicate question may arise from the terms of any conversation, which may be proved to have taken place, as to whether what was said by the defenders' employee amounted to an undertaking upon which the pursuer was entitled to rely as binding upon the defenders. The further averments of the pursuer all point to the unusual and special nature of the undertaking or contract upon which the pursuer is founding. I think that the nature and extent of the defenders' liability will be more satisfactorily determined by a proof than by a jury trial.

"There appears to me to be a further reason for not ordering a trial by jury. The pursuer's claim for damages comes under a number of different heads—*e.g.* suffering in health, expenditure owing to illness and loss of business. The claim is for a lump sum and no attempt has been made to

be preferred.[1] No special cause had been shown, since the case raised a pure question of fact. What amounted to "special cause," and whether, in the absence of special cause, an issue could be refused, were questions of law which the petitioner was entitled to submit for the judgment of the House of Lords. They were not questions of discretion.

Argued for the respondents;—There was no distinction between the present case and those in which similar applications had been made and refused.[2] The only matter that had been decided here was a matter of procedure, and it was within the discretion of the Court to say what amounted to "special cause," and what was the appropriate mode of procedure when special cause had been shown. Such questions were not appropriate for appeal to the House of Lords.

Lord Justice-Clerk.—This case in its present stage relates to procedure and to procedure only. We had an opportunity when the case was heard before us at considerable length, of considering the question whether we would interfere with the discretion of the Lord Ordinary, who held that it was a case more suitable for a proof before himself than for a jury trial, and we were unanimous in deciding that we ought not to interfere with the discretion of the Lord Ordinary in the matter.

I think it is an established principle that, except upon very strong grounds, the Court will not interfere with the discretion of the Lord Ordinary in fixing the mode in which proof in the case is to be taken. It is quite certain that if the Lord Ordinary stated in his note some ground upon which he proceeded, which in no way gave reasons for exercising his discretion in substituting proof for jury trial, it would be the bounden duty of the Court to interfere in the matter. But we have been of opinion that that is not the case here. The Lord Ordinary has stated grounds which are sufficient to prevent us from interfering with the judgment which he has pronounced.

In those circumstances, the question is whether the pursuer is to be allowed to appeal to the House of Lords on the question whether we have properly exercised our discretion. I do not think this is a petition which ought to be granted, and, therefore, I am for refusing it.

Lord Dundas.—I quite agree. When this case was before us, I thought it seemed to be a very peculiar one. It seemed to me that the facts were very special, and that they might, probably would, raise difficult questions of law at the inquiry. The Lord Ordinary, in the exercise of a dis-

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put a figure upon the separate items of claim. A part of his claim is thus stated: 'On account of his long absence from business he lost various opportunities and commissions which he would otherwise have had, and it is not yet possible to ascertain precisely what the pursuer's total loss under this head will be.' An inquiry into such a claim seems to me to be of a special character and not well suited for determination by jury.

"I propose to refuse an issue and to allow a proof."

[1] Evidence (Scotland) Act, 1866 (29 and 30 Vict. cap. 112), sec. 4.

[2] Scottish Rights of Way and Recreation Society, Limited, v. Macpherson, (1886) 14 R. 74; Pringle v. Dunsmure, (1877) 14 S. L. R. 498; Hope v. Hope's Trustees, (1898) 36 S. L. R. 220.

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Lord Dundas.

cretion which he thought he had, and which I think he had, thought fit to send the case to proof and refused an issue. We adhered to that interlocutor; and, as your Lordship has said, it is not the custom of either Division of the Court lightly to interfere with the discretion exercised by a Lord Ordinary in such matters. But it is now said by the learned Solicitor-General that we and the Lord Ordinary exercised our discretion wrongly, or rather that we and the Lord Ordinary assumed a discretion which we had not, because no special cause had been shown why the case should not be tried by a jury. I think there was ample ground for holding that there was special cause why that procedure should not be resorted to. I am against granting leave to appeal to the House of Lords from our interlocutor. The precedents are against our doing so; similar motions have been not infrequently made, and always refused. I do not think there is any general question of law raised, or indeed any question of law at all. I regard the matter as one of procedure and discretion. In some of the cases a consideration has been adverted to about the possibility of two appeals; and, for what it is worth, that element is here against the Solicitor-General, because if we were to grant him leave now to appeal, and he were unsuccessful, for aught we know there might be a second appeal at the end of the matter after proof had been taken. On the whole matter, I am of opinion that this is a petition which we ought not to grant.

Lord Salvesen.—I agree. One matter that was certainly in my mind when we adhered to the judgment of the Lord Ordinary was that, assuming that the contract had been broken, a difficult question of law might arise as to what damages reasonably and naturally flowed from that breach of contract. A jury, of course, is quite unable to appreciate matters of that kind, and is in the habit of assessing damages in a very rough and ready way indeed. Apart from that specialty, which led me to concur in affirming the Lord Ordinary's interlocutor, there are other grounds upon which this may be treated as more or less a special case; indeed we were not referred to any case that was at all like it. The question we have to decide now is not whether we were right in affirming the Lord Ordinary's interlocutor, but merely whether we should give facilities to have the matter taken further.

If this be, as I think it is, a matter of procedure only, not touching any legitimate rights that the pursuer has, but merely the mode in which these rights are to be ascertained and, if ascertained, to be converted into money, then I think we should be stultifying ourselves and acting against the long-established practice of this Court if we granted leave to appeal. That practice has existed since 1866, and has been consistently followed since then. I think this Court is presumably as well able to judge of the procedure that is proper for dealing with cases before it as even the House of Lords. Accordingly, I agree with your Lordship that we should refuse this application.

Lord Guthrie.—I agree. I think the way in which the petitioner has stated his application is sufficient for its disposal. He says, "there

being no special cause shown to the contrary." He does not deny that special cause is alleged. The Lord Ordinary has dealt with two matters which he thought amounted to "special cause," and we agree with him. If this motion were granted, such applications would be very frequent. The reports show that similar applications have come into Court raising exactly the same question—that is to say, whether the special cause that is alleged is or is not sufficient. These applications have all been refused, and refused by both Divisions, and I think we should follow the practice of the Court in this matter.

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THE COURT refused the petition.

DALGLEISH, DOBBIE, & Co., S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 13.

BRENES & COMPANY, Pursuers (Reclaimers).—*Constable, K.C.*—*Aitchison.*
GEORGE DOWNIE AND ANDREW M'DOUGALL, Defenders (Respondents).—*Cooper, K.C.*—*Normand.*

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Company—Director—Personal liability—Breach of trust—Sums paid to company for specified purpose applied to another purpose.

A limited company, which consisted of two shareholders only who were also its sole directors, received from their foreign correspondents a sum of £1000 for the purpose, expressed in a covering-letter, of meeting three named bills drawn by them upon the company, which were shortly to become due. The company did not meet the bills on maturity, but the £1000 was applied, to the extent of £600, in repaying to one of the directors outlays averred to have been incurred by him on behalf of the company.

In an action by the foreign correspondents against the two directors personally, to which the company were not called as defenders,—

Held that the directors' actings constituted not merely breach of contract but breach of trust, for which they were personally liable, and decree pronounced against them, jointly and severally, for payment of the £600 claimed.

Observations (*per* Lord Johnston) on the difference in the matter of responsibility between directors of merely nominal companies consisting of two members and directors of ordinary companies consisting of a large number of members.

1ST DIVISION. Lord Hunter.

ON 26th May 1913 Brenes & Company, merchants in San José, Costa Rica, and C. S. S. Guthrie, merchant in London, their mandatary, brought an action against George Downie, coffee planter, and Andrew M'Dougall, solicitor, both in Edinburgh, for payment of the sum of £1550, 9s. 8d.

The following statement of the circumstances of the action is taken from the opinion of the Lord Ordinary (Hunter):—

"In or about March 1912 the pursuers acted as representatives in the Republic of Costa Rica of a company called The Central and South American Land and Produce Company, Limited. Of that company the defenders were the sole directors and sole shareholders—the defender Downie being managing director, and the defender M'Dougall being secretary of the Company. The nominal capital of the Company was £25,000, divided into 25,000 shares of £1 each. Only £200 of the capital was subscribed, represented by the directors' qualification

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which was fixed by the articles of association at £100 each. The Company is now in liquidation, the First Division of the Court having, on 19th November 1912, pronounced an order for winding-up at the instance of the pursuers.

"As representatives of the Company the pursuers were, under certain letters of credit, authorised to draw upon it for sums of money up to a fixed amount. In particular, a letter of credit, dated 1st April 1912," was in these terms:—"We hereby authorise you to draw upon us, at 90 d/sight, for any sum or sums, but not exceeding in all £10,000 (Ten thousand pounds) sterling, provided that you do not draw more than £1000—by any one mail, and that you send us cover for the drafts so drawn in first-class sight drafts on London, the said sight drafts to reach us at least seven days before the maturity of the drafts drawn by you under this credit. . . ."

"The pursuers say that in pursuance of these arrangements they, on 13th April 1912, drew on the Company three bills of exchange for £400, £200, and £400 respectively, all payable to the order of Herrero Hnos., at ninety days after sight, at the Bank of Scotland, Bishopsgate, London. One of the bills for £400 and the bill for £200 were, on 7th May 1912, accepted by the Company, payable at the Bank of Scotland, London, and they accordingly became due on 8th August 1912. The other bill for £400 was, on 9th May 1912, accepted by the Company, payable at the Bank of Scotland, London, and, accordingly, it became due on 10th August 1912.

"In article 6 of their condescendence the pursuers explain that, on 17th July 1912, they forwarded to the Company a sight draft, explaining the purpose of the remittance by letter to the Company in these terms—'to meet our drafts 002, 003, and 004 for £1000 in all which will shortly become due, we have the pleasure to enclose herein ch/ 0298 of this Banco Mercantil at sight on Messrs A. Rüffer & Sons, London, for the sum of £1000.' The defenders, or rather the Company, of which the defenders are sole shareholders and directors, failed to retire the bills, and the pursuers had to provide a second sum of £1000 for this purpose.

"The Company have paid to the pursuers £300 to account of this sum. The sum now sued for includes first the £700, being the balance of £1000 after credit for £300 paid to account being allowed, interest and expenses, and a sum of £750 as damages for the injury to the pursuers' credit occasioned by the dishonour of the bills."

In answer to Cond. 6, referred to above, the defenders stated:—"The letters of 17th July 1912 from pursuers to the Company and the draft, No. 0298, are referred to. Admitted that said bills were dishonoured at maturity. *Quoad ultra* denied, and explained that on 5th August 1912 the Company received from the pursuers draft No. 0299, dated 17th July, payable at sight drawn by the Banco Mercantil de Costa Rica, on A. Rüffer & Sons, London, for £1000, which draft was sent for collection on 6th August by the North of Scotland and Town and County Bank, and the amount thereof was credited to the Company in its account with said bank on 8th August. The pursuers were in breach of their agreement with the Company contained in the letter of credit of 1st April 1912 condescended on, which was the letter of credit upon which the said three bills of exchange for £400, £200, and £400 were drawn, in failing to send said draft to the Company on or before 1st August 1912. On 9th August the Company remitted the sum of £600 to the Bank of Scotland, London, with

instructions to pay two of the said bills amounting to £600, and wrote to Messrs Baring Brothers & Company, Limited, requesting them not to present the other bill for £400 for payment until arrival of the next mail from Central America. The Bank of Scotland, London, to whom all the said bills had been presented, wrote to the Company that they could not pay the bills for £600 owing to uncertainty in their minds as to which bills the money was to be applied to, and had allowed them to go back on the drawers or holders. Messrs Baring Brothers & Company replied that the bill for £400 having passed out of their hands they could not do as the Company requested. The Company then made further efforts to find out in whose hands the bills were, with a view to paying the same, but their efforts were futile."

The following averments were also made upon record with reference to the transactions following upon the receipt by the Company, on 5th August, of the pursuers' draft for £1000:—(Cond. 7) "Up till 8th August 1912 the bankers of the Company were the Bank of Scotland, George Street Branch, Edinburgh. On that date, however, a new account was opened by the defenders in name of the Company with the North of Scotland and Town and County Bank, Limited, Edinburgh, when there was placed to the credit of the Company the sum of £1000, being the proceeds of the draft received by the defenders from the pursuers on 5th August as above mentioned. On the same day the defenders drew out of this new account two sums of £250 and £600 by cheque of the Company, and on 20th August a further sum of £500 was similarly drawn out." (Cond. 8) "The sum of £600 above referred to was, on 9th August 1912, remitted by the defenders to the Bank of Scotland, London. The pursuers believe and aver that it was not the intention of the defenders that the money so remitted should be applied in retiring the foresaid bills, and that they omitted to furnish the bank with such particulars regarding the bills as would have enabled them to be retired. The bank accordingly returned the remittance, and the said bills were dishonoured. Said sum of £600 so returned by the bank was received by the defenders, and on 16th August 1912 was lodged in the Company's account with the Bank of Scotland, George Street. On the following day the sum of £506, 19s. 1d. was placed to the credit of the Company in their account with the North of Scotland Bank, a corresponding sum being on the same day drawn out of the Company's account with the Bank of Scotland, George Street. On 20th August 1912 a sum of £500 was drawn out by the defender Downie from the North of Scotland Bank, and was debited to Downie personally in the Company's books. The sum of £250 drawn out on 8th August as above narrated was likewise debited to Downie. The defenders' statements in answer, so far as not coinciding herewith, are denied." (Ans. 7 and 8) "Denied under reference to answer 6. Explained that the Bank of Scotland, George Street Branch, Edinburgh, were the bankers of the Company to the date of liquidation, and that the Company also opened a new account with the North of Scotland and Town and County Bank, Limited, Edinburgh, on 8th August 1912. The respective bank accounts are referred to for the intromissions of the Company with these banks; and the books of the Company are referred to for the Company's transactions with the pursuers. The Bank of Scotland in London returned the sum of £600 which had been remitted to it by the Company for the express purpose of retiring pursuers' bills of £400 and £200, and said sum

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was lodged in the Company's account with the Bank of Scotland, George Street. Explained that the sums of £500 and £250 which were drawn out from the North of Scotland Bank by the Company and were debited to the defender Downie in the Company's books were due to the defender Downie from the Company. Downie had paid his travelling expenses in a journey to Central America on behalf of the Company out of his own pocket, and he was duly credited in the Company's books with these outlays. The payments so made to Downie in August and debited to him then, were paid to him in respect of the above-mentioned expenses. The defender M'Dougall was not *lucratus* by any of said transactions." (Cond. 11) "The defenders, as sole directors of the Company and as sole shareholders thereof, were aware of the specific purpose for which the said sum of £1000 was remitted to the Company by the pursuers, but failed to apply said sum to that purpose or to return the money when called upon. The defenders are liable to the pursuers for said sum of £700, in respect that to the extent of said sum the sum of £1000 remitted as aforesaid was converted either by the defenders, or by the Company with the defenders' privity and knowledge, to the use of the Company or of the defenders themselves. In so doing the defenders acted, or were privy to actings of the Company, in fraud of the pursuers' rights and in breach of trust. The defenders have received and still retain said sum of £700. The defenders are liable in damages to the pursuers for the loss, injury, and damage which the pursuers have sustained through their fraudulent acts."

The parties were also at issue (Cond. and Ans. 5) with regard to a sum of £100 represented by a bill for that amount drawn by the pursuers upon and paid by the Company on 14th May 1912. The defenders averred that this sum was still due to them by the pursuers, the pursuers maintaining that it had been granted in discharge of advances made by them to the Company.

On 21st October 1913 the Lord Ordinary (Hunter) pronounced this interlocutor:—"The Lord Ordinary having considered the cause, before answer allows to the parties a proof of their respective averments on record, and appoints the same to proceed on a date to be afterwards fixed." *

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* "OPINION.—[After the passage quoted above]—For the defenders it was maintained that the action ought to be dismissed as the person truly debtor to the pursuers is the Company, and as no averment is made that the Company is unable to meet the pursuers' claim. It was pointed out that if the defenders in their capacity as directors have misapplied or retained or become liable or accountable for any money or property of the Company, the Court may, on the application of the liquidator or of any creditor or contributory of the Company, examine into their conduct as directors and compel them to repay or restore the money of the company (sec. 215 of the Companies Act, 1908). On the other hand, the pursuers argued that if directors used or abused their position as directors to commit a wrong upon an individual they might be directly liable as wrongdoers. In the present case there are averments—which I need not go into in detail—to the effect that the defenders failed to employ the pursuers' remittance for the purpose of retiring the bills drawn upon the Company, and, on the contrary, used the money in meeting an alleged claim against the Company by the defender Downie, and that the pursuers have in consequence suffered damage. The averments made appear to me to make it advisable that there should be an inquiry before determining any of the pleas of

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The pursuers reclaimed, and the case was heard before the First Division on 26th November 1913.

Argued for the reclaimers;—The Lord Ordinary was wrong in allowing a proof of all the averments on record. The pursuers were entitled, on the record as it stood, to have decree *de plano* for the sum of £600 at least. That sum represented the unrefunded balance of the £1000, viz., £700, less the £100 dealt with in article 5 of the condescendence. As the parties were at issue on a question of fact with regard to this sum of £100 a proof should be allowed *quoad* it and also *quoad* the remaining items of the pursuers' claim. But as regarded the £600 there was no necessity for a proof, as there were admissions on record which entitled the pursuers to decree *de plano*. It was admitted (1) that in terms of the contract remittances were to be made for the purpose of retiring the bills; (2) that the remittance in question was made expressly for this purpose; and (3) that the defenders had not so applied the remittance, but had paid it into the pocket of one of themselves, for it was clear from the admissions and from the entries in the Company's bank account that what was paid to the defender Downie was part of the £1000 received from the pursuers. These circumstances distinguished the action from a mere claim for breach of contract; the appropriation of money remitted for a particular purpose and its application to other purposes was fraudulent.[1] In these circumstances it was not necessary for the pursuers to proceed against the Company, the party with whom the contract was made, for the defenders were liable, in respect of their fraudulent actings, jointly and severally with the Company. The pursuers might sue either or both of the joint wrongdoers, and the case of a company and its directors was no exception to this general rule of law.

Argued for the respondents;—It was only by establishing fraud against the defenders that the pursuers could make them liable in a question between themselves and the Company. But the Court would not pronounce decree in an action based on fraud without inquiry into the facts; it would always give the defenders an opportunity of showing that the averments were consistent with their innocence. If the pursuers were in a position to show that the Company was unable to meet the bills, and that its inability to do so was owing to the fraudulent action of the defenders, they might be entitled to succeed in the action. But the pursuers were not in this position: they had not taken any steps, either by claiming in the liquidation, as it was their duty to do, or otherwise, to show that the Company had no assets wherewith to meet the bills. Nor did their averments disclose fraud on the part of the defenders. The £1000 which they had remitted to the Company was not to be treated in law as earmarked for any specific purpose. The obligation of the Company

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parties. I cannot so read the record and admissions as to hold that I should be justified in the meantime in pronouncing decree for payment against the defenders for any part of the sum concluded for. I therefore allow a proof before answer."

[1] Palmer's Company Law, (9th ed.) p. 199; Pollock on Torts, (9th ed.) p. 75; Société Panhard & Levassor v. Panhard Levassor Motor Co., Limited, [1901] 2 Ch. 513; Blyth v. Maberly's Assignees, (1832) 10 S. 796, *per* Lord President Hope, at p. 801; Cullen v. Thomson's Trustees & Kerr, (1862) 4 Macq. 424; Macadam v. Martin's Trustee, (1872) 11 Macph. 33, *per* Lord Deas, at p. 37.

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was to meet the bills out of its general funds, not necessarily out of these particular funds. At the highest, the failure of the Company to meet the bills was a breach of contract by the Company for which the Company might be made liable in damages; it was not a breach of trust for which the directors could be made personally liable.[1] Where there was no fraudulent intention there could be no liability in respect of fraud, and the defenders were prepared to show, and were entitled to have the opportunity of showing, the absence of fraudulent intention. In any case, the situation was precisely that provided for by section 215 of the Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), and the pursuers should have sought their remedy by claiming against the defenders in the liquidation.

At advising on 26th November 1913,—

LORD PRESIDENT.—In this case the pursuers ask decree now for the sum of £600 sterling, and I think they are entitled to have that decree, for I can find no averments in this record which require to be supported by parole evidence in order to establish the pursuers' case. In my opinion they require no parole evidence in support of their averments in order to secure a decree for £600. On the other hand, Mr Normand, who has said everything that could be said on behalf of the defenders, has been unable to point us to any averment in the defences which, if established by evidence, would enable him to resist decree for £600.

The pursuers' case, stated shortly, is this,—that they transmitted to this country a certain sum of money to be applied by the Company, of which the defenders are the only shareholders, to a specific purpose, that the money was received but that it was not applied to that purpose, but on the contrary that the defenders, or at all events one of the defenders, with the full knowledge and assent of the other, helped himself to the cash.

The facts are these: on 17th July 1912, the pursuers, who are apparently merchants in Central America, transmitted to this country a draft for £1000 sterling, which they specifically set forth in the letter in which it was enclosed was to be applied to meet three bills which are identified in the letter, bills of which the Company were acceptors and the pursuers were drawers. These bills matured at London and, at maturity, the sum contained in the draft was to be applied to retiring the bills. It is admitted that the transmission of the money was made in pursuance of an agreement which is expressed in a letter of credit, dated 1st April 1912; it is further admitted that the money was actually received in this country, and we have before us a minute of meeting of the Company at which the defenders, who are the sole shareholders and sole directors of the Company, were present, which recorded the receipt of the letter containing the £1000 and approved of the letter—in other words, the Company accepted the trust. It is further admitted on the record that the £1000 was placed to the credit of the Company in its account with its own bank on the 8th August. It is also admitted

[1] Wilson v. Lord Bury, (1880) 5 Q. B. D. 518, *per* Brett, L.J., at pp. 527-8.

that not one penny of the £1000 was ever applied to retire the bills at maturity. It is admitted that, on the 8th August, one of the defenders, to wit Downie, drew upon the bank for £250 of the £1000 that was in the Company's account in order to be applied to the specific purpose I have mentioned, and that later in the month—on the 20th August—he drew a cheque for £500 upon the same account and received cash. It is further admitted upon the record that the £250 and £500 were applied by Downie to his own purposes, in other words in order to defray the expense which he had incurred during the year preceding in a visit to South America on the business of the Company.

It is not said in this record that M'Dougall, who was sole shareholder along with Downie and sole director of the Company along with Downie, was unaware of or disapproved of what was done. He does not, in short, separate himself from Downie. The defence given in is one given in for both defenders, and these are the facts plainly set forth in this record which are admitted and which require no parole proof to support them. There is, I think, a clear and unqualified admission on record for both defenders of misappropriation of this money.

I am of opinion that, inasmuch as there is a question of fact raised with regard to the balance of the money, mainly in connection with a bill which is set out in the 5th article of the condescendence and the 5th answer, we cannot give decree for the full sum which Downie drew from the bank and applied to his own purposes. But it appears to me that we are in a position now to give decree for the £600 which is claimed, without any parole evidence being required in support of the claim. I therefore come to the conclusion that the Lord Ordinary's interlocutor cannot be upheld, and that we should now give decree for £600 in favour of the pursuers, and *quoad ultra* affirm the Lord Ordinary's interlocutor allowing a proof.

Lord Johnston.—I think that this case depends entirely upon the original contract between the parties as to the mode of conducting the credit out of which the whole question arises. On 1st April 1912 the defenders, through their managing director, George Downie, wrote authorising the pursuers to draw upon them at ninety days' sight for any sums, but not exceeding in all £10,000, provided that no more than £1000 should be drawn for by any one mail, and adding "and that you" (the pursuers) "send us" (the Company) "cover for the drafts so drawn in first-class sight drafts on London, said sight drafts to reach us at least seven days before the maturity of the drafts drawn by you under this credit." What followed was that a certain series of bills, to the amount of £1000, were drawn, were accepted, and fell due on certain dates in August 1912; that first-class sight drafts on London were, by letter of 17th July, forwarded and were received in London, but they were received a day or two too late to comply with the condition that they should "reach us at least seven days before the maturity" of the bills which had to be met.

Now, it seems to me that at that point the defenders were perfectly entitled to say, "We will dishonour these bills, because you have not

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Ld. Johnston.

complied with your obligation of putting us in funds to take them up." But if they had done that I cannot conceive that they could by any possibility have retained the drafts and placed the proceeds to their credit. What they did was neither to take up the bills nor to return the drafts. They therefore retained the money which had been sent to them for a definite purpose, and did not apply it to that purpose. At that stage they were considerably overdrawn with the Bank of Scotland in Edinburgh, and what they did was to open a new account with another bank, namely, the North of Scotland and Town and County Bank. They had no account there. They had had no transactions with that bank before, but they opened an account by placing to their credit the £1000 which belonged to the pursuers. I admit that at first they apparently intended to take up the bills, because they sent their cheque for £600 upon the North of Scotland and Town and County Bank to London *pro tanto* for that purpose. But then they sent it too late. The bills had been dishonoured; they could not be called in, and the proceeds of their cheque were returned to them, and replaced in their account. What is complained of is that, in that state of matters, Mr Downie, the defenders' managing director, drew for his own purpose upon an account which he knew contained nothing but the proceeds of drafts which had been sent to his Company under a definite contract to be applied to a definite purpose, and which had not been so applied. I cannot hold that that was anything other than misappropriating property which he had no right to touch.

I wish to distinguish this case from any of the cases quoted to us. This is technically a registered Company, but it is one of those private companies which it is now possible to create, consisting of two gentlemen who themselves are the directors, and themselves are the shareholders, and therefore themselves are the Company. I cannot regard this sort of company as similar to those with which the cases to which we were referred were concerned. The directors of an ordinary limited public company cannot, of course, know the whole details of the company's banking accounts. I regard this case as one in which there is a company only in name; it consisted of two individuals knowing everything that was done in the company, and knowing, in particular, that the only sum that they had to draw upon was a sum placed in their hands for a definite purpose and under a definite obligation, and they actively and passively allowed it to be appropriated to the private purposes of one of them.

Under these circumstances I agree in the conclusion to which your Lordship has come.

Lord Mackenzie.—I am of the same opinion as your Lordships, and think that the pursuers are entitled to decree *de plano* for the sum of £600. I do so upon the ground that it sufficiently appears from the papers before us that the defenders have been guilty of a breach of trust, and not merely of a breach of contract.

I think that the fund of £1000, of which the £600 forms a part, was received by the defenders, Mr Downie and Mr M'Dougall, as trustees in order that it might be applied to a specific purpose. That purpose is

defined by the letters of 1st April 1912 and 17th July 1912, in the latter of which it is distinctly stated that "the money is sent to meet our drafts." There is sufficient in the print to show that not only did the defenders not apply it to the purpose for which it was sent, but also that they never proposed or offered to return the draft which had been sent. Therefore the nature of the claim in the present case is that the pursuers come forward and say, pointing to the admission of the receipt by Mr Downie of two sums of £250 and £500, "that is our money."

The money never became the property of the defenders, and the pursuers are entitled to vindicate it and get a decree against the defenders personally for repayment. I am unable to see anything stated upon the defenders' side of the record which, if proved, would entitle them to resist the present demand. Further, I was unable, from the very able statement of Mr Normand, to gather any fact, whether appearing on the record or not, which if proved would avail his clients in the very least.

It was pointed out that there was a distinction between the position of Mr M'Dougall and that of Mr Downie, but there is really no difference between them in regard to this matter. The person who actually received the money of which Mr M'Dougall was a trustee was Mr Downie, but nowhere on the record does Mr M'Dougall dissociate himself from anything Mr Downie did. Accordingly, I think that the two defenders are liable jointly and severally for the money which was misappropriated, and therefore I agree with the judgment proposed by your Lordships.

LORD SKERRINGTON.—I concur.

THE COURT pronounced this interlocutor:—"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Hunter, dated 21st October 1913, and heard counsel for the parties, recall said interlocutor: *hoc statu* decern against the defenders jointly and severally for payment to the pursuers of the sum of £600, being a portion of the sum concluded for: *Quoad ultra*, before answer, allow to the parties a proof of their respective averments on record and remit to the Lord Ordinary to take the said proof and to proceed as accords. . . ."

E. I. FINDLAY, S.S.C.—ANDREW M'DOUGALL, Solicitor—Agents.

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Shedden's Trustee v. Dykes.

WILLIAM KENNETH (Miss Janet Shedden's Trustee), First Party.—*Anderson, K.C.—Aitchison.*

MRS MARGARET DYKES, Second Party.—*Constable, K.C.—C. H. Brown.*

THE ROYAL HOSPITAL FOR SICK CHILDREN, GLASGOW, Third Party.—*Cooper, K.C.—A. Brown.*

Trust — Exercise of discretionary powers — Delectus personæ — Assumed trustee.

A testatrix by her settlement appointed two persons to be her trustees and executors (the appointment of one of them being afterwards recalled by codicil), and conveyed to them her whole estate. The trust purposes included a direction to divide the residue among such charitable institutions in Glasgow, and in such proportions "as my trustees in their absolute and uncontrolled discretion shall decide." The deed was silent as to the assumption of new trustees. On the testatrix's death the sole nominated trustee accepted office and, after assuming a new trustee in virtue of the statutory power to do so, died without having taken any steps to distribute the residue.

Held on a construction of the terms of the settlement that, as there was no indication that the testatrix intended to limit the exercise of the discretionary power with regard to residue to the trustee nominated by her, that power could be validly exercised by the assumed trustee.

1ST DIVISION. ON 25th October 1912 a special case was presented for the opinion of the Court with reference to a question as to the powers of an assumed trustee, being the sole acting trustee under the trust-disposition and settlement of Miss Janet Shedden. William Kenneth, the trustee, was the *first party* to the case; Mrs Margaret Dykes, the testatrix's sole next of kin, was the *second party;* and the Royal Hospital for Sick Children, Glasgow, was the *third party.*

Miss Shedden's will, which was dated 11th February 1904, was in the following terms:—"I, Miss Janet Shedden, . . . do hereby assign, dispone, and convey the whole means and estate of every description, heritable and moveable, wherever situated, that shall belong and be owing to me at the time of my decease, to Robert Scott Stewart, solicitor in Glasgow, and Andrew Stewart, solicitor in Glasgow, and the acceptor and survivor of them, as trustees and trustee for the purposes after specified; and I nominate and appoint the said Robert Scott Stewart and Andrew Stewart, and the acceptor and survivor of them, to be my executors and executor: But these presents are granted in trust always for the purposes following, *videlicet:*—(First) I direct my trustees to pay all my just debts, sickbed and funeral expenses, and the expenses of the trust hereby created: (Second) I give and bequeath the legacies following to the following persons and others respectively, and direct my trustees to pay the same accordingly, namely:—(*Primo*) £50 to each of my said trustees who shall accept office under these presents —[Here followed a number of other pecuniary legacies]—And said legacies shall all be paid as soon as possible after the lapse of six months from my decease, with interest from and after the lapse of such six months at the average rate of interest, if any, that my trustees shall have received from my estate, howsoever the same may be invested or wheresoever the same may be: And my trustees shall be the absolute judges as to what such average rate of interest is or

shall be . . . and should there be any doubt as to the respective legatees, or any of them, whom it is my intention to favour, my trustees shall be the only judges in the matter . . . (Third) I give and bequeath the whole residue and remainder of my estate and all free proceeds thereof to my trustees, to be by them paid, divided, and distributed to and among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow, and in such sums and proportions to each, or the whole to any one of such societies, institutions, or objects, all as my trustees in their absolute and uncontrolled discretion shall decide; and I declare that the judgment and action of my trustees in such payment, division, and distribution shall be absolute and unchallengeable by or at the instance of any person or persons, or others whatsoever, and that the mere receipts of the respective secretaries, treasurers, or other officials of the respective objects that my trustees shall select as to take benefit under this present provision shall fully discharge and exonerate my trustees of all sums of money that my trustees shall actually pay bearing to be in virtue hereof: And further, I declare that I have not favoured those of my relatives, whom I might otherwise have been inclined to favour, because they have not made any attempt to show to me, nor did they attempt to show to my late sister any such affection or attention as I or she might have expected: And I empower my trustees to sell the whole or any part of my estate by public roup or private bargain, and to employ a law-agent or law-agents, who may be of my said trustees' own number, or any firm of which they or either of them may be the partners or a partner . . . and notwithstanding that I have bequeathed to each of my said trustees who shall accept the foresaid legacy of £50, I declare that my said trustees shall have and enjoy all the immunities and privileges of gratuitous trustees . . ."

By codicil, dated 5th April 1907, Miss Shedden recalled the appointment of Robert Scott Stewart as trustee and executor under the will.

Miss Shedden died on 3rd June 1910, and Andrew Stewart accepted office as trustee and executor, and proceeded to administer the estate in terms of the settlement. By deed of assumption dated 30th September 1910, he assumed William Kenneth as a trustee under the trust-disposition and settlement, and along with him continued to administer the trust-estate. Andrew Stewart died on 29th December 1910, and thereafter William Kenneth, as the sole trustee acting under the said trust-disposition and settlement, continued the administration of the estate.

The estate left by the testatrix consisted wholly of moveables, and amounted to £6000 or thereby. After fulfilling all the trust purposes except the provision dealing with residue, there remained a sum of £3937, 1s. 2d. representing the residue of the estate. No allocation had been made by the trustees up to the date of Andrew Stewart's death, but William Kenneth by minute, dated 22nd December 1911, bearing to be in exercise of the discretionary powers conferred by the third purpose of the settlement, allocated a sum of £500 to the third party, the Royal Hospital for Sick Children, Glasgow.

A question having arisen as to right of the assumed trustee to exercise the discretionary power with regard to the residue, this special case was presented for its determination. The contention of the first and third parties was that, as Andrew Stewart had by force of statute power to assume new trustees, the new trustee assumed

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by him had all the powers conferred by the testatrix on the original trustee, and accordingly had validly exercised these powers in allocating a share of residue to the third parties. The contention of the second party was that the discretionary powers conferred on Andrew Stewart were personal to him, and lapsed on his death, and accordingly that the residue had fallen into intestacy, and was payable to her as the sole next of kin of the testatrix. The second party also stated a contention that the residuary bequest was void from uncertainty, but this contention was not maintained at the debate.

The questions of law were:—"(1) Is the bequest of residue in the third purpose of the trust-disposition and settlement void from uncertainty? (2) If the preceding question is answered in the negative, (*a*) Is the first party, as assumed trustee foresaid, entitled to exercise the discretionary powers as to residue contained in the said purpose? or, (*b*) Did the residue of the estate of the testatrix fall into intestacy upon the death of the said Andrew Stewart without having exercised the discretionary powers conferred by the settlement?"

The case was heard before the First Division on 5th, 18th, and 19th November 1913.

Argued for the second party;—No power was conferred by the testatrix upon her trustees to assume new trustees, for the clause conferring the privileges and immunities of gratuitous trustees could not be so interpreted; it was clearly introduced only to provide for resignations. Where then a testamentary deed contained no power to assume new trustees, and also conferred on the original trustees not only a discretion to apportion but, as here, a discretion to select the objects themselves of the testator's bounty, the presumption was that this wide discretion was conferred only on the trustees selected by the testator himself, those with regard to whom he had exercised a *delectus personæ*. In such circumstances the Court would not authorise the exercise of this discretion by a judicial factor or by assumed trustees.[1] No doubt the testatrix might have contemplated administration by a succession of trustees in the event of the resignation or death of the single trustee whom she had appointed, but that succession was with regard to acts of administration only, and did not extend to the exercise of the personal discretion for which she had selected the original trustee. A distinction had been recognised in Scotland and also in England between powers of administration and powers of such wide discretion as had been conferred in the present case. The presence or absence of a power of assuming new trustees was an important element in testing which class of powers assumed trustees were intended to possess, and in the absence of a power of assumption ordinary acts of administration would alone be held to be within their competence.[2] The only apparent conflict with this principle in the

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[1] Dick v. Ferguson, (1758) M. 7446; Ireland v. Glass, (1833) 11 S. 626; Allan, (1869) 8 Macph. 139; Hill's Trustees v. Thomson, (1874) 2 R. 68; Simson, &c., (1883) 10 R. 540, Lord President Inglis, at p. 543-4; Robbie's Judicial Factor v. Macrae, (1893) 20 R. 358, Lord M'Laren, at p. 362; Grieve's Trustees v. Wilson and Others, (1904) 12 S. L. T. 347, Lord Low, at pp. 347-8.

[2] Simson, &c., 10 R. 540, Lord President Inglis, at p. 544; Robbie's Judicial Factor v. Macrae, 20 R. 358, Lord M'Laren, at p. 363; Cole v. Wade, (1807) 16 Vesey, 27, Sir W. Grant, M.R., at p. 44; Walter v. Maunde, (1810) 19 Vesey, 423, Lord Eldon, L.C., at p. 424.

English decisions arose from a case in which reliance had been placed on the judgment of three executors and only two were acting.[1] If, however, there was any difference now in English law it was in consequence of section 37 of the Trustee Act, 1893,[2] which did not apply to Scotland. But whatever might be the present rule in England, it was well settled in Scotland that, if discretionary powers were conferred upon trustees named, the burden lay on those who sought to overcome the implication of *delectus personæ* and to have it found that the discretionary powers conferred could be exercised by others.[3] If there had been no settled rule of law in Scotland the law of England might usefully have been referred to, but not if in Scotland the law was well settled.

Argued for the third party;—The true test was whether the terms of a settlement contained anything to indicate an intention that the powers conferred thereby should be exercised exclusively by the trustees therein named.[4] There was no such indication here; on the contrary, the settlement contained indications to the opposite effect. For example the testatrix's express declaration of her reason for not favouring her relatives made it clear that she desired the residuary clause of her settlement to be carried out by any holder of the office of trustee, rather than that it should fail and the residue be thrown into intestacy. Further, whenever she desired to refer to the individuals she had named as her trustees she spoke of them as "my said trustees," whenever she desired to refer merely to the holders of the office of trustee she spoke of them as "my trustees," and the latter was the expression used in conferring the discretionary power with regard to residue. Moreover, she had conferred upon her trustees the immunities and privileges of gratuitous trustees, and her settlement must be held to have been written in knowledge of the statutory effects resulting from that provision, including the powers of resignation and of assumption of new trustees.[5] Also there were various matters demanding the attention of the trustees before the residue could be disposed of, and accordingly the testatrix must have been aware that by that time the original trustees might have ceased to act, and that others would have uncontrolled discretion in the distribution of the residue. It could not therefore be maintained that this settlement gave any indication of *delectus personæ* with reference to the persons who were to exercise the discretionary powers conferred, or any indication that the testatrix intended to draw a distinction between ordinary powers of administration and these discretionary powers. In the absence of *delectus personæ* trustees assumed or appointed by the Court could exercise the discretionary powers conferred by the deed on the original trustees.[6]

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[1] Crawford v. Forshaw, [1891] 2 Ch. 261, Bowen, L.J., at p. 268. *Cf.* Eastick v. Smith, [1904] 1 Ch. 139, Farwell, J., at p. 142; Lewin on Trusts, (12th ed.) 754; Sykes v. Sheard, (1863) 2 De G. J. & S. 6; Hibbard v. Lamb, (1756) Amb. 309; Farwell on Powers, (2nd ed.) 460.

[2] 56 and 57 Vict. cap. 53.

[3] Campbell & M'Intyre v. M'Intyres, (1824) 3 S. 126 (N. E.) 85; Laurie and Another v. Brown and Others, 1911, 1 S. L. T. 84.

[4] Hill's Trustees v. Thomson, 2 R. 68, Lord Justice-Clerk Moncreiff, at p. 69; Grieve's Trustees v. Wilson and Others, 12 S. L. T. 347, Lord Low, at p. 347.

[5] Trusts (Scotland) Act, 1861 (24 and 25 Vict. cap. 84), sec. 1.

[6] Trusts (Scotland) Act, 1867 (30 and 31 Vict. cap. 97), secs. 1 and 12.

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The Outer House decision in *Blair* v. *Macfarlane's Trustees*[1] was directly in point. The cases relied on by the second parties were distinguishable. *Dick* v. *Ferguson*[2] was an action of reduction arising under quite different circumstances, and the other cases[3] were instances where the deeds in question contained expressions which implied a *delectus personæ*. It was to be noted too that in England discretionary powers could be exercised by trustees whether named by the truster or not, unless there was a clear indication of personal confidence in the trustees named.[4] But if the law of England operated against what was manifestly the intention of the testatrix in the present case, viz., that the powers conferred by her should be exercised by any holders of the office of trustee, that law could not affect the decision of the case, because the testatrix could not be held to have known the law of England, or to have made her settlement with that law in view.

The first party adopted the argument presented for the third party.

At advising on 28th November 1913,—

LORD PRESIDENT.—The question presented for our consideration in this special case is whether the assumed trustee under the trust-disposition and settlement of Miss Janet Shedden may validly exercise a discretionary power which the testatrix confided to her original trustee. I am of opinion that he can.

As is not unusual the trust-disposition is silent here on the subject of the assumption of trustees, and, that being so, we must hold that the deed contains a power of assumption, the contrary not being expressed. That has been the law of Scotland by statutory enactment since the year 1861 (24 and 25 Vict. cap. 84, sec. 1). The precise effect of the statute is equivalent to an inscription in the deed of a power of assumption of new trustees. The trustee thus assumed derives his authority from the testatrix, and from the moment of his appointment is, I think, clothed with all the powers, discretionary and otherwise, confided to the original trustee, unless the testatrix has clearly indicated a contrary intention. No contrary intention is to be found in the deed before us, because the residuary clause runs as follows:—"I give and bequeath the whole residue and remainder of my estate and all free proceeds thereof to my trustees, to be by them paid, divided, and distributed to and among such charitable and philanthropic societies, institutions, and objects in or connected with Glasgow, and in such sums and proportions to each, or the whole to any one of such societies, institutions, or objects, all as my trustees in their absolute and uncontrolled discretion shall decide; and I declare that the judgment and action of my trustees in such payment, division, and distribution shall be absolute and unchallengeable."

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[1] (1896) 4 S. L. T. 23.

[2] M. 7446.

[3] Hill's Trustees v. Thomson, 2 R. 68; Simson, &c., 10 R. 540, Lord Deas, at p. 545, Lord Shand, at p. 546; Robbie's Judicial Factor v. Macrae, 20 R. 358, Lord M'Laren, at p. 361.

[4] Cole v. Wade, 16 Vesey, 27, Sir William Grant, M.R., at p. 45; Byam v. Byam, (1854) 19 Beav. 58, Sir John Romilly, M.R., at p. 66; Crawford v. Forshaw, [1891] 2 Ch. 261, Kay, L.J., at p. 269; Eastick v. Smith, [1904] 1 Ch. 139.

It is impossible, I think, to spell out of the residue clause so expressed anything approaching *delectus personæ*. The powers are here conferred, as I read the deed, on "my trustees, whoever they may be," whether original, assumed, or, it may be, nominated by the Court. If they are lawfully in the saddle they are clothed with these discretionary powers. They are given to "my trustees" as trustees and not as selected individuals. The powers are no doubt wide; for they embrace not merely the apportionment of the residue among the charities but also the selection of the objects of the testatrix's bounty. But however wide they may be, inasmuch as the testatrix has virtually empowered her original trustee to assume a new trustee without placing any limitation upon the exercise of the powers conferred by the settlement, it would not be in our power, I think, even if we desired, to limit the powers of the assumed trustee.

There are more ways than one in which a testator may indicate an intention to deny to an assumed trustee powers confided to original trustees, but the question whether or no there is *delectus personæ*, it appears to me, cannot be determined, either solely or mainly, by an examination of the discretionary powers given or by the difficulty or delicacy of the exercise of these powers. If a testator desires to debar an assumed trustee from exercising discretionary powers it is very easy to say so; and, if it is not said either expressly or impliedly, I know no reason why the Court should assume that it is intended. To place an assumed trustee in a position of inferiority—to place an exceptional disability upon an assumed trustee—would, it appears to me, tend to defeat the object of the statute as well as the object of the testator, for the very type of man who would naturally be selected to be a trustee by the original trustee—or, it may be, by the Court—to exercise discretionary powers would, of course, refuse to take office if he were placed in an inferior position, a position of disqualification in contrast to the original trustees. And we can see very plainly in the present instance how entirely the intentions of this testatrix would be frustrated if we sustained the contentions of the second party.

In expressing this opinion I have had fully in view all the Scottish authorities which were quoted to us, and I am satisfied that my opinion is not in conflict, but on the contrary is in harmony, with all the prior cases. It is no doubt satisfactory to find that the law of England, in this chapter, runs parallel with the law of Scotland. But the similarity between the two systems of jurisprudence ought not, in my opinion, to affect our judgment here. Both sides of the bar maintained that the law of England was in favour of their contention, but both sides of the bar very frankly acknowledged that, had it been otherwise, they would have invited us to reject the law of England. And we would have done so, for after all in these will cases the sole object of the Court is to ascertain and to give effect to the intention of the testator; and I cannot, for my part, hold that a Scotch testatrix, or her man of business, in framing a Scotch settlement is bound to know and to have in view the law of a foreign state.

I am therefore for answering the first question, as we were invited to do, in the negative, the first alternative of the second question in the affirmative, and the second alternative of that question in the negative.

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LORD JOHNSTON.—I concur in the result at which your Lordship has arrived. We have had in this case a very able and anxious argument on the general question, as well as the special question raised in this case; but I desire to say that, so far as I am concerned, I treat the case entirely as a case with special circumstances, enabling one to arrive at a conclusion without any consideration of the more general questions, on which I desire to reserve my opinion.

I agree with your Lordship that the trust-settlement in question must, from its terms, be taken to be written in view of the statutory provisions which admit of the assumption of new trustees. It is very probable that the testatrix did not fully appreciate the distinction between original and assumed trustees, or know anything about the provisions of the Trusts Acts, but all this was certainly before those who drew her will, and their understanding must be held to be her understanding if she puts her signature to the deed which they prepared.

That being so, what I find is that there is in the settlement a marked distinction between the expressions which apply solely to the trustees nominated and the expressions which apply to trustees generally. Where she refers solely to the two trustees nominated, Mr Robert Scott Stewart and Mr Andrew Stewart, she carefully distinguishes them as "my said trustees." Where she refers to her trustees generally she refers to them as "my trustees." I think that she meant to distinguish, and that the distinction is perfectly sufficient for the decision of this case, because when she comes to bequeath the residue of her estate for such charitable objects and in such proportions, "all as my trustees in their absolute and uncontrolled discretion shall decide," she does not use the special term "my said trustees," but the general term "my trustees."

I am by no means desirous of touching upon the more general question, because I am not satisfied that, given terms different from what we have here, such a discretion given to trustees would not be properly confined to the trustees nominated. And I am moved a good deal in that direction by the consideration that it was only with very great difficulty that the Courts came to hold that a bequest such as this—to charitable societies to be selected by someone else—was not a delegation of the power of testing which could not be supported at law. This seems to me to be a considerable extension of these decisions, because it is not merely the delegation to persons named to select the objects of the testator's testamentary intention, but the delegation to persons named to choose other persons to choose the objects of the testator's testamentary intention.

I therefore desire to reserve my opinion upon the general question, and still more so upon the question whether such powers can be competently transferred to the nominees of the Court, whether trustees or judicial factors.

LORD MACKENZIE.—The question in this case is whether an assumed trustee is entitled to exercise the discretionary powers contained in the settlement. The duty of the Court is to carry out the intention of the testatrix as expressed by her. The determination of the question, therefore, depends, in my opinion, upon the construction to be put upon the

terms of the settlement. If from the language used it appears that there was a special *delectus personæ* the discretionary power will not transmit. If, however, there is no reason for holding that the testatrix intended there should be any special *delectus personæ*, there is no reason why the powers should not be exercised by an assumed as well as by the original trustees.

The position of matters was that at the date of the death of the testatrix there was only one trustee nominated by her, the appointment of the other having been revoked by codicil. That she contemplated that this trustee might resign sufficiently appears from the declaration that the original trustees, notwithstanding they were legatees under the settlement, should have and enjoy all the immunities and privileges of gratuitous trustees. This included power to resign, which was only conferred by statute. Although no express power to assume new trustees is given by the settlement, this, to my mind, is not of importance, because there must be read into it the statutory power of assumption, and the testatrix must be presumed to have known the law in regard to this. It must therefore be held that the testatrix did not intend the trust purposes to fail through failure of the original trustees.

It was argued, however, that the powers conferred under the third purpose are so wide, being powers of selection and not mere administration, that this afforded ground for holding that they were only to be exercised by the original trustees. The fact that the testatrix conferred this power on "my trustees," and not on "my said trustees" (the expression used in other parts of the settlement), shows that she did not limit the exercise to the trustees nominated by herself only. Further, I cannot leave out of view that there is in the settlement an express declaration of her reason for not favouring her relatives, which I think goes to support the argument against the claim of the next of kin. It was not contended that the third purpose was void from uncertainty, nor do I think in view of recent authorities that there was room for argument on this point.

It is not necessary to review the authorities in Scotland as the question is one of construction. We are not here concerned with the question whether discretionary powers such as these could be exercised by a judicial factor, who is an officer of Court. Therefore the case is not the same as that of *Robbie's Judicial Factor*.[1] The decisions in the Outer House by Lord Kincairney in the cases of *Blair* (*John Macfarlane's Trustee*) v. *Malcolm David Macfarlane's Trustees*, and *Blair and Another* (*Malcolm Macfarlane's Trustees*) v. *Helen Macfarlane's Trustees and Others*,[2] appear on all fours with the present. The observations of Lord Low in the case of *Grieve's Trustees*[3] were made with reference to purposes of a very peculiar character. We were referred to a number of cases in England, the more recent of which certainly contain nothing contrary to the conclusion at which I arrive. If I may say so, it appears to me that what Bowen, L.J., says in the case of *Crawford* v. *Forshaw*,[4] might well be taken as applicable to the case in hand: "I regard this case as purely one of construction—one

[1] 20 R. 358.
[2] 4 S. L. T. 22 and 23.
[3] 12 S. L. T. 347.
[4] [1891] 2 Ch., at p. 267.

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in which, therefore, we may well be guided, and in which I am personally very glad to be guided, by the reasoning in previous cases, and by general principles of law, but in which we are not concluded by authority." It was argued that the law as regards assumed trustees in England was statutory, and we were referred to the Act 56 and 57 Vict. c. 53, sec. 37. This, however, only applies to trustees appointed by the Court.

I am therefore of opinion that question 2 (*a*) should be answered in the affirmative, and the other questions as proposed by your Lordship.

LORD SKERRINGTON.—I agree for the reasons explained by your Lordship in the chair.

THE COURT answered question 1 in the negative and question 2 (*a*) in the affirmative and 2 (*b*) in the negative.

DOVE, LOCKHART, & SMART, S.S.C.—E. A. & F. HUNTER & Co., W.S.—MARTIN, MILLIGAN, & MACDONALD, W.S.—Agents.

No. 15.

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J. & C. Murray v. Wallace, Marrs, & Co.

JOHN & CHARLES MURRAY, Pursuers (Reclaimers).—*Horne, K.C.—MacRobert.*

WALLACE, MARRS, & COMPANY, Defenders (Respondents).—*Murray, K.C.—Macmillan, K.C.—Lippe.*

Arrestment jurisdictionis fundandæ causa—Subjects arrestable—Accountability—Sum in hands of bank—Bank not liable to account directly to common debtor.

Personal bar—Arrestment—Obligation to pay "nett cash"—Cash paid to bank for payee—Right of payer to arrest in hands of bank.

A London firm sold to a Glasgow firm a quantity of iron, which was to be shipped to Scottish ports and to be paid for "nett cash against shipping documents." When the iron had reached the ports of destination the sellers handed the shipping documents to their bank in London with instructions to obtain payment of the price from the purchasers, and the bank sent on the documents to their correspondents, a bank in Glasgow, with instructions to carry through the transaction. The Glasgow bank accordingly, in exchange for the documents, obtained payment from the purchasers of the price, and entered it in their books to the credit of the London bank. An hour afterwards the purchasers arrested this money in the hands of the Glasgow bank to found jurisdiction against the sellers in an action of damages.

Held that, as the Glasgow bank were under no duty to account for this money to the sellers, but only to the London bank who had employed them, the arrestments were inept to found jurisdiction.

Held further (*rev.* judgment of Lord Dewar, *diss.* Lord Mackenzie) that the purchasers were not barred by the terms of their contract with the sellers from attempting to arrest the cash payment which they had themselves made.

1ST DIVISION. Lord Dewar.

ON 6th August 1912 John & Charles Murray, metal merchants, Bothwell Street, Glasgow, brought an action of damages for failure to implement the terms of a contract against Wallace, Marrs, & Company, metal merchants in London.

The following narrative is quoted from the opinion of the Lord President:—

"This case relates to the validity of an arrestment to found jurisdic-

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tion. The facts are as follows. The pursuers are iron merchants in Glasgow, the defenders iron merchants in London. A contract for the sale of a quantity of iron bars was entered into between the parties—the pursuers being the buyers and the defenders the sellers of the iron. A portion of the goods was shipped to Grangemouth, another portion to Glasgow. The terms of settlement, as expressed in the contract, were 'nett cash against shipping documents.' Accordingly, on the 31st of July 1912 the defenders, the sellers, instructed their bankers in London, viz., the London County and Westminster Bank, to collect cash from the pursuers in exchange for the shipping documents, which they had transmitted to their London Bank. At the same time they directed the London Bank when the cash (£890, 7s. 11d.) was received to place it to their, the defenders', credit in their account with the London Bank. On the following day the London Bank proceeded to carry out these instructions by in turn transmitting the shipping documents to their correspondents in Glasgow, the Commercial Bank, with instructions to collect the cash from the pursuers, and to hand over to them the bills of lading. The Commercial Bank on 2nd August fulfilled these directions. They received the cash at two o'clock on the afternoon of the 2nd; they handed over the shipping documents (the bills of lading) to the pursuers; and in due course they placed the cash received, £890, 7s. 11d., to the credit of the London Bank, and intimated that they had done so. About an hour later the pursuers laid on an arrestment to found jurisdiction by virtue of letters of arrestment obtained from the Sheriff of Lanarkshire. It is the validity of that arrestment which is now in question."

The defenders pleaded, *inter alia*;—(1) In respect that the defenders are not subject to the jurisdiction of this Court, the action should be dismissed.

On 27th February 1913, after a proof, the Lord Ordinary (Dewar) sustained the first plea in law for the defenders and dismissed the action.*

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* "OPINION.—The question for decision here is whether jurisdiction has been competently founded against the defenders—a firm of London metal merchants—in respect of arrestments laid on by the pursuers *jurisdictionis fundandæ causa*.

"In December 1911 and January and February 1912, the pursuers, who are metal merchants in Glasgow, entered into several contracts with the defenders, whereby the defenders agreed to deliver a large quantity of Continental iron bars. The pursuers allege that the defenders failed to implement their contracts, and they have brought this action of damages against them, having laid on arrestments to found jurisdiction.

"It appears from the evidence that in July 1912 the defenders undertook to ship a consignment of bars to Scotland, provided the pursuers agreed to pay cash against presentation of bills of lading. The pursuers having agreed to do so, the defenders shipped the goods to Grangemouth, and on 1st August sent the bills of lading, together with an account (No. 28 of process), to their bankers, the London County and Westminster Bank, with instructions to deliver the documents in exchange for the money—a sum of £890, 7s. 11d. On the same day the London bankers forwarded these documents to their Glasgow correspondents, the Commercial Bank, with instructions to carry out the transaction. On 2nd August the pursuers, having received an order notice from the Commercial Bank, paid over the money and received the bills of lading in exchange. But they had previ-

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The pursuers reclaimed, and the case was heard before the First Division on 22nd and 23rd May 1913.

On 7th June the Court pronounced an interlocutor allowing the defenders to amend the record, and allowed the parties a proof with regard to the amendments.

The defenders accordingly amended their answers by adding an averment in the following terms:—"Explained . . . that in any event the pursuers were not entitled to arrest the funds alleged to have been attached in respect of a special obligation undertaken by them to pay over to the defenders the said funds in exchange for shipping documents handed to the pursuers thereagainst. The alleged arrestment was contrary to the good faith of the pursuers' said undertaking and in breach of the said obligation."

They also added the following plea:—(2) The alleged arrestment being in breach of the obligation undertaken by the pursuers and

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ously arranged with their solicitors that, when the money was paid over, it should immediately be arrested to found jurisdiction. The money was paid at two o'clock, and the arrestments were laid on at three. The parties had been in correspondence for some time previously regarding this transaction, and the letters show that the defenders were careful to stipulate that they should receive the cash in exchange for the documents, and the pursuers agreed to these terms but they did not disclose to the defenders that they had arranged to arrest the money when they had obtained possession of the documents.

"The defenders' name appears both on the account and on the bills of lading, but it appears that in a banking transaction, such as this, no notice is taken of this. The practice is for the collecting bank to account only to the instructing bank.

"In these circumstances the pursuers maintained that the arrestment was valid: that, although the Commercial Bank may have considered itself accountable to the London bank alone, yet it was truly accountable to the defenders, whose names were disclosed on the account and bills of lading. To this the defenders replied that there was no contract between the arrestees and the defenders, and they were not accountable to them. If they were not identified with the defenders then they were not directly debtors to the common debtors, and the arrestment was invalid. If, on the other hand, they were in reality identified with the defenders, then there was not such independent possession as could be the foundation of an arrestment. And further, and in any case, they argued that the pursuers were personally barred from using arrestment, in respect that they had agreed to transmit the money if they got possession of the documents, and to prevent the transmission of the money in such circumstances was contrary to good faith.

"In the view I take of the case, I do not think that I require to determine what the true position of the bank was in the transaction, because I am of opinion that the defenders are right in their contention that the pursuers are, in the circumstances disclosed in the evidence, barred by their actings. They agreed that if they obtained possession of the documents they would immediately transmit the money to the defenders. They got the documents and they did not transmit the money, and the evidence shows that they never intended to do so. They instructed their solicitors to lay a *nexus* on it to prevent that very transmission which they had promised and on the faith of which they had obtained the documents. I do not think that they were entitled to do that. I was not referred to any case where a point precisely similar had been considered; but there are a number of decisions which show that the Court will not sanction an arrestment where the arrester has not treated his opponent quite frankly or fairly. Thus when an arrestment is made possible by illegal use, or *mala fides*, or negligence

contrary to the good faith of their undertaking as condescended on, the pursuers are barred *personali exceptione* from maintaining that jurisdiction has been constituted against the defenders.

After further proof before Lord Mackenzie, the import of which is set forth in his Lordship's opinion, the case was further heard before the First Division on 14th and 15th November 1913.

Argued for the reclaimers;—(1) The test of whether money was arrestable was whether the arrestee was bound to account for the money to the common debtor. Here the Glasgow Bank was bound to account to the defenders, and the interposition of the London Bank was immaterial. Although the Glasgow Bank was primarily bound to pay over the money to the London Bank, the London Bank was merely the hand of the defenders in the matter; the defenders could have brought a direct action against the Glasgow Bank for payment, and (as it was not suggested that the defenders were overdrawn with their London Bank) could have interdicted the Glasgow Bank from paying over the money to the London Bank. Accordingly, if a direct right of action was necessary, that condition also was fulfilled here.[1] Further, the Glasgow Bank could not have set off this money against any claim they might have against the London Bank, nor could a creditor of the London Bank have arrested the money in their hands. The money was not credited to the defenders by the London Bank until it had reached their hands, and if it had been lost on the way the loss would have fallen on the defenders. Further, there was clearly privity of contract between the Glasgow Bank and the defenders, because when the defenders employed the London Bank to collect the money in Glasgow, that bank quite legitimately delegated the duty to the Glasgow Bank, and delegated it in terms which disclosed the names of their principals and the whole nature of the transaction.[2] Accordingly, all the requisites of accountability on the part of the Glasgow Bank to the defenders were present here, and the money had been validly arrested.[3] (2) The pursuers were not barred by the terms of the contract, or by the correspondence, from exercising their undoubted right of arrestment. The cases founded on by the Lord Ordinary[4] were cases where there

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of the arrester, the arrestment is held ineffectual. In the case of *Rintoul*, 1 Macph. 137, where the arrester had wrongfully withheld a delivery-order for goods till arrestments could be used, the arrestments were recalled on the ground that 'this is a style of practice which cannot be sanctioned, and ought not to be encouraged . . . just a trick, and the parties who played it should not get the benefit of it.' See also *Heron*, 22 R. 182; *Trowsdale's Trustee*, 9 Macph. 88; *Campbell*, 21 D. 63.

"In the present case I think the use of arrestment was contrary to the good faith of what passed between the parties. I accordingly sustain the first plea in law for the defenders and dismiss the action."

[1] Mitchell, &c. v. Burn, &c., (1874) 1 R. 900, Lord President Inglis, at p. 905.

[2] Blackwood Wright on Principal and Agent, (2nd ed.) 167.

[3] Lindsay v. London and North-Western Railway Co., (1860) 22 D. 571; Leggat Brothers v. Gray, 1908 S. C. 67, Lord President Dunedin, at p. 71; Baines & Tait v. Compagnie Generale des Mines d'Asphalte, (1879) 6 R. 846; Shankland & Co. v. M'Gildowny, 1912 S. C. 857, Lord President Dunedin, at p. 866; Graham Stewart on Diligence, 255; Heron v. Winfields, Limited, (1894) 22 R. 182; Young v. Aktiebolaget Ofverums Bruk, (1890) 18 R. 163.

[4] Rintoul & Co. v. Bannatyne, (1862) 1 Macph. 137; Trowsdale's Trustee v. Forcett Railway Co., (1870) 9 Macph. 88.

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was something in the nature of a trick, and there had been nothing of that kind on the part of the pursuers here. On the contrary, the situation which rendered arrestment possible was entirely the creation of the defenders. If they had forwarded the shipping documents to the pursuers in ordinary course they would have been paid by cheque. It was their unusual method of employing a bank as intermediary that made the money arrestable.

Argued for the respondents;—(1) When the bills of lading were handed by the defenders to the London County and Westminster Bank, with a request to credit them with the cash to be obtained in exchange for them, no directions and no authority were given by the defenders as to the employment of any agent in Glasgow, and as far as appeared they were unaware of the employment of an agent or even of the existence of the Commercial Bank, and there was accordingly no privity of contract between them and that bank. In employing the Glasgow Bank the London Bank acted on its own responsibility, and it was liable to the defenders for the actings of the Glasgow Bank with the cash.[1] Accordingly it was to the London Bank alone that the Glasgow Bank was accountable, and the defenders could have had no direct action against the latter bank. The mere fact that the money belonged to the defenders and that the arrestees were aware of this was insufficient; the test was accountability, and there was no accountability here between the Glasgow Bank and the defenders.[2] (2) By their contract to pay "nett cash against shipping documents," especially when read in light of the subsequent correspondence, the pursuers had barred themselves from taking any steps to prevent the cash from reaching the defenders. It could not therefore be intercepted by them consistently with good faith.

At advising on 28th November 1913,—

Lord President.—[After the narrative quoted *supra*]—If my recital of the material facts of the case is correct, then I think it is obvious that the arrestment was inept, because on the afternoon of the 2nd the Commercial Bank in Glasgow was not under any obligation to account to the defenders. There was no direct obligation arising *ex contractu* or *quasi ex contractu* on the part of the Commercial Bank towards the defenders. There was no privity of contract between the defenders and the Commercial Bank. There was no legal relationship, so far as I can see, at all between the defenders and the Commercial Bank. And in these circumstances I think it is almost too plain for argument that the arrestment attached nothing. The relationship of the Commercial Bank to the defenders was, I think, quite clearly and quite correctly expressed in the evidence given by their agent in the proof led before the Lord Ordinary, where he says: "At the date that arrestment was laid on there was nothing standing in the books of the Bank at the credit of Wallace, Marrs, & Company. The Bank at that date held no money belonging to them." That seems to me to be the correct expression of the lack of legal relationship between the Commercial Bank and the

[1] Mackersy v. Ramsay, Bonars, & Co., (1843) 2 Bell's App. 30.

[2] Bell's Com. ii. 70-71; Heron v. Winfields, Limited, 22 R. 182, Lord M'Laren, at p. 185; Shankland & Co. v. M'Gildowny, 1912 S. C. 857, Lord President Dunedin, at p. 866.

defenders. It is nothing to the purpose to say that the Commercial Bank knew, when the shipping documents reached them, that the defenders were the customers of the London and Westminster Bank, and that their customers, to wit, the defenders, had intimated plainly to the pursuers that the cash was to be transmitted to them, the defenders, directly or through their bankers. That was no doubt true; but knowledge of these facts does not constitute a legal relationship which otherwise did not exist.

I think it unnecessary to cover familiar ground relating to the effect of arrestment to found jurisdiction, because the whole subject was so recently and so exhaustively explored in this Court in the cases of *Heron*,[1] *Leggat*,[2] and *Shankland*.[3] I only say that I desire respectfully to concur with the views of Lord President Dunedin and the other learned Judges who gave opinions in those cases; and applying the doctrine as there laid down, I cannot but come to the conclusion that this arrestment attached nothing, and that, accordingly, the plea of no jurisdiction must be sustained.

Now the Lord Ordinary reached exactly the same conclusion, but on a totally different ground. He found it unnecessary, he tells us, to consider the question on which I have just expressed an opinion, because he found in the case material to enable him to sustain the plea of no jurisdiction apart altogether from the question of the validity of the arrestment itself. The Lord Ordinary said that he was of opinion that the defenders were right in their contention that the pursuers, in the circumstances disclosed in the evidence, were barred by their own actings from founding on the arrestment; and his Lordship came to the conclusion that the use of the arrestment was contrary to the good faith of what passed between the parties. I must own that I cannot understand on what ground the Lord Ordinary reached that conclusion. There are no actings averred, and none are proved, which would in my opinion bar the pursuers from exercising their legal right. No doubt a party may expressly contract not to exercise his legal rights, and if he so contracts he will be held to his bargain. And at the first discussion before this Division of the Court, I understand it was maintained on the part of the defenders that the pursuers had contracted not to exercise their legal right to lay on the arrestment, and that they had undertaken that the whole £890 should reach the defenders, if the bills of lading were handed over. Indeed, an amendment of the record was allowed in this Division of the Court for the purpose of giving effect to that contention. It runs as follows:—(I am reading now from the amendment made on the first answer)—". . . the pursuers were not entitled to arrest the funds alleged to have been attached in respect of a special obligation undertaken by them to pay over to the defenders the said funds in exchange for shipping documents handed to the pursuers thereagainst. The alleged arrestment was contrary to the good faith of the pursuers' said undertaking, and in breach of the said obligation." In my opinion that is a hopelessly irrelevant statement, because it simply repeats in other language the express

[1] 22 R. 182. [2] 1908 S. C. 67. [3] 1912 S. C. 857.

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terms of the contract "nett cash against shipping documents"; and it seems to me to be idle to contend that the consignee who has paid cash in exchange for the documents into the bank of the consignor is not entitled, immediately after he has paid in the money, to arrest to found jurisdiction. There is no bad faith; there is no breach of any contract in so doing; and accordingly an averment that an express obligation was undertaken to pay over the funds to the defenders in exchange for the shipping documents does not seem to me to lead to the conclusion that there was any breach of contract in laying on the arrestment.

In any event, the arrestment which is here challenged is not an arrestment on the dependence or in execution. It is an arrestment to found jurisdiction. Now, an arrestment to found jurisdiction creates no *nexus*; it attaches no property. It is now, I think, well-established law that an arrestment to found jurisdiction does not disentitle the arrestee immediately after to part with the subjects arrested. And accordingly the arrestment to found jurisdiction did not prevent, and could not prevent, the defenders from receiving their cash. No doubt the test of the validity of an arrestment to found jurisdiction is exactly the same as the test of the validity of an arrestment on the dependence or in execution. But the effect is entirely different. That has, I think, been well settled law for forty years. Lord Justice-Clerk Moncreiff in *Trowsdale*[1] thus expresses the law:—"It is perfectly true that in point of fact an arrestment *ad fundandam* does not fix the subject arrested within the jurisdiction, for the arrestee may safely part with it, and it so far differs from an arrestment in execution; but it does not follow, and is not in my opinion the law, that there is any difference between the two kinds of arrestment in regard to the subjects arrestable." Lord President Dunedin in the case of *Leggat Brothers*[2] expresses the doctrine equally clearly. His Lordship says:—". . . the doctrine, which after a certain amount of doubt, especially, I think, as shown in the case of *Malone & M'Gibbon* v. *The Caledonian Railway Company*,[3] may now be held to be firmly established by the case of *North*[4]—the doctrine, namely, that an arrestment *ad fundandam* does not create a *nexus* as against the arrestee which prevents him from parting with the subjects—that doctrine is perfectly consistent with the other doctrine that the origin of the process was the idea that there should be property which could be taken in execution; and consequently, when you are considering whether a subject is arrestable to found jurisdiction, as was being considered in the case of *Trowsdale's Trustee*,[1] the true criterion is whether the subject is something which, if it were arrested in execution and the diligence were worked out, could be made available by the creditor in the debt." And Lord Kinnear in the same case says this:—"I, of course, keep in view what your Lordship has explained—the distinction between arrestments in execution or on the dependence and arrestments for founding jurisdiction, and we must take it as now settled in law that an arrestment for founding jurisdiction really attaches nothing. But then, it does not follow that such an arrestment will be

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[1] 9 Macph. 88, at p. 92.
[2] 1908 S. C., at p. 72.
[3] 11 R. 853.
[4] 17 R. (H. L.) 60.

good if, in fact, there is nothing to attach."[1] Accordingly, the conclusion I reach is that it was an irrelevant averment to say that an arrestment to found jurisdiction prevented the defenders from receiving their cash. It did not, and could not.

Now that would be sufficient for this case; but evidence was given in support of the amendment, I presume on the footing that the averment in the terms which we see on the amended record was really meant to allege that the pursuers had made a contract with the defenders, by which they debarred themselves from exercising their legal rights and undertook an absolute obligation that the cash should actually reach the defenders. I have examined the evidence led before Lord Mackenzie on the amendment, and I can find nothing in it to support the view that the defenders came under any such contract, or, if they did, that they broke it. No doubt at one stage the arrangement was that the shipping documents should go to the defenders in Glasgow without passing through the bank, and that in turn the pursuers should send the cash to the defenders. I think that if that mode of settlement had been ultimately resorted to the pursuers would not have been entitled to retain any part of the money against their counter claim, nor to arrest in their own hands. But I can find nothing in the evidence which supports the averment.

I therefore come to the conclusion that the arrestment was inept, that jurisdiction was not constituted, and that accordingly we should affirm the Lord Ordinary's interlocutor, although on totally different grounds.

Lord Johnston.—I concur with your Lordship. There are two grounds of decision—(1) that upon which the Lord Ordinary proceeded, and (2) that on which the case can and ought to be determined. On the first question I shall say very little except this that I think that the proof which was led was entirely incompetent and entirely ineffectual. I do not see that any change in the conditions of the contract for delivery of and payment for the goods in question was made by anything which occurred in the correspondence of July 1912. The original contract was "nett cash against bills of lading"; and I cannot find, in any of these letters, that anything was done which varies that contract one iota. The whole proof has therefore gone for nothing.

Taking, then, the case upon the footing of "nett cash against bills of lading," there was nothing to prevent the attachment of the cash by anyone, including the purchasers, if they were smart enough to do so before the cash was put beyond their reach, and I am quite unable to see that there was anything done by the purchaser here to which bad faith could be attributed. I say so much, because it is only fair to the purchaser to point out that, in the opinion of the Court, he has done nothing to have any imputation of bad faith attributed to him.

I do not, however, think that the case ought to be determined on this ground. The question really is, Was there attachment by arrestment? Now the course which was followed was that the bills of lading were

[1] 1908 S. C., at p. 76.

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handed by the sellers to their own bankers in London for collection, and by their bankers in London were sent to the latter's agents in Glasgow, and the transaction was carried out in Glasgow by the exchange of cash for the bills of lading. Now the London and Westminster Bank were clearly agents of the sellers, but the Commercial Bank in Glasgow were not; they were only the agents of the sellers' agents. And I think it has often been laid down that the agent of my agent is not my agent. There is no privity of contract between me and my agent's agent, and therefore no direct accountability on his part to me. I therefore agree with your Lordship in thinking that as arrestability depends on accountability there was here no valid arrestment.

Lord Mackenzie.—The question whether the arrestments to found jurisdiction attached anything depends upon whether there was, at the time they were used, any privity of contract between the Commercial Bank of Scotland, Limited, Glasgow, and the defenders. If there was not, then there was not a present accountability of the former to the latter. Unless the defenders could have brought an action against the Commercial Bank founded upon a direct personal obligation, arising *ex contractu* or *quasi ex contractu*, the arrestments are bad. An action of the nature of *rei vindicatio* would not, for this purpose, be sufficient. It would not be enough, to make the arrestments good, that the defenders had the ultimate right of property in what was arrested. These principles are laid down in the case of *Heron* v. *Winfields, Limited*,[1] and *Shankland & Company* v. *M'Gildowny*.[2]

The application of these principles to the present case appears to me plain. The money arrested was money paid by the pursuers into the Commercial Bank of Scotland, Limited, at Glasgow. The Commercial Bank was accountable for this money to the London County and Westminster Bank, Limited, in London. The latter had selected and employed the former as their agents. The defenders had nothing to do either with this employment or this selection, and were not parties to the contract. There is no evidence that they knew anything about the Commercial Bank. The defenders' contract was with the London bank, to whom they wrote on 31st July 1912, "Please present to Messrs J. & C. Murray, 53 Bothwell Street, Glasgow, and hand them in exchange for the amount of our statement enclosed, £890, 7s. 11d., the attached 4 Bills of Lading in duplicate and credit the amount to our a/c." The London bank were free to select any agent they chose. They chose the Commercial Bank, Glasgow, to whom they wrote on 1st August 1912, "Please present to Messrs J. & C. Murray, 53 Bothwell Street, Glasgow, and hand them in exchange for amount of statement enclosed (£890, 7s. 11d.), the attached 4 B/Lading in duplicate. Please wire fate, for which we enclose stamped form." On the principle laid down in *Mackersy* v. *Ramsay, Bonars, & Company*[3] the London bank was liable for the actings of the Commercial Bank, their agents, and the Commercial Bank was accountable to them. The fact that the account, No. 28 of process, was transmitted by the defenders to

[1] 22 R. 182. [2] 1912 S. C. 857. [3] 2 Bell's App. 30.

the London County and Westminster Bank with their letter of 31st July, and then sent on by the latter to the Commercial Bank in Glasgow on 1st August, was founded upon by the pursuers. They referred to the docquet on the account, "All payment to be made direct to Wallace, Marrs, & Co., London, or through their bankers," and maintained that this was certioration to the Commercial Bank of the fact that the defenders were the consignees. I do not think so. The notification was to the people who owed the money, viz., the pursuers, not to the Commercial Bank. Whatever effect the docquet might have had if the defenders had brought an action against the Commercial Bank on the ground that the money arrested belonged to them, it has no effect in the present case. On this ground, therefore, I hold the arrestments to be invalid.

This is sufficient to dispose of the case, and the further question does not arise except on the assumption that something was attached. An argument founded on the specialties was, however, addressed to us, and as the Lord Ordinary's judgment proceeds upon the special circumstances of the case, it is right I should state shortly my opinion upon it. In the first place, I wish to say that in so far as the Lord Ordinary's opinion is founded on authorities which lay down that an arresting creditor cannot retain the benefit of a trick, I do not think there is any warrant for imputing to the pursuers any motive to get the better of the defenders by a trick. The pursuers considered that consistently with the special bargain they had made by correspondence with the defenders they were entitled to arrest. I think they were wrong in this view. The defenders were entitled, in my opinion, to construe the pursuers' letters and telegram as meaning that if and when the bills of lading were received by them in Glasgow payment would be made by them to the defenders, that is to say, that there was an implied undertaking that the pursuers would themselves take no action to prevent the money reaching the hands of the defenders. Now whatever view may be taken of the effect of arrestment to found jurisdiction, whether it creates a *nexus* or not, its practical result when followed by arrestment on the dependence of the action would be effectually to defeat in this case what I consider the legitimate expectation of the defenders.

The facts of the case are that the pursuers considered themselves badly treated by the defenders in regard to the contracts for delivery of iron, and were unable to get from them bills of lading for 70 tons shipped to Grangemouth, and 100 tons shipped to Glasgow. Even though they had received (by arrangement with the shipping agents) the Grangemouth consignment, they had not, without the bills of lading, a proper title to the consignment. They were pressing the defenders to send on the bills of lading. The defenders delayed doing so. The pursuers had made counter claims, not of great amount—£26, 5s. 11d.—the price of the two consignments being £890, 7s. 11d. On 12th July the pursuers wrote, "We shall send you our cheque whenever you produce the B/L." Now no doubt the terms of the original contract were "cash against bills of lading," but it is one thing to make a contract "Terms Cash," it is another matter to write and induce the sellers to send something by saying, "Whenever you send what I bought I will pay you." Dealing for

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the present solely with the Grangemouth consignment, the letters and evidence show that the parties had in view that the bills of lading might be sent (1) to the pursuers in Glasgow; (2) to the shipping agents at Grangemouth; or (3) to the bankers in Glasgow. Mr Murray says in his evidence, "On 12th July 1912 it was a matter of complete indifference to me whether the bills were sent to me direct or to the Shipping Agents, or presented to me by the bank, or by someone on behalf of the defenders. I did not intend by that letter that there should be any alteration of the previous course of dealing which had been to present the Bills of Lading through the bank." On 16th July the pursuers wrote, "If you will hand the Bills/lading to the shipping Co., at Grangemouth instructing them to advise us when they had received them payment will be sent to you in course of post." In his evidence Mr Murray says, "I did not mean by that to make it a condition that the bills should be sent to the Shipping Company. I put that remark in because of a remark they made. If they had come on that date in reply to that letter of 16th July there would have been no trouble, and I would have been perfectly content that they should have been sent through the bank at that date." There was thus no indication that the receipt of the money by the defenders depended upon whether the bills of lading came to the pursuers through one channel or another. Mr Murray admits that up to the 17th of July he did not care through what channel the bills of lading came, but that on that day he changed his mind; and that thereafter his promise to pay applied only to the contingency of the bills of lading being sent either (1) direct to his firm; or (2) to the shipping agents at Grangemouth. If they were sent to a bank in Glasgow he was to use his own phrase "absolved." The unfortunate thing is that the pursuers did not make plain to the defenders what was in their minds. On 20th July they sent this telegram—"101 Canon Street, B.O., E.C., 20 Jy. 12—*received here at* 10.58. Glasgow X 13 10/22.—Wallimars, Lrd. We undertake pay Invoices less credit on receipt B. Ladings here. Atacama." It is too narrow a construction to read "here" as limited to the pursuer's office. The defenders were entitled to read it as meaning Glasgow. The defenders accordingly wrote on 22nd July—"With reference to yours of the 20th inst., we thank you for your undertaking to pay us the above amount less our Credit Note for £3, 0s. 3d. in exchange for the Bills of Lading, as per your telegram of the 20th inst. reading as follows:—'We undertake pay invoices less credit on receipt B. Ladings here.' On this understanding we are therefore handing the Bills of Lading to our Bankers for transmission to you with instruction to present same in exchange for your cheque for £353: 2/4." In his original examination Mr Murray said with reference to this letter, "(Q.) Do you agree there was no dubiety about your position—that you contracted to pay them the money for those invoice goods against presentation of the bills of lading? (A.) Yes." I think the pursuers should have seen that the defenders were not drawing any distinctions as to the channel through which the bills of lading were to go, and that they were proceeding on an undertaking to pay "us," the mode of payment being by cheque. The unchallenged receipt by the pursuers of the letter of

22nd July taken with the previous letters in my opinion operates as a bar to using arrestments to found jurisdiction. Just as the pursuers would not have been entitled to stop payment of a cheque drawn by them in favour of the defenders, so they were, in consequence of the terms of the correspondence, not entitled to stop the money being transmitted to the defenders.

So far the Grangemouth consignment only has been dealt with. The Glasgow consignment is brought into the same position by the letter of 25th July from the pursuers, which says "we shall of course pay for the goods immediately on presentation and in exchange for the Bill of Lading, and would advise you to have this document presented immediately. . . . Why don't you send your Bills of Lading through a Bank or through your agent here?"

I am therefore of opinion that if the arrestments attached anything, the pursuers were barred by their special bargain from using them.

LORD SKERRINGTON.—I agree with your Lordship in the chair and Lord Johnston on both branches of the case.

THE COURT adhered.

A. C. D. VERT, S.S.C.—W. CROFT GRAY, S.S.C.—Agents.

MRS AGNES TURNER OR FRASER, Appellant.—*A. M. Mackay.*
JOHN RIDDELL & COMPANY, Respondents.—*Horne, K.C.—Aitchison.*

No. 16.

Nov. 29, 1913.

Fraser v. Riddell & Co.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Driver of traction-engine falling from engine while drunk.*

The driver of a traction-engine, while driving the engine, fell from the footplate and was run over and killed. In an application for compensation at the instance of his widow the arbitrator found that the accident did not arise out of his employment, in respect that the man was under the influence of drink and unfit for his work at the time of the accident.

Held that the accident arose out of and in the course of the employment.

1ST DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of Lanarkshire at Glasgow, between the widow of the late James Fraser (for herself and as tutor and curator for her children) and John Riddell & Company, the interim Sheriff-substitute (Macdonald) refused to award compensation, and, at the request of the applicants, stated a case for appeal.

The case set forth:—

"(1) On 26th March 1913 the deceased James Fraser was a traction-engine driver in the employment of the respondents, John Riddell & Company. (2) About 11.30 P.M. on said date, while driving a traction-engine belonging to the respondents in Bilsland Drive, Maryhill, Glasgow, he fell off the footplate on to the roadway. (3) One of the wheels of a wagon attached to the engine passed over him. (4) As the result of the injuries he received he died on the following day. (5) When he commenced his duties on the said date, and when

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Ld. President.

Now I do not think it is pressing the arbitrator's finding too far to say that this clearly indicates that the evidence disclosed to the arbitrator that the deceased did not jump off and was not shoved off the footplate. He simply fell. If an engine driver falls off the footplate while driving his engine it appears to me that that is an accident which is incidental to the employment in which he is engaged. It is not what has been called in the cited cases "an added peril." It is just such an accident as might happen to him if he slipped his foot accidentally while perfectly sober and fit for his work. And accordingly the arbitrator finds that he was in the course of his employment at the time that the accident befell him.

But then, he further finds that, at the time of the accident, he was under the influence of drink and unfit for his work. It was argued to us to-day by Mr Aitchison that the finding that the deceased was unfit for his work comes into conflict with the finding that he was engaged in the performance of his duty of driving the engine at the time when the accident befell him. It appears to me that there is no necessary contradiction at all between these two findings. A man may be engaged in the performance of his work and an accident may occur incidental to his work, and therefore "out of" his employment, even although he is in a state of intoxication so great as to be, in the opinion of ordinary people, unfit for the performance of his work. If an accident befalls him under these conditions it appears to me that, owing to his intoxicated condition, it is rightly called an accident due to serious and wilful misconduct; but it is none the less an accident arising "out of" his employment, because it is incidental to it.

I think it unnecessary to review the authorities which have been so amply cited to us at the discussion to-day. I agree with the Master of the Rolls in the case of *Watkins*,[1] when he says that "it is not very easy to put cases on either side of the line," that is, to say whether the injury is accident arising "out of" the employment but brought about by serious and wilful misconduct, or whether it is more correctly denominated an injury which has not arisen "out of" the employment but is due to an "added peril." And I still more agree with what I observe Lord Justice Moulton says in the same case, where he points out that "Although serious and wilful misconduct does not prevent the workman recovering compensation in these cases, it does not make a thing within the Act that otherwise would not be; and so we have the difficulty of finding out a line between something that takes the accident entirely out of the employment and something which within the employment is a serious and wilful misconduct which leads to the accident. It is a difficulty which I do not think will ever be solved by phrases." I entirely agree with that opinion.

This case, it seems to me, it is not difficult to place on its proper side of the line. I think the facts found by the arbitrator lead necessarily and inevitably to the conclusion that the accident occurred not only while the man was "in the course of" his employment but arose "out of" his employment. Accordingly I propose that we should answer the question put to us in the stated case in the negative.

[1] 5 Butterworth's W. C. C. 307.

LORD SKERRINGTON.—I agree with your Lordship and have nothing to add. Nov. 29, 1913.

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LORD HUNTER.—I also agree.

THE COURT answered the question of law in the negative.

HILL MURRAY & BRYDON, S.S.C.—STEEDMAN & RICHARDSON, S.S.C.—Agents.

No. 17.

Dec. 2, 1913.

THE FARMERS' MART, LIMITED, Pursuers (Respondents).—*Sandeman, K.C.—W. Mitchell.*
JOHN MILNE, Defender (Reclaimer).—*Murray, K.C.—Wilton.*

Farmers' Mart, Limited, v. Milne.

Contract—Pactum illicitum—Trustee in bankruptcy—Agreement to share fees.

A firm of land-agents agreed with their manager that all fees which he earned from any appointment which he might obtain as trustee or factor on any estate should be pooled with all fees which they derived as salesmen or valuators in connection with that estate, and that the fees so pooled, after payment to the firm of the balance of any debt due to them by such estate, should be divided equally between the parties.

In an action by the firm against their manager to recover, under this agreement, a proportion of fees alleged to have been earned by him as trustee or factor on various estates and, *inter alia*, as trustee in a sequestration, *held* (*rev.* judgment of Lord Hunter) that, although there was no suggestion that the defender had acted improperly in the conduct of his trusteeships, still the agreement necessarily placed him in the position of having conflicting interests, and was therefore illegal and unenforceable, and action *dismissed*.

2D DIVISION. Lord Hunter.

ON 12th May 1913 the Farmers' Mart, Limited, Brechin, brought an action against John Milne, auctioneer, for an accounting in regard to all fees derived by him between 1st April 1907 and 19th August 1908, as factor or trustee on any estate, and for payment of the proportion of such fees due by him under an agreement between him and the pursuers dated 9th April 1907.

The pursuers averred that they carried on business in Brechin and elsewhere as live-stock salesmen, agents, auctioneers, appraisers, and land-surveyors. The defender was appointed manager of the pursuers' business in 1899, and continued to act as such till 19th August 1908. After 1st April 1907 he was employed on the terms contained in an agreement dated 9th April 1907, to which the pursuers were the first parties and the defender was the second party, and which provided, *inter alia* :—"(Fifth) The second party shall be entitled but shall not be bound, to undertake any factorship or trusteeship on, or other office involving the management of, any estate, provided always that before undertaking any such factorship, trusteeship, or office, he shall first obtain the consent of the first parties, unless in the case of a testamentary or other gratuitous trusteeship, executorship, or factorship, any of which he shall be entitled to accept without the consent of the first parties. The fees or other remuneration derived by the second party from any such factorship, trusteeship, or office as aforesaid, accepted by the second party after the commencement of this agreement, shall (after deduction therefrom of all charges and other out-of-pocket expenses incurred by the second party in connection therewith, and that whether by way of legal, clerical, or other assistance or otherwise) be pooled with all fees and commissions, including fees for measure-

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ments derived by the first parties from any sales or valuations in connection with any such estate under the management of the second party as aforesaid, and the proceeds thereof shall be divided in the portion of one-half to the first parties, and the other half to the second party, provided always that, before any such division shall take place, there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate, after giving credit for all sums received, or falling to be received, on account of such debt, and that whether from the principal or any subsidiary or collateral obligant therefor, or from the respective estate of any such obligants. . . ."

The pursuers also averred that between 1st April 1907 and 19th August 1908 the defender had acted as trustee or factor on several estates, and in particular as trustee under a trust-deed for behoof of creditors granted by John Fairweather, and as trustee on the sequestrated estates of Stewart Dick, and that the defender refused to account to the pursuers for the proportion of fees derived from his trusteeships, as he was bound to do under the fifth clause of the agreement of 9th April 1907. There was no averment by either party which suggested that the defender had in any way acted improperly in the discharge of his duties as trustee.

The pursuers pleaded, *inter alia*;—(1) The defender being bound under and in terms of the said agreement of 9th April 1907, and in particular article fifth thereof, to account to the pursuers for all fees or other remuneration derived by him (*a*) from his said trusteeship on the trust-estate of the said John Fairweather, and (*b*) in connection with the office of factor, trustee, or other office involving the management of any other estate undertaken by the defender during the period up to 19th August 1908, the pursuers are entitled to decree of accounting as concluded for, and, on the balances due to the pursuers being ascertained in terms of said agreement, they are entitled to decree for the same.

The defender pleaded, *inter alia*;—(1) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the defender is entitled to decree of absolvitor. (3) The agreement founded upon by the pursuers being void in respect it is corrupt and illegal, the pursuers cannot maintain the present action, and the same ought to be dismissed.

On 29th October 1913 the Lord Ordinary (Hunter) pronounced an interlocutor repelling the 1st and 3rd pleas in law for the defender, and ordaining him to lodge the accounts called for.*

* "OPINION.—[After a narrative of the facts]—In support of his case the defender's counsel referred me to several cases. In *Laughland* v *Millar, Laughland, & Company*, (1904) 6 F. 413, one of the directors of a company entered into an agreement with the managers of the company that if they received a bonus of £700 from the company on the sale of its business he should receive £200 from them. The contract was held to be illegal, and the managers were assoilzied in an action for the £200 raised against them by the director. The ground of that decision was that the managers and the director had entered into a combination to get into their possession a sum of money belonging to the shareholders, and, in the evidence given by the director, he admitted that but for the agreement he would have done what it was his duty to do, *i.e.*, he would have had the £700 divided among the shareholders. In *Harrington*, (1878) 3 Q. B. D. 549, it was decided, as put by Cockburn, C.J., 'that when a bribe is given, or a promise of a

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The defender reclaimed, and the case was heard before the Second Division (without Lord Salvesen) on 2nd December 1913.

Argued for the reclaimer;—A trustee in bankruptcy acted in a fiduciary capacity. He represented the interests both of the creditors and of the bankrupt, could be removed if he did not perform his duty faithfully, and could take no benefit from his office except his commission.[1] It was accordingly incumbent on him not to put himself in any position where his interest conflicted with his duty. This was just what he had done in the present case, for, under the fifth clause of the agreement, he had a direct interest to employ his firm as valuators, to deal leniently with their charges, and to look favourably on their claims as creditors. This was very different from the kind of agreement in *Sleigh* v. *Sleigh's Judicial Factor*,[2] and was a *pactum illicitum* which the Court would not countenance in any way.[3] Moreover, the agreement to pool fees was an offence against the Prevention of

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bribe is made, to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be.' The defender's counsel founded strongly on the case of *Macgown*, 13th December 1808, F. C., where it was held that a bargain by a competitor for the office of trusteeship upon a bankrupt estate to hand over a proportion of his commission as trustee to other competitors was corrupt.

"I have not been able to satisfy myself that the decision in any of the cases to which I was referred would justify me in dismissing the action, as I was asked to do by the defender's counsel. As regards the pooling arrangement, I do not see that there is anything corrupt in the manager of a business arranging for his remuneration as trustee being shared by the members of the firm whose business he manages. It is quite a usual arrangement that one of the partners in a law-agents' or an accountants' business should communicate the fees earned by himself individually for discharging such duties as those of trustee on a sequestrated estate. If a partner may so communicate his fees I do not see why the manager of a business may not make a similar arrangement. What is communicated are fees actually earned, and the agreement entered into does not involve any failure of duty on the part of the trustee towards those whose interests he must protect. It is maintained, however, for the defender that the arrangement between the parties in this case enables the pursuers to get an undue preference over the other creditors of a bankrupt. The stipulations as to the pursuers receiving payment in full of any debt due to them by the bankrupt out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties. The creditors on the estate have not in any way suffered, and I do not think there is anything illegal in one creditor receiving more than the others as long as he does not receive a preference out of the bankrupt estate on which all ought to rank equally. As regards the provision that the pursuers are to pool fees received by them for measurement work with the fees earned by the defender as trustee, I do not think that the averments are of such a character as to justify my hold-

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[1] Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), secs. 74, 125, 159; Goudy on Bankruptcy, (3rd ed.) pp. 244, 365 *seq.*

[2] 1908 S. C. 1112.

[3] Macgown v. Tod, Dec. 13, 1808, F. C.; M'Taggart's Reps. v. Roberton, (1834) 12 S. 338; Mann v. Dickson, (1857) 19 D. 942.

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Corruption Act, 1906.[1] The parties had acted "corruptly," in the sense explained by Blackburn, J., in *Bewdley Election Petition*.[2] It was no defence to say that in fact the defender had not acted improperly in his capacity as trustee. If the agreement was corrupt, the irrefutable presumption was that his mind had been influenced.[3] The result was that, as the agreement was on the face of it illegal and unenforceable, the only course was to dismiss the action.[4]

Argued for the respondents;—If this contract were illegal and unenforceable, which was denied, it could only be because it was contrary to public policy, and it was only in very special circumstances that the freedom of contract was interfered with on this ground.[5] There were no such circumstances in this case. The whole question turned on the construction of the agreement, since it was not alleged that any illegality had in fact been committed. There was nothing in the agreement itself which of necessity implied that its execution involved, or might involve, any impropriety. It did not necessarily place the defender in a position of double interest, for there was nothing in the agreement binding him either to accept the trusteeship on an estate on which the pursuers were creditors, or to give employment to the pursuers. Seeing that the agreement could be fulfilled in a perfectly legal manner, it could not be set aside *ab ante* without proof of some actual illegality.[6]

Lord Justice-Clerk.—[After narrating the facts and the terms of the agreement]—Now that is an arrangement by which, quite plainly, the Mart was to get the benefit of carrying out sales or valuations in connection with estates under the management of the defender, in those cases where the defender had employed the Mart to carry out such sales or valuations, and that then their profits and his remuneration as trustee were to be pooled and halved between the parties. It seems to me quite clear that that was an arrangement which might lead to double interest, since it would be to the advantage of the defender to employ the Mart as sales-

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ing that the whole agreement is illegal, and the defender freed from the obligations under which he has voluntarily come. It may be that as regards certain of the fees pooled it may be established that there was an improper stipulation which renders it against public policy to give effect to the provisions of the agreement; but I do not think that on a mere construction of the terms used I should be justified in sustaining without inquiry a plea which would free the defender from obligations deliberately undertaken by him. I shall therefore meantime order an account by the defender—a course which will allow him, if he can, to state and prove any illegality in connection with any of the particular items in the accounting."

[1] 6 Edw. VII. cap. 34, sec. 1; Graham v. Hart, 1908 S. C. (J.) 26.

[2] (1869) 19 L. T. 676, at p. 678.

[3] Harrington v. Victoria Graving Dock Co., (1878) 3 Q. B. D. 549; Hovenden & Sons v. Millhoff, (1900) 83 L. T. 41; Shipway v. Broadwood, [1899] 1 Q. B. 369.

[4] Laughland v. Millar, Laughland, & Co., (1904) 6 F. 413; Scott v. Brown, Doering, M'Nab, & Co., [1892] 2 Q. B. 724; North Western Salt Co., Limited, v. Electrolytic Alkali Co., Limited, [1913] 3 K. B. 422.

[5] Pollock on Contracts, (8th ed.) p. 332; Printing and Numerical Registering Co. v. Sampson, (1875) L. R., 19 Eq. 462, *per* Jessel, M.R., at p. 465.

[6] Thwaites v. Coulthwaite, [1896] 1 Ch. 496.

men or valuators in preference to others, and also to his advantage that their charges should be as high as possible, since 50 per cent of the fees would ultimately find their way into his own pocket.

I do not think that the proper way to look at this case is to consider merely what has happened or what has been done in working out the arrangement. The question is not whether the defender has taken an improper advantage of his office, but whether he was in such a position as to be tempted to do so, that is to say, whether he was placed in such a position that his duty conflicted with his interest. In my opinion he was. A contract of this kind may be innocent in the sense that it may be possible to carry it out without committing any illegality. But that is not the right way to look at the contract in this case. Is the agreement one under which there may be a corrupt use of the defender's position? If so, and if under the agreement that may be done which the law strikes at, then I think the law strikes at the agreement itself because of what may be done and not because of what has been done.

Holding this view of the proper reading of the contract, I have come to the conclusion that the pursuers are not entitled to found on this contract, and that we ought to recall the Lord Ordinary's interlocutor.

LORD DUNDAS.—I concur.

LORD GUTHRIE.—I am of the same opinion.

The Lord Ordinary has repelled the third plea in law which is to the effect that the agreement is corrupt and illegal. But he has made a reservation in his opinion which was admitted not to be consistent with the terms of his interlocutor, because he says, "It may be that as regards certain of the fees pooled it may be established that there was an improper stipulation which renders it against public policy to give effect to the provisions of the agreement."

It is averred by the pursuers, and it is not denied, that in several instances the defender acted as factor and trustee on sequestrated estates, but it is not said that he ever acted improperly. The question raised in this case is thus a pure question of construction of the agreement, seeing that there are no averments of corrupt conduct under any of the three heads which Mr Wilton founded on as involving Milne in a position of double interest. It was said by Mr Wilton, first, that the defender had an interest to employ the firm, whose servant he was, for valuations and other purposes. Secondly, Mr Wilton said that he had an interest to allow his firm to pile up their charges, if they were so employed. And, thirdly, Mr Wilton said that he had an interest to deal favourably with his firm's claims as creditors.

I agree with your Lordship in thinking that, in all these particulars, Mr Milne had a direct and necessary double interest which the law will not allow. As was said by Mr Mitchell, almost any contract may involve the possibility of a double interest, but that is not to say that in every case a question of double interest necessarily or directly arises. Here, seeing that, under the arrangement between him and his firm, the defender might participate in the results of any of those three things that I have

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mentioned, the case does come within the category of direct and necessary double interest. Take the last of them—the interest that he had to deal favourably with his firm's claims. It appears that, under the 5th clause of the contract, before a division was made out of what had been pooled, "there shall out of said proceeds be paid to the first parties the balance of any debt remaining due to them from such estate." That was to be deducted. Therefore, as much as possible should, in order to suit Milne, be charged against the estate, leaving as little as possible to be paid out of the fund of which he was to get a certain proportion.

Accordingly, I think, applying the words of Chief Justice Cockburn in the case of *Harrington*,[1] this is a case, where a payment, or a promise of payment—whether you call it a bribe or not—was given to this man in the cases where he acted as a factor or trustee which put him in the position of having a direct and necessary inducement to act otherwise than with loyalty and fidelity to the creditors whom he represented. In that case, as the Lord Chief Justice puts it, "the agreement is a corrupt one and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be."

THE COURT recalled the interlocutor reclaimed against, sustained the first and third pleas in law for the defender, and dismissed the action.

TAIT & CRICHTON, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 18.

Dec. 3, 1913.

Costin v. Hume.

MARY CATHERINE COSTIN, Pursuer (Appellant).—*Carmont.*
ANDREW HUME, Defender (Respondent).—*A. A. Fraser.*

Title to sue—Donation—Title of donee to sue for recovery of gift sent in error to third party.

The pursuer in an action for payment of a sum of money averred that the money was a charitable donation intended for her which had been sent in error to the defender, and that the defender fraudulently refused to part with it though informed by the donor that the gift was not for his benefit but for that of the pursuer.

Held that the pursuer had relevantly averred a title to sue the defender for recovery of the gift.

2D DIVISION. Sheriff of Dumfries and Galloway.

ON 7th July 1913 Mary Catherine Costin, Dumfries, brought an action in the Sheriff Court at Dumfries against Andrew Hume, music teacher there. The pursuer craved the Court "to find and declare that defender has no right of property or any other right, title, or interest in a sum of £67, 2s. which was remitted to him on or about 2nd January 1913 out of the 'Titanic' Relief Fund by the committee in charge thereof, through Mr Percy F. Corkhill, the Town Hall, Liverpool; that the said sum was remitted to defender for the benefit of pursuer and her pupil child who was born on 18th October 1912, and to be paid over by him to pursuer; and that defender is bound to pay said sum and all interest accrued thereon to the pursuer"; and concluded against the defender for payment of £67, 2s.

The pursuer averred:—(Cond. 1) "The late John Law Hume, who

[1] 3 Q. B. D. 549.

was one of the bandsmen on the White Star Liner 'Titanic,' was drowned in the wreck of that vessel in mid Atlantic on or about 15th April 1912. He was a son of the defender, and resided with him." (Cond. 2) "At the date of the death of the said John Law Hume the pursuer was engaged to be married to him." (Cond. 3) "Immediately after the wreck of the 'Titanic,' public subscriptions were opened for the benefit of the dependants of those who had perished in the disaster, including a fund known as the Mansion House Fund, which was administered by a committee under the Lord Mayor of London. As the pursuer was about to become the mother of a child of which the said John Law Hume was the father, she, through her agent, Mr G. T. Hendrie, solicitor, Dumfries, lodged an application for a grant from the said fund on or about 28th June 1912 . . ." (Cond. 4) ". . . On the 18th October 1912 the pursuer's child, a daughter, was born, and intimation was, on same date, sent to the Public Trustee. By letter dated 21st October 1912, the Public Trustee wrote to Mr Hendrie—'I have to acknowledge receipt of your letter of 18th inst. informing me that an infant child has now been born in the Costin case. This child has now been entered on the schedule of dependants, and her mother will receive consideration for relief in respect of herself and the child in due course.'" (Cond. 5) "By decree dated the 2nd and 3rd, both days of December 1912, in an action in the Sheriff Court at Dumfries at the instance of the pursuer against the defender and others as representatives of the said deceased John Law Hume, the Sheriff-substitute found and declared (first) that the said John Law Hume was the father of the female child of which the pursuer was delivered on Friday 18th October 1912, and (second) that the pursuer was entitled to recover out of any estate left by the said John Law Hume" inlying charges and aliment to the amount of £67, 2s. (Cond. 6) "On 11th December 1912 Mr Hendrie sent a copy of said decree to the Public Trustee, and in reply received a letter dated 16th December 1912 stating that he had forwarded the copy decree to Mr P. F. Corkhill, honorary secretary of the Liverpool 'Titanic' Fund, whose committee was dealing with the case, and Mr Hendrie was requested to communicate direct with Mr Corkhill in future at the Town Hall, Liverpool. Mr Hendrie accordingly did so, and received a reply from Mr Corkhill dated 18th December 1912 that the claim was having attention." (Cond. 7) "As Mr Hendrie did not hear further from Mr Corkhill for several months, he caused inquiries to be made and ascertained that Mr Corkhill's committee had considered the pursuer's claim with the copy decree before them, and had resolved to make a grant for the benefit of the pursuer and her child out of the funds at their disposal of £67, 2s., being a sum equal to the total amount of aliment and inlying expenses awarded under said decree. This sum was remitted by Mr Corkhill to the defender on 2nd January 1913. It was acknowledged by the defender by letter dated 3rd January 1913, in which he said—'I note that the cheque you enclose corresponds in value to the claim which I am given to understand has been put forward on behalf of Miss Costin.' The defender, prior to that date, had been in correspondence with Mr Corkhill making and urging claims on his own behalf, and urging that the pursuer's claim should not receive consideration by the committee. But Mr Corkhill made it clear to the defender that the committee did not and could not regard the defender as in any way dependent on the deceased, and

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that the pursuer's claim was a good one, as the committee believed it was the intention of the deceased to marry the pursuer, in which case he would have had the obligation of a wife and child. . . ." (Cond. 8) "The said remittance of £67, 2s. was made to the defender under the erroneous impression that the foresaid decree was binding upon him personally, and that he either had implemented or would implement the same by payment of the full sum down. He had, in fact, alleged to the committee that the pursuer's claim had been settled. . . ." (Cond. 9) "Having ascertained the foregoing facts regarding the remittance of £67, 2s., Mr Hendrie, on 25th April 1913, applied to the defender for payment, and in answer the defender wrote on 26th April 1913—'I have not received any sum of money to be paid to your client; had it been otherwise I would have adopted one of two courses, viz., either sent the sum to you or returned it to the sender. The sum to which you refer was sent me as a full payment of my own personal claim of which I have full confirmation thereof.' This was duly communicated to Mr Corkhill who, after making thorough inquiry, wrote to defender on 18th June 1913, informing him definitely that the money was intended for the benefit of pursuer and her child, and not in any sense for defender's own benefit. But, in face of that intimation, the defender still lays claim to the money, and his agents, Messrs Whitelaw & Edgar, solicitors, Dumfries, on 28th June 1913, wrote to Mr Hendrie as follows—'We have seen Mr Hume, and are instructed by him to say that the £67, 2s. which he received was intended for him, and he is therefore not prepared to pay over any part of that sum to your client (the pursuer).' The defender is thus fraudulently attempting to appropriate the said money, and the pursuer has been compelled to raise the present action. . . ."

The pursuer pleaded, *inter alia*;—(1) The sum of £67, 2s. having been remitted to defender for the benefit of the pursuer and her child, and not to any extent for the personal benefit of the defender, and the defender having laid claim thereto as his own personal property, the pursuer is entitled to decree of declarator and payment in terms of the prayer of the writ. (2) The defender having fraudulently laid claim to said money after direct intimation from the sender that it was not for defender's personal benefit, should be ordained forthwith to consign the amount in Court pending the final disposal of this action. (3) *The defender having fraudulently laid claim to said money after direct intimation from the sender that it was not for the defender's personal benefit, the pursuer is entitled to declarator and payment as craved.**

The defender pleaded, *inter alia*;—(1) No title to sue. (2) The action is incompetent, and should be dismissed, with expenses. (3) The averments being insufficient to support the conclusions of the writ, the action should be dismissed, with expenses.

On 21st October 1913 the Sheriff-substitute (Campion) sustained the first plea in law for the defender and dismissed the action.

The pursuer appealed, and the case was heard before the Second Division (without Lord Salvesen) on 2nd and 3rd December 1913.

Argued for the appellant;—The pursuer had averred a relevant title to sue the defender for recovery of the money. The money

* Plea (3) was added by amendment during the debate in the Court of Session.

had been sent to the defender for behoof of the pursuer. If in such circumstances the sender had become bankrupt, his trustee could not have claimed the money.[1] The "Titanic" Fund Committee had abandoned all right to or interest in the money, and the only person who could vindicate a right of property therein was the pursuer.

Argued for the respondent;—The pursuer's averments disclosed neither a title to sue nor a relevant ground of action. She had suffered no pecuniary loss and therefore had no interest.[2] Even if she were considered to have an interest, that *per se* did not give her a title.[3] There might be a relationship of a contractual nature between the "Titanic" Fund Committee and the defender, but the pursuer could not found on the existence of such a contract.[4] The pursuer had no assignation from the Committee, and mere acquiescence or concurrence on their part did not cure the defect in the pursuer's title.[5]

LORD JUSTICE-CLERK.—This case has been thrown out in the Court below on the ground, as stated by the Sheriff-substitute,—who treats the case as a *condictio indebiti*,—that there was no title to sue. I cannot agree in that judgment. We cannot deal with the merits of the case at this stage, but it appears to me that the pursuer has set out a good title to sue. Her case is simply this, that a certain sum of money was sent by A to B to be delivered to her, and that B declines to deliver it. In those circumstances, it appears to me that the proper course is to remit the case back to the Sheriff to allow a proof.

LORD DUNDAS.—I agree, and if I add a few words it is only because the case is rather a peculiar one. The Sheriff-substitute, as your lordship has pointed out, sustained the plea of no title to sue, and when the case came here we also heard an argument by the respondent's counsel to the effect that the pursuer's case was irrelevant. That contention is not very artistically stated on the record, but I think the third plea for the defender was meant to raise it. So that there are before us pleas to relevancy and to title to be considered. The second plea for the defender was (no doubt quite rightly) abandoned by counsel at our bar.

Now I agree with your lordship in thinking that, as regards the plea to title, the Sheriff-substitute has fallen into error. He says in his opinion: "It is a case of a gratuitous contribution granted by the committee of the 'Titanic' Relief Fund for the benefit of pursuer and her child. But the pursuer would not have been in the position of having a title to sue said committee for the sum in question. If so, she cannot have now a better title to sue anyone in whose hands the sum awarded may, through some misunderstanding, be deposited." I think there is a

[1] **Brierly v. Mackintosh**, (1843) 5 D. 1100, *aff.* 5 Bell's App. 1.
[2] **M'Donald v. M'Call**, (1890) 17 R. 951; **Hunter v. Hunter**, (1904) 7 F. 136.
[3] **Mackay's Manual of Practice**, p. 126, commenting on **Pyper v. Christie**, (1878) 6 R. 143, *per* Lord Young, at p. 145.
[4] **Pollock on Contracts**, (8th ed.) p. 223; **Tweddle v. Atkinson**, (1861) 1 B & S. 393.
[5] **Hislop v. MacRitchie's Trustees**, (1881) 8 R. (H. L.) 95.

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non sequitur involved in that statement. Be it that the pursuer could not have sued the donor, the charitable fund, if they had not paid her, surely it does not follow that, if the charitable fund places the money intended for the pursuer and her child in the hands of a third party, the pursuer may not perfectly well, so far as title goes, sue that party for the money. Suppose the fund had chosen to deposit the money in a bank for behoof of the pursuer and her child, could the bank possibly have disputed liability to pay the money upon her due demand? I think not. The Sheriff-substitute also talks about *condictio indebiti*. I cannot see that *condictio indebiti* arises here at all. It is not a case where the donor is endeavouring to get repayment of money which he had paid under error. It is a case of this pursuer seeking, not repayment, but payment from the defender who, she says, has got money belonging to her in his hands. I think, therefore, with your Lordship, that the pursuer's averments are quite relevant to support her title and also, if substantiated, to support her case upon the merits. But I agree in thinking that we cannot go further than that at present, and that the case must go back to the Sheriff-substitute for proof, because the respondent's counsel is not in a position to admit the documents upon which obviously the case to a large extent depends. We cannot, therefore, repel even the plea to title in the meantime, and it is not worth while to repel the plea to relevancy. The pursuer's averments bearing upon her title to sue must go to proof along with her averments on the merits. All that we now say is that her record is relevant, as regards both title and merits; but the documents and other matters requiring substantiation will have to be proved.

Lord Guthrie.—I am of the same opinion. The Sheriff-substitute, although he has found that the pursuer has no title to sue, has pretty clearly indicated that he has no sympathy, so far as the facts have been brought before him, with the defender's position, because he says, "The defender however denies that he has any funds belonging to the pursuer, though if there ever could be any misapprehension on that point it must surely have been effectually removed by the letter of 18th June 1913 from Mr Corkhill, the secretary of the fund, to the defender Hume."

In dealing with the title to sue he has not mentioned or adverted to the case of fraud which the pursuer makes in her condescendence. The case of fraud against the defender comes out in condescendence 7. She says, "Mr Corkhill made it clear to the defender that the committee did not and could not regard the defender as in any way dependent on the deceased, and that the pursuer's claim was a good one." Then in condescendence 9 she says, "The defender is thus fraudulently attempting to appropriate the said money."

The Sheriff-substitute, on the other hand, deals with the case as one where there has been some misunderstanding. He says, "If so she cannot have now a better title to sue anyone in whose hands the sum awarded may through some misunderstanding be deposited." Then he says, "The sum in question may have been remitted to the defender Hume under the erroneous impression that the defender had already settled with the pursuer." As I read the pursuer's case, it is not a case

of misunderstanding or erroneous impression at all, but that the defender was not only bound to know but did actually know that he was getting this money for Miss Costin and not for himself. A plea in law has now been added appropriate to the averments of fraud.

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THE COURT pronounced this interlocutor:—"Sustain the appeal, recall the interlocutor appealed against, allow to the parties before answer a proof of their respective averments."

BEVERIDGE, SUTHERLAND, & SMITH, W.S.—R. F. CALDER, Solicitor—Agents.

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MISS ELIZABETH BIRNIE COUPER, Pursuer (Respondent).—*Cooper, K.C.—Wilton.*

RIGHT HONOURABLE ALEXANDER HUGH BRUCE, BARON BALFOUR OF BURLEIGH, Defender (Reclaimer).—*Clyde, K.C.—J. H. Millar.*

Reparation—Slander—Privilege—Sufficiency of averments of malice—Report by ratepayer to local authority as to management of a public hospital.

The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer for defamatory statements regarding her conduct, contained in letters addressed by him to the County Council and to the Local Government Board, reporting information which he alleged he had received with regard to the management of the hospital, and demanding an inquiry. The pursuer averred that the defamatory statements were deliberately invented by the defender, although he had information in his possession which disproved them; that they were made maliciously and with the intention of injuring her; that the defender, although he stated in his letter to the County Council that certain information as to the hospital had been given to him, had in point of fact received no such information; and that the letter to the Local Government Board was accompanied by a private letter from the defender to a member of the Board, designed to influence him against the pursuer in considering the charges as to her management of the hospital, and that the defender declined to produce this letter although it had been returned to him.

Held that, while the defender's letters were privileged, facts and circumstances sufficient to infer malice were averred; and issues *allowed*.

Reparation—Slander—Innuendo.

A ratepayer having made certain charges against the matron of a hospital, an inquiry was held in which evidence was given by the matron and by other members of the hospital staff. The commissioner who conducted the inquiry reported adversely on the credibility of certain members of the staff, but stated his belief in the truthfulness of the matron, and exonerated her from the charges made against her. On this report being sent to the ratepayer, he acknowledged receipt of it in a letter in which he said: "I have but a languid interest in the question of which member of the staff lied the most." In an action of damages for defamation brought by the matron against the ratepayer, the pursuer sought to innuendo these words as representing that she had lied in giving evidence at the inquiry.

Held (*rev.* judgment of Lord Dewar) that the words would not bear this innuendo; and an issue *disallowed*.

(SEE report of previous action between the same parties, 1913 S. C. 492.)

2D DIVISION. Lord Dewar.

On 26th July 1912 Miss Elizabeth Birnie Couper, matron of

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the Clackmannan Combination Infectious Diseases Hospital, Alloa, brought an action of damages for defamation against Lord Balfour of Burleigh, residing at Kennet, Alloa. On 15th January 1913, by interlocutor of the Second Division, that action was dismissed, in respect that the pursuer's averments were irrelevant.*

Thereafter, on 4th April 1913, Miss Couper brought the present action of damages for defamation against Lord Balfour of Burleigh.

In this action the pursuer, after setting forth that the hospital was administered by a committee of management who were nominated by the County Council of Clackmannan and the burghs of Alloa, Alva, Tillicoultry, and Dollar, averred:—(Cond. 2) "On 15th July 1911 two children, Rose and Carlos Forbes, aged respectively six and three years, were admitted to the hospital, being notified by Dr James Robertson, Clackmannan, their family medical attendant, as suffering from scarlet fever, and were placed in the scarlet fever ward. On 31st July a Mrs Comrie was admitted to the hospital suffering from scarlet fever, and died next day in the hospital. Carlos Forbes died in the hospital on 21st August 1911." (Cond. 3) "On or about 1st September 1911 the defender, without communicating in any way with the said Hospital Committee, addressed the following letter to James Whitehead Moir, solicitor, Alloa, clerk to the County Council of Clackmannanshire, namely:—

'Kennet, Alloa, Sept. 1, 1911.

'Dear Mr Moir,—I desire to lay before you the following statement of facts, and beg the favour that a stringent inquiry will be made into the whole circumstances, which seem to me to reflect very seriously on the management of the County Fever Hospital.

'On Saturday, July 15th, two children of my overseer, Mr R. Forbes (Rose and Carlos being the Christian names), were taken to the hospital. They were both suffering from scarlet fever of a very mild type. Both were out of bed and progressing to a favourable recovery when seen by their parents on August 5. On August 11th Rose was sent home said to be cured, but on the following day or on the 13th she developed serious fever, and had to be again taken to the hospital. This time the fever was most severe. I understand it was of the type known as "Septic." The little boy also developed the severe type of fever about the same or *an earlier date.*

'The serious part of the case is this, that on or about July 30th, a woman from Sauchie with the most malignant type of fever was put into a bed in close proximity to the children, almost the next bed to one of them. This woman died within a few hours. The dates would seem to show that both children were infected from this poor woman with the malignant fever, and as I have said, the little boy died. I am told that a lad Norval from Clackmannan, who entered the hospital about May 22nd suffering from the same mild form of fever as these two children, also got the serious type of fever in the hospital, but recovered. So far the facts are not, I think, susceptible of contradiction. I am told, but this is hearsay, that the matron was responsible for putting the Sauchie woman into the close proximity to the two Forbes children, and that she did it in spite of remonstrances from at least one other member of the staff. If this is the case it points in my opinion to criminal conduct.

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'In any case the whole circumstances should in my opinion be made the subject for a most rigid and circumstantial inquiry. I am confident you will agree with me, and that the County Council will see that such an inquiry is made.

'I add that I reserve my right to carry the matter further by appeal to the Local Government Board, or otherwise as may seem right.—I am, faithfully yours, 'BALFOUR OF BURLEIGH.

'J. W. Moir, Esq.'

The defender on any matters affecting the hospital had previously communicated with the said Hospital Committee, and in regard to such matters it was his duty, and he knew it, if he had any complaint to make against the hospital staff, to make such complaint to the said Hospital Committee." (Cond. 4) "The statements in the said letter, namely:—[The portion of the letter from "The serious part" to "criminal conduct." was here quoted]—are of and concerning the pursuer, and are false, calumnious, and malicious. The woman referred to was put in the bed in which it is customary to put female patients on their admission. If the defender had made any inquiry he would have found this to be the case. It was not true that the defender had received any information, hearsay or otherwise, that the pursuer had put the woman into the bed mentioned in spite of remonstrances from at least one other member of the staff. No such remonstrances had been made, and the defender was never told that they had. Further, it was not true that the defender had been told that a lad Norval had entered the hospital suffering from the same mild type of fever as the two children, and had got the serious type in the hospital. A boy Norval was admitted to the hospital, but he was suffering on admission from a very bad type of fever. The statements referred to were made by the defender recklessly and without regard to whether they were true or false. These statements were intended to represent and convey, and did represent and convey, the meaning that the pursuer was responsible for the death of Carlos Forbes mentioned in the letter by reason of her criminal conduct as matron in putting a patient suffering from the most malignant type of fever into close proximity to the said Carlos Forbes. There was absolutely no foundation for any imputation upon the character of the pursuer." (Cond. 5) "The defender had no right or duty to make the said statements complained of, and in any event he had no right or duty to make the said statements to the said James Whitehead Moir. The said James Whitehead Moir was not an official of the hospital, nor concerned in its management. The County Council of Clackmannanshire, to which body the said James Whitehead Moir was clerk, was not the proper authority to receive or deal with complaints against the hospital, and the defender knew that it was not. Any complaint should have been addressed to the Hospital Committee, and the defender knew that. The defender addressed the said letter to the said James Whitehead Moir instead of to the said Hospital Committee for the purpose of prejudicing the said committee and their servants, and in particular the pursuer, in the eyes of the County Council, who elect four out of thirteen members of the said committee, and with a view to getting the County Council to influence its representatives on the said committee to support his false accusations when the matter was considered by the said committee, who, alone, as he well knew, could investigate them. Further, with the object of forcing both the County Council to use pressure upon

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the said committee and of compelling the said committee to make a report substantiating his false accusations, he intimated in the said letter that he reserved his right to appeal to the Local Government Board, by way of threat, believing that he would thereby coerce the said committee into making a report bearing out his accusations rather than have a Local Government Board inquiry into their administration. . . ." (Cond. 6) "The said letter of 1st September 1911 was transmitted by the said James Whitehead Moir to the said Hospital Committee. Neither he nor the County Council of Clackmannan had power to investigate the accusations made therein, and the defender knew that they had not. After inquiry the said committee found that the allegations of the defender against the management of the hospital were not supported by any evidence, and in particular with regard to the said statements complained of by the pursuer as affecting her, the said committee found that they were (as they were in fact) groundless. The said committee further recorded their opinion that the defender should either substantiate his said complaint in regard to her by evidence or withdraw it. In particular the committee found (1) that the lad Norval had come into hospital suffering from a severe attack of scarlet fever, and that his illness was not contracted there; (2) that the woman referred to in the defender's letter of 1st September was put into the bed into which it was customary to put new patients; and (3) that the members of the nursing staff on duty at the time in question repudiated the statement to the effect that any remonstrance had been made by them. Further, it appeared from reports by the physician who had charge of the hospital that it was extremely doubtful, in view of subsequent developments, whether the diagnosis of the said Dr Robertson, that the said two children were suffering from scarlet fever when they went to the hospital, was correct. The said Dr Robertson is a personal friend of the defender." (Cond. 7) "By letter dated 5th October 1911, the clerk to the hospital intimated to the said James Whitehead Moir the decision of the said committee of management, and reference is made to this letter for its terms. On 12th October 1911 the decision of the said committee of management was communicated to the defender. Copies of signed statements from (1) Dr John Crawford, the medical superintendent; (2) Dr R. Cramb, principal officer of Govan Combination Hospital, Shieldhall, Glasgow, and who had acted as *locum tenens* for the said Dr John Crawford during the first fortnight of August 1911; (3) the pursuer; and (4) the nurses of the hospital, together with a copy of the said letter of 5th October 1911, were also transmitted to the defender." (Cond. 8) "The defender, although invited by the said committee to withdraw his said charges against the pursuer, declined to do so. On the contrary, the defender openly expressed his dissatisfaction with the conclusions of the said committee, impugned without the slightest ground therefor the impartiality of the said committee, and, in spite of his knowledge that there were no grounds in fact for the imputations he had made against the pursuer, he did not withdraw his charges, but determined to press for further inquiry. The defender intimated this resolution upon his part by letter, dated 17th October 1911, to the said James Whitehead Moir. The defender was very angry that the said committee had not yielded to the pressure he had tried to put on them by his said letter of 1st September 1911, and by his threat of appealing to the Local Government Board. He was

in particular annoyed that his accusations had been found baseless, that it had become generally known among the public in Alloa and Clackmannanshire (as it had) that he had been found in the wrong in his allegations, and that the accuracy of his friend's, Dr Robertson's, diagnosis had been doubted. The defender had no right or duty to demand any further inquiry on the part of anyone into the statements made by him in the said letter of 1st September 1911. No one with any legitimate interest disputed the conclusions reached by the said committee, or complained of these conclusions in any way, and the defender in particular had no information of any kind warranting his pressing for any further inquiry into the said charges upon the personal conduct of the pursuer. Moreover, the defender had then received information which showed that these charges were false and ought not to have been made in his said letter of 1st September 1911. He determined, however, upon getting an additional inquiry into the whole of the statements in his said letter of 1st September 1911, not in the interests of the father of the said children or on public grounds, but solely in the hope that he might get some sort of report which would relieve him of the public discredit he had incurred by making charges which had been found baseless, and which would remove the doubts cast on the diagnosis of Dr Robertson." (Cond. 9) "On or about 18th October 1911, the defender addressed a letter to the Secretary of the Local Government Board for Scotland in the following terms:—

'October 18th 1911.

'Sir,—I beg to submit the accompanying correspondence relative to the Combination Fever Hospital in Alloa for the information of the Local Government Board for Scotland.

'I have numbered them 1 to 6 in chronological order.—I am, &c.,

'BALFOUR OF BURLEIGH.'

The correspondence sent with this letter consisted, *inter alia*, of (1) copy of the defender's said letter of 1st September 1911 to Mr Moir; (2) the said letter dated 5th October 1911 by the clerk to the said Hospital Committee to Mr Moir; (3) copy of the said signed statements by the medical superintendent, the pursuer, and others, referred to in said last-mentioned letter; (4) Mr Moir's letter to the defender dated 12th October 1911, transmitting the said letter of 5th October 1911, and relative signed statements; and (5) copy of the defender's said letter of 17th October 1911 to Mr Moir. The defender also at the same time communicated privately in writing with the legal member of the said Board. The defender had no right to communicate privately with the said legal member or any member of the Board in reference to the matter, and he did so solely with the view of improperly influencing the consideration by the said legal member of the said Board of the said letter of 18th October 1911 and its other enclosures to the prejudice of the pursuer. It is believed that the Board returned the said private letter to the defender, who is hereby called upon to produce the said letter or a copy thereof." (Cond. 10) "Although the defender did not in his said letter of 18th October 1911 expressly ask for a further inquiry, his object and purpose in writing that letter and in writing the said private letter to the legal member of the said Local Government Board for Scotland was to get the Board to cause an inquiry to be made with reference to the whole allegations made by him in the said letter of 1st September 1911. The defender was well aware that there were no grounds, public or

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otherwise, for any such inquiry. He had been a former president of the Board, and he thought that the fact of his previous official connection with the Board would influence the Board to order such an inquiry. No other person, upon the information which he placed before the Board, could have obtained such an inquiry. The Board, relying on the defender's eminent position, believed that he must have grounds for the said allegations which he made. In point of fact, he had no grounds whatever, and he was moreover in possession of information completely disproving such allegations." (Cond. 11) "The Local Government Board therefore appointed their medical inspector, Dr Frederick Dittmar, to inquire into the said allegations made by the defender. Dr Dittmar is not only a highly experienced official of the Board, but a medical man of the best reputation and character, and conducts any investigations committed to him by the Board with scrupulous care and impartiality. After making his investigations he reported to the said Board that in his opinion the said Rose and Carlos Forbes probably did not suffer from scarlet fever when admitted to the hospital, that it was impossible to say from whom the said Carlos Forbes obtained his infection after admission to the hospital, that it was not likely that he was infected by the said woman patient, and that in any event that matter was of secondary importance. In connection with the discharge of her duties by the pursuer no blame was in any way attached to the pursuer by the said Dr Dittmar." (Cond. 12) "On or about 27th December 1911 the said Local Government Board communicated to the defender the report of the said Dr Dittmar. The said report contains, *inter alia*, careful statements of the evidence given to Dr Dittmar by all the persons who could give any information on the matters of the charges made by the defender. The defender was very angry at the result of this second inquiry. It was well known in Alloa and Clackmannanshire generally that the inquiry was taking place, and the defender was extremely annoyed that this second inquiry, like the first, resulted in showing the baselessness of his accusations and casting great doubt on Dr Robertson's diagnosis. The defender attributed, without any cause, this result to the partisanship of the said Dr Dittmar. He refused to accept the inquiry held by him as final. The defender resolved, regardless of all truth and considerations, to bring the hospital management and those who had anything to do with the hospital into disrepute, and in furtherance of this resolve he determined to renew the charges he had already made, and to make further charges against, *inter alios*, the pursuer, without having the slightest ground therefor." (Cond. 13) "On or about 11th January 1912 the defender, in pursuance of his said resolution, addressed a letter to the Secretary of the Local Government Board in the following terms:—

'11th January 1912.

'Sir,—I duly received your letter of the 27th, with a copy of Dr Dittmar's report. I regret to have to say that neither the method of the inquiry nor the result seem to me, according to my humble judgment, to be at all satisfactory.

'I think it was a grave error of judgment on the part of Dr Dittmar to be driven about the country by Dr Crawford, in regard to whose administration at least one part of his inquiry had reference. I do not wish to use harsh terms, but I think the result achieved is little less than a farce. Medical terms are used in such a way as to confuse, rather than to enlighten, people of even average intelligence. This

I can see, ignorant as I am, from such knowledge as I have acquired during my thirty years' presidency of the London Fever Hospital.

'Taking the report itself, let me refer you to the following points:—

'On page 29 in the twentieth line Dr Dittmar commits himself to this statement:—"The responsible officials in hospital do not appear to have been absolutely certain that the cases had scarlet fever when admitted to hospital, but Dr Crawford's opinion was that, though not typical cases, on the whole they were probably suffering from the disease. It was perhaps natural to leave them in the scarlet fever ward in the circumstances, but from what occurred, I think it will be generally admitted that it was a pity they were not moved to one of the observation wards within a few days of admission to hospital."

'I do not think many people will agree with him, and in my opinion, if those in authority really entertained any doubt, the course taken is enough in itself to condemn the whole administration of the hospital. Either the authorities had suspicion at the time that the children had not scarlet fever or they had no such suspicion. If they had no such suspicion they cannot found upon it now. If they had, no words of mine can be too severe for the folly of leaving children in a ward of the kind under the circumstances then existing. I may say that it was both illegal as a matter of administration, and cruel as a matter of conduct.

'On page 31, on the third line from the bottom, Dr Dittmar again refers to the observation wards. May I ask if he saw them, and if he has anywhere recorded his candid opinion about them?

'Page 32, the seventeenth line. It may be of no importance in Dr Dittmar's opinion how the child got his second attack of fever, but even Dr Dittmar cannot gloss over the fact that the boy did get it and that he died of it.

'In the third line from the bottom of the same page Dr Dittmar says, "the idea that Carlos was infected by this woman has probably arisen from the circumstance that her case and that of Carlos both ended fatally." This seems to me a perfectly fatuous and entirely silly remark, for which no shade or shadow of foundation is given. If the poor child died of septic infection and not malignant fever it only makes the case for the hospital worse.

'With regard to the two last lines on page 33, Dr Dittmar may belittle the incident as much as he likes, but it seems to me harsh treatment for a baby fever patient, notwithstanding Dr Dittmar's opinion. But are the nurses to be relied on?

'With regard to the last four lines of page 34, I suggest that the state of circumstances therein revealed is not in accordance with the Public Health Act, and yet, so far as I can see, there is no real condemnation of the state of matters admitted to exist.

'All along I have been afraid that a much worse state of things existed than has been revealed.

'I understand now that events have occurred since I left home some days ago which throw a lurid light on the whole matter under discussion. I understand from a source on which I think I can rely that two or three of the hospital nurses have resigned their places, and that the matron has also gone, and that they realise the grave responsibility of their position and some of the things that have occurred. A further inquiry would throw a good deal more light upon the actual state of matters and on what happened, but that inquiry would have to be conducted by a gentleman who really desired to find out the

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truth. I understand these nurses went to a medical man in Alloa and informed him that the original charts and registers in the case of the Forbes boy had been wilfully destroyed, either with the knowledge or under the direction of the matron, and that those submitted to Dr Dittmar were fabricated for the purpose.

'I am going to Switzerland to-morrow, and shall be away for about ten days, but the Local Government Board and Dr Dittmar may rest assured that the matter will not rest where he has left it.—I am, &c.,

'BALFOUR OF BURLEIGH.'"

(Cond. 14) "The statements in the said letter of 11th January 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious. They were made by the defender recklessly and without any cause, in the knowledge that they were false, and in gross disregard for the interests of the pursuer, and not for the purpose of having the circumstances of the illness of the said Rose and Carlos Forbes investigated, but to gratify his resentment and ill-will at his said charges having been found baseless, and at the reflections which had been cast on the said Dr Robertson's diagnosis. So far as any of these statements were based upon alleged information supplied to the defender by the said Dr Robertson, the defender was not entitled to rely on its accuracy. The defender was aware that Dr Robertson's diagnosis had been doubted, that Dr Robertson was very angry at this, and that Dr Robertson, like himself, was anxious to get the hospital, its committee and servants, discredited in public estimation. The defender himself represented in the said letter of 11th January 1912 that certain nurses examined by the said Dr Dittmar were not trustworthy persons, and yet some of the grave charges against the pursuer made by the defender in the said letter were based, as he knew, on information said to have been furnished by these nurses. The defender further knew when he wrote the said letter of 11th January 1912 that one of the said nurses had been summarily dismissed by the medical superintendent with the approval of the convener of the Hospital Committee on 8th January 1912. Notwithstanding these facts, and that the said Dr Robertson had invited the defender before taking any further action in the matter to see the said nurses, the defender declined this opportunity and immediately wrote his said letter of 11th January 1912. The defender had no information before writing his said letter of 11th January 1912, other than a letter dated 9th January 1912, addressed to him by the said Dr Robertson. The information in the said letter did not justify him in writing the said letter of 11th January 1912. The statement at the end of said letter that 'the Local Government Board and Dr Dittmar may rest assured that the matter will not rest where he has left it,' was made with the view of forcing the Local Government Board to make a report, regardless of truth, which might appear to justify the accusations which the defender had made. The said letter was written, not with the *bona fide* object of getting an impartial inquiry into the matter, but with the object of getting a report which might, regardless of truth, establish a false reputation of the defender as a public-spirited ratepayer." (Cond. 15) "Further, the defender deliberately invented the statements in the said letter, namely—'that the matron' (meaning thereby the pursuer) 'has also gone, and that they' (meaning thereby the said nurses and the pursuer) 'realise the grave responsibility of their position, and some of the things that have occurred.' For these statements in particular affecting the pur-

suer the defender had absolutely no ground whatever. Neither the said Dr Robertson nor any one else had ever made any statements to the defender to any such effect, and he had no information of any kind, hearsay or otherwise, warranting his making such statements. In fact, from the information then in his possession he knew that it was untrue to suggest or assert that the pursuer had surrendered her position as matron, that she had gone from the hospital, that she had left Alloa, and also that she had realised her position, and had acknowledged or confessed by her conduct in leaving the hospital her guilt of the charges he imputed to her in the said letter of 11th January 1912. Prior to the adjustment of the record in this action it was admitted, on behalf of the defender, that the sole information upon which he proceeded in writing the said letter of 11th January 1912 was the said letter of 9th January 1912 written to him by the said Dr Robertson." (Cond. 16) "The said statements complained of in the said letter of 11th January 1912, and, in particular, the statements contained in the second last paragraph thereof, were intended to represent and convey, and did represent and convey, that the pursuer was responsible for the death of the said Carlos Forbes by reason of her criminal conduct while acting as matron of the hospital in putting a patient suffering from the most malignant type of fever into close proximity to the said Carlos Forbes; that the pursuer had given false evidence to the said Dr Dittmar at the inquiry before him; that she had procured nurses acting under her to give false evidence thereat; that she had wilfully destroyed, or caused to be destroyed, original charts and registers in the case of the said Carlos Forbes; that she had fabricated or caused to be fabricated other charts and registers in their place; that she had uttered and submitted these fabricated charts and register to the said Dr Dittmar as true and genuine documents, and to defeat the ends of justice; that, realising her guilt, she had deserted her said post as matron, and left Alloa as a person guilty of grave crimes; that but for the partiality of the said Dr Dittmar her guilt as alleged by him would have been discovered; and that she was not fit to be matron of the said hospital, or of any hospital." (Cond. 17) "The purpose of the defender in writing the said letter to the said Local Government Board of 11th January 1912 was to force a third inquiry, because of his displeasure and disappointment with the result of the said two previous inquiries, and in particular because the result of the said two inquiries proved that he had made baseless charges against the management of the hospital and against the pursuer. The defender wished to get another inquiry not in order to substantiate the charges he had made, which he knew to be groundless, but in the hope of obtaining some finding that would free him from reproach for the false charges he had made, and would make him appear to be a public-spirited citizen. The defender had no right as a citizen or otherwise to address the said letter of 11th January 1912 to the Local Government Board. Further, in pursuance of his said policy of compelling the Board to accept his views, he improperly threatened the Board in the said letter that he would bring their position in the matter before Parliament. The Board ordered a fresh inquiry in respect of his attack upon the said Dr Dittmar, his threats if the Board did not comply with his request, and his fresh and groundless allegations against the pursuer. The Board appointed James A. Fleming, K.C., then Sheriff of Dumfries

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and Galloway, as their commissioner, to hold this inquiry." (Cond. 18) "The result of the inquiry, held on three days in February 1912 by the said Commissioner, was that he, on 18th March 1912, also reported to the said Local Government Board that all the charges made against the pursuer by the defender were without foundation. The witnesses adduced at this inquiry were all examined on oath. The pursuer was a member of the staff of the said hospital, and as such she was one of these witnesses so examined.* On 25th April 1912 the Local Government Board transmitted to the defender a copy of the report of the said Commissioner." (Cond. 19) "On or about 29th April 1912 the defender, who refused to accept the findings of the said Commissioner, addressed a letter to the secretary of the said Local Government Board in the following terms:—

'29th April 1912.

'Sir,—I have to acknowledge the receipt of your letter of the 25th with above reference number, and enclosing a copy of the report, dated the 18th March, by Sheriff Fleming, on the allegations made to the Board that certain evidence submitted to their medical inspector in regard to the Clackmannan Combination Hospital had been found to be false. It bears all the marks of a careful and conscientious investigation, but for that Sheriff Fleming's reputation is a sufficient guarantee.

'I wish to say that, so far as I am concerned, I have but a very languid interest in the question of which members of the staff lied the most. The point in which I was interested was that into which Dr Dittmar was originally appointed to inquire, namely, as to the treatment of the Forbes children, and as to the attempts on the part of the hospital authorities to allege that they had never had scarlet fever, as a sort of quasi justification for the treatment they received in the hospital, and as a palliation of their responsibility for the melancholy results which followed. I have already expressed my view of Dr Dittmar's inquiry and of his report, and really these are the only matters about which I have either any real interest or any claim to express an opinion.

'I see nothing in this report to lead me to modify the views which I then expressed, and in regard to which it would be of prime interest to me if I could have the judgment of the Local Government Board.

—I am, &c., BALFOUR OF BURLEIGH.'

The statements in the said letter of 29th April 1912 are in part of and concerning the pursuer, and are false, calumnious, and malicious, and were intended to represent, and did represent, that, notwithstanding that the said Commissioner had reported to the said Local Government Board that the said charges made by the defender in his said letter of 11th January 1912 against the pursuer were without foundation, these charges were nevertheless true; that his original charges against the pursuer first made in his said letter of 1st September 1911 were also true; that in particular she was responsible for the improper treatment the said Forbes children received, and for the

* In his report the Commissioner, after commenting adversely on the credibility of the evidence of some of the nurses, stated:—"On the other hand, the matron impressed me very favourably. I think she is a woman anxious to do her work, truthful in her whole account of what she has done, even of the faults she has committed, and full of zeal and desire to have the hospital work done as smoothly as possible."

death of one of them in consequence of such treatment; that she was a deliberate liar, and had no regard for truth; and that she had given false evidence in the said inquiries conducted by the said Dr Dittmar and by the said Commissioner; and that in the inquiry before the said Commissioner she had been guilty of perjury. Without any justification the defender, by writing the said letter, sought to induce the said Local Government Board to support his unwarrantable persistence in his said accusations against the pursuer, and to issue a judgment differing from the findings of the said Commissioner. On 31st May 1912 the said Local Government Board, by letter of that date written by their secretary, informed the defender that 'they entirely agree with Sheriff Fleming's conclusions that no fault is proved against the administration of the hospital, so far as regards the Hospital Committee, the medical officer, the matron, or the sisters.' The said Board at the same time characterised the defender's said attack upon Dr Dittmar, which he renewed in his said letter of 29th April 1912, as unjustifiable, and it was in fact unjustifiable. On or about 29th June 1912 the said Board, by their secretary, informed the clerk to the said committee that they concurred in the findings of the said Commissioner. It is believed and averred that in further correspondence with the said Board, after receipt by him of the Board's said letter of 31st May 1912, the defender has adhered to and persisted in the imputations made by him upon the pursuer and the said Dr Dittmar. The defender is called upon to produce said further correspondence." (Cond. 20) "On or about 13th May 1912 the pursuer, by her agents, requested the defender to withdraw the said charges and insinuations which he had made against her in the said letters complained of, and to make such reparation to her as he might consider right and proper in the circumstances. Again, on 22nd May 1912, failing to obtain a satisfactory reply from the defender, the pursuer's agents, by letter of this date, urged the defender to accept the findings of Sheriff Fleming, and to grant the pursuer the fitting reparation of an apology. The pursuer then offered that the whole matter, in so far as regards herself, might be so honourably closed. The defender declined to accept Sheriff Fleming's report, and insisted upon the Local Government Board giving their judgment thereon before he would consider the pursuer's said request for an apology. The Board intimated their judgment as aforesaid to him on 31st May 1912. Thereafter the defender still declined to withdraw any of his allegations against the pursuer, or to give any apology to the pursuer, and intimated by letter from his agents, dated 4th June 1912, to the pursuer's agents, *inter alia*:—'If the report of Sheriff Fleming, which followed that inqury, seems to exoner the matron from much of the blame which Dr Robertson's letter seems to cast upon her, we think the matron has cause to thank rather than to blame his Lordship for the opportunity which that inquiry has given her of clearing herself of the stigma thrown upon her conduct as matron by several of the nurses serving under her.' The said statements in the said letter of 4th June 1912 are of and concerning the pursuer, are false, calumnious, and malicious, and were made because the defender was very angry at the Local Government Board not having made a report which justified his action in bringing the matter before them. By the said letter of 4th June 1912 he admitted that he had thrown a stigma upon the pursuer and her conduct as matron. He falsely, calumniously, and maliciously repre-

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sented by the said letter that the pursuer was unfit for her position as matron, although she was not so bad as he had represented her to be. The said letter of 4th June 1912 is produced. The defender has refused to express regret for the imputations cast upon the pursuer, and he has further refused to supply the pursuer with the names of his alleged informants in regard to the statements made by him in his said letter of 1st September 1911."

The defender pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) In respect that the letters of the defender libelled and the statements therein contained and complained of by the pursuer were privileged, the action should be dismissed.

On 15th July 1913 the Lord Ordinary (Dewar) approved of five issues for the trial of the cause.* The first was based on the letter of 1st September 1911, printed *ante*, p. 140, and the second on the letter of 11th January 1912, printed *ante*, p. 144. The third, which was based on the letter of 29th April 1912, printed *ante*, p. 148, was in these terms:—"Whether the statements in the said letter are in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represent, and were intended to represent, that the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming, K.C., or make similar false, malicious, and calumnious representations of and concerning the pursuer, to the loss, injury, and damage of the pursuer?" The two other issues (which were based on the letter of 29th April 1912 and on subsequent letters) were withdrawn by the pursuer's counsel in the Inner House and, accordingly, are not dealt with in this report.

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* "OPINION.—[After narrating the facts averred by the pursuer]—These, I think, are the material facts upon which the pursuer founds. She makes a number of averments which I shall notice presently, but the substance of the case she presents is this. The defender is a man in a very prominent position, whose utterances and opinions carry great weight. He has recklessly and maliciously preferred grave charges against her, which have affected, and still most seriously affect, her character and reputation. These charges have been investigated at the defender's request on three separate occasions by three impartial tribunals. She has been declared innocent on all three occasions. Yet the defender will not acknowledge her innocence, but persists in accusing her still. She has made every effort to induce him to assist in removing the stigma from her character which he has placed upon it, and to restore her to the position she occupied in public estimation before he attacked her. All her efforts have failed, and she now appeals as a last resort for a trial by jury. The defender's answer to this is, that he made the statement complained of in the public interest, on a privileged occasion, and without malice, and is therefore under no legal obligation to withdraw anything he said. Assuming that the occasion was privileged—and I think it was—the question whether the pursuer is entitled to a jury trial depends upon whether she has stated on record facts and circumstances sufficient, if proved, to show that the defender abused the occasion, and displayed such reckless disregard of the pursuer's feelings and interests that a jury might reasonably infer that he was acting not in the public interest, but from some improper motive. Before proceeding to consider this question it is necessary to recall the circumstances in which a jury trial has already been refused.

"When the case was previously before me the only letters I was asked to consider were the first two. I decided that they contained defamatory

The defender reclaimed, and the case was heard before the Second Division on 20th, 22nd, and 29th November 1913. Dec. 6, 1913.

Argued for the reclaimer;—All the issues should be disallowed in respect that, the occasion being privileged, malice was not relevantly averred; and, in any event, the third issue should not be allowed, as the letter on which it was founded contained no issuable matter. The present case was similar to cases of judicial slander,[1] and fell within the rule applicable in such cases, viz., that to overcome the privilege it is not enough to aver that the statements complained of were false, and known by the defender to be false, but facts and circumstances inferring malice must be set forth.[2] No such circumstances were averred here. In the former action between these parties it was held that the pursuer's averments were irrrelevant; and the only additional material averment in the present case was that the defender deliberately invented the statements he made. But an aver-

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statements; but that the occasions on which they were written were privileged, and that the pursuer must therefore aver upon record facts and circumstances from which malice might reasonably be inferred. Their Lordships of the Second Division agreed with me in this. I further decided that the averments made by the pursuer on record were sufficient, if proved, to entitle the jury, if they thought fit, to infer malice and to decide in the pursuer's favour. The considerations which weighed with me in reaching this conclusion were these:—(1) It appeared to me that the defender had used language of unnecessary violence, and had *prima facie* not treated the pursuer's interests and feelings with that consideration which the law expects and requires of one who is protected in discharging a public duty. While the defender was privileged in laying facts before the authorities sufficient to induce them to institute an inquiry into the management of the hospital, he appeared to have gone beyond what was necessary for that purpose in suggesting that the pursuer had been guilty of criminal conduct. (2) The pursuer averred, and offered to prove, that the charges were made without any inquiry as to whether they were true or false. (3) They were repeated after her innocence had been established. (4) The defender refused to withdraw them although, as the pursuer averred, he knew that there were no grounds in fact for imputing criminal conduct to her at all. I thought that if these things were proved to the satisfaction of the jury, they might quite reasonably reach the conclusion that the defender had permitted his mind to be influenced by some improper motive, and had gone beyond the region of privilege, and I accordingly allowed the issues. But my interlocutor was recalled by the Inner House. That decision is, of course, binding on me, and the question now is whether the averments which the pursuer has made on *this* record are sufficient to distinguish the present case from that which has already been decided. I think they are.

"In the former case, although it was held that the pursuer's averments fell short of what was relevant to infer malice, I gather from the opinions expressed that they were not considered very far short. Lord Dundas said: 'It may be that the defender could, in the circumstances, without any sacrifice of principle or of dignity, have expressed some measure of regret that statements made by him in the *bona fide* discharge of a duty . . . should have cast unmerited reflection upon the pursuer's character and caused her pain and inconvenience. It may be that such an expression would have been a kind and handsome act on his part.' Lord Salvesen agrees with this and says: 'It is to be regretted that the defender should

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[1] Ingram v. Russell, (1893) 20 R. 771, *per* Lord M'Laren, at p. 778.

[2] Campbell v. Cochrane, (1905) 8 F. 205; M. v. H., 1908 S. C. 1130; Stevenson v. Wilson, (1903) 5 F. 309; A v. B, 1907 S. C. 1154.

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ment of this kind without specification of any circumstances supporting it was not in the present instance enough to displace the privilege. In some special cases it might possibly be sufficient; but, as the letters here showed that the defender had proceeded on some information given to him, the pursuer was bound to disclose the facts which enabled her to say that the defender had invented the statements. Moreover, as the pursuer in condescendence 10 alleged that the defender had information in his possession which disproved his statements, the pursuer ought to have stated what that information was.[1] The third issue in any case was not admissible, as the letter on which it was founded would not bear the innuendo put on it. In deciding the case the Lord Ordinary had misapprehended the import of *Clark* v. *Molyneux*.[2]

Argued for the respondent;—Sufficient facts and circumstances inferring malice were set forth on record.[3] Not only were some of

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have *lent such a credulous ear to the statements of the doctor*.' And Lord Guthrie says: 'It is impossible not to feel sympathy for a person like the pursuer who has been subjected to the anxiety, pain, and expense of three inquiries into charges which these inquiries have proved unfounded, *and to regret that these charges should ever have been made*.' Now when a man lends too credulous an ear to the voice of the slanderer and makes unfounded charges which should never have been made, and which cause anxiety, pain, and expense, and when he refuses to do anything at all—even to say a word which could be said without sacrifice of principle or dignity—to assist in repairing the injury which his credulity and rashness have caused, I think he must be assumed to have come very near that point when one may reasonably ask whether he has acted in this way in the honest belief that it was all necessary in the public interest, or whether he has not permitted himself to be influenced at some stage by some improper motive. I do not, therefore, think that much additional averment is necessary. But the pursuer has put a good many new averments on record, and the following, I think, are the most important:—(1) It is averred that it is not true that the defender had received any information, hearsay or otherwise, that the pursuer had put the woman into a bed in close proximity to the children in spite of remonstrances from at least one of the other members of the staff. No such remonstrance had been made, and the defender was never told that it had. These statements were made by the defender recklessly and without due regard to whether they were true or false; (2) that although the defender knew that the Hospital Committee was the proper authority to address, yet he wrote to the clerk to the County Council for the purpose of getting the County Council to influence its representatives on the committee to support his false accusations; (3) when the Hospital Committee delivered its report the defender impugned, without the slightest grounds therefor, the impartiality of the committee, and in spite of his knowledge that there were no grounds for the imputations he had made against the pursuer, determined to press for further inquiry, not on public grounds, but because he was angry that he had been found in the wrong, and hoped that a fresh report might relieve him from the public discredit he had incurred by making charges which had been proved baseless; (4) that the defender 'deliberately invented' the statements in the letter of 11th

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[1] Webster v. Paterson & Sons, 1910 S. C. 459, *per* Lord Guthrie, at p. 463.

[2] (1877) 3 Q. B. D. 237.

[3] Royal Aquarium and Summer and Winter Garden Society v. Parkinson, [1892] 1 Q. B. 431; M. v. H., 1908 S. C. 1130; Clark v. Molyneux, 3 Q. B. D. 237; Shaw v. Morgan, (1888) 15 R. 865.

the defender's statements alleged to be false to his own knowledge, but malice further appeared from the facts that the statements (1) were made without inquiry [1]; (2) were made recklessly and without regard to whether they were true or false [2]; (3) were repeated, and no apology was offered for them [3]; (4) were couched in violent terms [4]; and (5) were submitted to the wrong local authority.[5] In regard to the third issue the pursuer was entitled to have the decision of the jury as to whether the letter was not intended to convey the meaning set forth in the innuendo.

At advising on 6th December 1913,—

Lord Dundas.—This case is the sequel of an action of damages for slander raised by the present pursuer against the present defender which

January that the pursuer had surrendered her position at the hospital and had left Alloa, and that he knew from the information then in his possession that it was untrue to suggest that she acknowledged by her conduct in leaving the hospital her guilt of the charges he imputed to her; (5) that the defender wrote a private letter to a member of the Local Government Board (which was returned to him) with the view of improperly influencing the Board to the prejudice of the pursuer. Some of these averments may be very difficult to substantiate, but at this stage I must assume that they are true and can be proved, and on that hypothesis there can, I think, be no doubt that they are relevant and sufficient to entitle the pursuer to have her case laid before a jury. 'If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive.'—*Clark* v. *Molyneux*, (1877) 3 Q. B. D. 237, at p. 247. I think this dictum covers the pursuer's case. She offers to prove that the defender made some of the accusations against her knowing them to be false. That he made others recklessly without caring whether they were true or false—and did so, not in the public interest, but because he was angry that he had been found in the wrong. The only question I have to consider is whether these averments are relevant and sufficient. I think they are. It will be for the jury to decide, after hearing evidence, whether they are true or false. I therefore approve of the first two issues.

"The third, fourth, and fifth issues were not before the Court in the previous action and therefore require separate consideration. They are

[1] White & Co. v. Credit Reform Association and Credit Index, Limited, [1905] 1 K. B. 653, *per* Collins, M.R., at p. 658; Elliott v. Garrett, [1902] 1 K. B. 870; Shaw v. Morgan, 15 R. 865, *per* Lord Young, at pp. 870, 871.

[2] Forteith v. Earl of Fife, (1821) 2 Murray, 463; M'Donald v. Fergusson, (1853) 15 D. 545, *per* Lord President M'Neill, at p. 548.

[3] Ingram v. Russell, 20 R. 771, *per* Lord M'Laren, at p. 778; Currie v. Weir, (1900) 2 F. 522, *per* Lord Moncreiff, at p. 524; Folkard on Slander and Libel, (7th ed.) p. 212. Hulton & Co. v. Jones, [1910] A. C. 20, *per* Loreburn, L.C., at p. 23, and Wragg v. Thomson & Co., Limited, 1909, 2 S. L. T. 409, were also referred to.

[4] Gall v. Slesser, 1907 S. C. 708; Torrance v. Leaf, (1835) 13 S. 1146.

[5] Hebditch v. MacIlwaine and Others, [1894] 2 Q. B. 54, *per* Esher, M.R., at p. 59, Davey, L.J., at p. 64.

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was before us some time ago.[1] In that case the Lord Ordinary allowed issues; but we reversed his judgment and dismissed the action, because we held that, the occasions being admittedly privileged, the pursuer had not relevantly averred malice on the part of the defender. The pursuer in this new action has greatly amplified her condescendence. The Lord Ordinary has held it to be relevant, and has approved of five issues for the trial of the cause. The fourth and fifth of these were (rightly and properly, I think) abandoned by the pursuer's counsel at our bar. I have come to the conclusion that of the remaining three issues the first and second must be allowed, and that the third should be refused.

In support of the first and second issues the pursuer in her new record makes a series of averments which I cannot doubt are relevant to infer malice. Some of them amount to very grave allegations indeed, importing as they do that the defender has been guilty of deliberate falsehood and fabrication. I do not disguise my impression that the pursuer will have the greatest difficulty in proving them at the trial, when one looks at the documents which are in process, quite apart from one's public

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based upon the letter which the defender wrote to the Local Government Board on 29th April, and the two letters which his solicitors, on his instructions, wrote to Messrs Wood & Robertson on 4th and 25th June. The first question raised is whether the occasions on which these letters were written were privileged. [After examining the circumstances]—I am therefore of opinion that all three occasions were privileged, and the word 'maliciously' must be inserted in all the issues.

"The next question is whether the words complained of in the third issue will bear the innuendo which the pursuer seeks to put upon them. The words occur in the letter dated 29th April, and are:—'I wish to say that, so far as I am concerned, I have but a very languid interest in the question of which members of the staff lied the most.' The innuendo proposed is whether these words were intended to represent that 'the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming.' The defender maintained that the words are not reasonably capable of bearing that meaning; that they only refer to the fact that a considerable portion of Sheriff Fleming's report dealt with the unsatisfactory nature of the evidence given by some of the nurses, and were not intended to refer to or reflect on the pursuer at all. That may be so. But it must be kept in view that the defender had already accused the pursuer of wilfully destroying documents and fabricating others to deceive the Commissioner, and it was largely on account of that accusation that Sheriff Fleming had been appointed, and that, I think, was the chief question to which he directed his attention. He found, after a very careful analysis of the evidence, that the accusations were without foundation, and that some of the nurses had given false evidence, and that the pursuer had spoken the truth. In these circumstances, the defender cannot be surprised that his comment—which is certainly not generous—should be open to misconstruction. If he did not mean to suggest that the *whole* staff—including the pursuer—lied, he should have made that clear. It may be that he was not thinking of the pursuer at the time. That is quite possible. But, on the other hand, he may have intended to include her, and if he did, I think the words used are capable of bearing the innuendo. It will be for the jury to say, after they have heard any explanation the defender may have to offer, whether he intended or did not intend to accuse the pursuer of having given false evidence. [His Lordship then dealt with the fourth and fifth issues.]"

[1] 1913 S. C. 492.

knowledge of the defender's character and position. But I assume, as I am bound to assume, that the record has been framed by learned counsel with a full sense of their great responsibility, and upon what they have reason to believe are reliable instructions. In cond. 4 it is averred, with regard to certain statements in the defender's letter of 1st September 1911, that it is not true that he had received any information, hearsay or otherwise, that the pursuer had put the Sauchie woman into the bed mentioned in spite of remonstrances from at least one member of the staff; that no such remonstrances had been made, and that the defender was never told that they had been made; and that the defender made the statements recklessly and without regard to whether they were true or false. Again, the pursuer alleges (cond. 8) that, when the defender moved for an inquiry by the Local Government Board after he had received the report of the investigation by the hospital authorities, he had then received information which showed that there was no ground for the imputations against the pursuer contained in his said letter of 1st September 1911; that he was influenced, in moving for the second inquiry, by oblique motives; and (cond. 10) that "in point of fact he had no grounds whatever, and he was moreover in possession of information completely disproving such allegations." Then, as regards the defender's letter of 11th January 1912, the pursuer avers (cond. 14) that the statements in it, so far as of and concerning her, were made by the defender recklessly and without any cause, in the knowledge that they were false, and to gratify his resentment and ill-will; and that the letter was written "not with the *bona fide* object of getting an impartial inquiry into the matter, but with the object of getting a report which might, regardless of truth, establish a false reputation of the defender as a public-spirited ratepayer." The pursuer further avers (cond. 15), with reference to the same letter, that the defender "deliberately invented" certain of the statements made in it; that he had "absolutely no grounds whatever" for making them; that neither Dr Robertson nor anyone else had ever made any statements to the defender to any such effect, and he had no information of any kind, hearsay or otherwise, warranting his making them; and that in fact, from the information then in his possession, he knew it was untrue to suggest what is said or suggested in his letter. However startling the averments I have summarised may be, they are deliberately made upon the pursuer's record by responsible counsel, and I cannot doubt that they are relevant, because, if they can be substantiated, they would afford amply sufficient grounds for attributing malice to the defender. There is another topic which, as it is averred by the pursuer, seems to me to raise matter for inquiry. It is alleged (cond. 9) that on 18th October 1911, when the defender wrote to the Local Government Board, after the hospital committee's report had been issued, he at the same time sent a private letter to the legal member of that Board in reference to the matter. The pursuer alleges that this private letter was written solely with the view of improperly influencing the legal member's consideration of the subject-matter of inquiry, and that it was returned to the defender by the Board; and she calls upon the defender to produce the letter. The defender does not produce it. If we had the letter

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before us, it may be that its contents would turn out to be harmless enough as regards the matters at issue. But in its absence I must say that I cannot be judicially satisfied, having regard to the pursuer's averments, that its contents may not be such as to afford ground for some reasonable inference of malice or oblique motive on the defender's part. The incident is, I think, one calling for inquiry and explanation.

I agree, therefore, with the Lord Ordinary that the first and second issues must be allowed. The third issue stands, I think, in a different position. I am for refusing it, upon the ground that the words complained of could not, in my judgment, upon any reasonable or legitimate construction, be held to have been used of and concerning the pursuer. The issue is based upon a passage in a letter, dated 29th April 1912, by the defender to the secretary of the Local Government Board, where he says, "I wish to say that, so far as I am concerned, I have but a very languid interest in the question of which members of the staff lied the most." The proposed issue puts the question whether the statements are in whole or in part of and concerning the pursuer, and falsely, maliciously, and calumniously represent, and were intended to represent, that the pursuer had lied in giving evidence in inquiries conducted by Dr Dittmar and Sheriff Fleming, K.C.? The hospital staff consisted of a visiting physician, a matron (the pursuer), a sister, and four probationers. If the passage complained of is isolated from its context and taken quite by itself, it might be open to read it as meaning or implying that, as all the staff had lied, the defender was not concerned with the question which of them had lied the most. But the passage must be read along with its immediate context. The opening sentence of the letter discloses that the defender was acknowledging receipt of Sheriff Fleming's report, which he characterises as bearing all the marks of a careful and conscientious investigation. Then follow the words complained of. Now, the learned Sheriff's report, which is produced, and must at this stage be considered so far as is necessary for the fair understanding of the defender's letter, makes it plain that he had carefully expressed his opinion in regard to the truthfulness, or the reverse, of the witnesses examined before him; and, while commenting in very unfavourable terms upon the evidence of certain nurses, stated that, on the other hand, the pursuer impressed him favourably, and was, in his opinion, truthful in her whole account of what she had done, even of the faults she had committed. I think it would be a wholly unreasonable construction, in these circumstances, if a jury were to hold that the passage in the letter which is complained of was intended to refer to or include the pursuer. Her counsel frankly admitted that, upon his reading of the words, they might be held to refer to any member of the staff, including the visiting physician, quite as well as to the matron.

For these reasons, I think we should recall the Lord Ordinary's interlocutor; refuse the third, fourth, and fifth issues; approve of the first and second issues; and appoint these to be the issues for the trial of the cause.

LORD SALVESEN.—I have had an opportunity of reading the opinion of Lord Dundas and am unable to resist the reasoning with which he supports his conclusions. I cannot, however, refrain from saying that I

concur with reluctance and regret. Apart from the position which the defender holds in public esteem, I think that the averments made by the pursuer that he deliberately invented defamatory stories with regard to a woman with whom he had never come in contact are so improbable as to be almost incredible, and it is these statements alone which contain relevant material from which malice may be inferred. We are, however, not at liberty to consider at this stage of the cause whether the pursuer's averments are capable of proof, but only whether, if proved, they would support the charge of malicious defamation which is now made. There is no better evidence of a slander being malicious both in fact and in law than that it was uttered in the knowledge of its falsity. This was conceded by the defender's counsel, but his main ground in support of the plea of irrelevancy was that the averments were lacking in specification. I fail to see, however, how the only serious averments of the pursuer can be made more specific without disclosing the evidence upon which they are presumably based, and this she is not bound to do as a condition of obtaining an inquiry.

Lord Guthrie.—In view of the opinions delivered in this Division, when the previous case between the parties was before the Court, the only question which arises on the first two issues is whether, the circumstances being, on the face of the pursuer's own averments, privileged, facts and circumstances have now been averred by the pursuer sufficient, if proved, to infer malice on the part of the defender. Under the previous record we had to deal with averments which charged the defender with the circulation of defamatory statements about the pursuer, but we construed these averments as admitting that the defender passed on the statements as he got them. In my opinion I said: "The pursuer founds on statements passed on by the defender to the proper authorities as hearsay requiring investigation, but she does not suggest that he in any way originated these statements, or even altered them." The pursuer now avers, in connection with the letters which form the subject of the first and second issues, that, instead of passing on statements reported to him by others as these statements reached him, the defender invented material statements defamatory of the pursuer contained in these letters. Obviously such conduct, if proved, might reasonably be held to infer malice. In regard to the third issue, I agree that, taking the letter of 29th April 1912, along with Sheriff Fleming's report to which it refers, the statements in the letter are not reasonably capable of bearing the innuendo which the pursuer seeks to put upon them, and therefore that the third issue should be disallowed.

Lord Justice-Clerk.—When the former case between these parties was considered by the Court it was decided that upon the record as presented no issue could be allowed, there being a case of privilege disclosed, and there being no averments of fact from which malice could be implied. There is now, in this second action, a record presented to the Court in which very grave charges are made against the defender, many in number, and expressed in very strong terms—stronger than in the course of a long

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experience I have ever seen in a case of the kind. Lord Dundas, in an opinion which I have had the opportunity of perusing, has given a full statement of the charges now made against the defender, and it is unnecessary to recapitulate them. They include accusations of deliberate and wilful falsehood, statements that the defender said he had received information regarding the conduct of hospital officials when, in point of fact, he had received no such information—that neither by hearsay or otherwise had he been informed of things as to which he asserted that he had been so informed; that he made statements knowing them to be false, and it is even said that he "invented" accusations which he knew to be untrue, and that he endeavoured to induce a public authority to give a decision contrary to what he knew to be the fact.

All these things are stated in the condescendence by the pursuer, and maintained as fact by her counsel, who must be presumed to have well considered what allegations were to be made as stating matter of fact, and at this stage the Court must take the statements *pro veritate* and, on the assumption that they do relate facts, consider whether they are such as to give ground for an issue based on malice. I agree with your Lordships that they do supply such ground. If they can be substantiated by evidence, then beyond doubt a case of malice would be made out. I therefore agree that the first and second issues should be allowed to go to trial.

I think it right to notice that there is another averment relating to a letter said to have been written to a member of the Local Government Board by the defender, when he was endeavouring to induce the Board to take up the inquiry regarding the matters of which he complained. It is said that the letter was one in which he endeavoured unjustifiably to bring pressure to bear upon the Board, taking advantage of his distinguished position. It is alleged that the Local Government Board returned the letter to him. If so, it is in his possession, and is not as yet produced. If such a letter, written with such intent, was sent as alleged, I cannot doubt that it might be a question of fact for the consideration of a jury, whether it afforded evidence of malice. At present when the contents are not revealed, I think the allegations regarding it may be taken into consideration in the question whether malice is sufficiently averred.

As regards the third issue, I concur with your Lordships in thinking that it ought to be disallowed. I am unable to see that reading the part of the letter in the schedule in any reasonable sense it can be held that there is any accusation made against the pursuer. The defender is referring to Mr Fleming's report, which speaks of the pursuer only in terms of approbation, but speaks somewhat strongly in regard to the want of truthfulness of some of the nurses in the hospital. When the defender in his letter speaks of "those who lied the most" the expression cannot be extended beyond those of whom Mr Fleming spoke, except upon the footing that it was intended to include the whole staff, for there is certainly no allusion to the pursuer individually. There is no indication that allusion is being made to any other persons than those whom the reporter had indicated as having prevaricated and so not spoken the truth. It therefore does not seem to me that the words quoted can bear the innuendo which the pursuer endeavours to put upon them. I am in

favour therefore of disallowing the third issue and, the fourth and fifth having been withdrawn, the result will be that the first and second issues only will be approved of for the trial of the cause. Dec. 6, 1913. Couper v. Lord Balfour of Burleigh.

THE COURT recalled the interlocutor of the Lord Ordinary; disallowed the third issue; and, the fourth and fifth issues having been withdrawn, approved of the first and second issues for the trial of the cause; and remitted the cause to the Lord Ordinary to proceed therein.

G. M. WOOD & ROBERTSON, W.S.—W. & J. COOK, W.S.—Agents.

CHARLES HOWATSON, Appellant.—*Chree, K.C.*—*Macquisten.*
JOHN M'CLYMONT, Respondent.

No. 20.

Dec. 12, 1913.

Howatson v. M'Clymont.

Lease—Small holdings—Exceptions—Permanent grass park held for business not "primarily agricultural or pastoral"—Pasture tenanted by dairykeeper—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49), *sec.* 26 (3) (*g*).

The Small Landholders (Scotland) Act, 1911, enacts, sec. 26 (3), "A person shall not be held an existing yearly tenant or a qualified leaseholder under this Act in respect of . . . (*g*) Any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattle-dealer, and the like."

A dairykeeper was the yearly tenant of two fields of permanent pasture which he used for grazing and feeding five cows, whose milk he sold in his dairy business along with the milk, which he purchased, of ten other cows belonging to neighbouring farmers.

Held (*diss.* Lord Ormidale) that the subjects were held by him for the purposes of a business or calling which was "primarily pastoral," and accordingly did not fall within the provisions of section 26 (3) (*g*) so as to exclude him from the benefit of the Act.

ON 24th January 1913, John M'Clymont, dairykeeper, Kirkburnhead, Muirkirk, in the county of Ayr, applied to the Scottish Land Court to be declared a statutory small tenant in respect of a holding known as Toll-parks, Kirkburnhead, in the parish of Muirkirk and county of Ayr, belonging to Charles Howatson of Glenbuck, Ayrshire, and to have the period of renewal of his tenancy and a first equitable rent fixed in terms of section 32 of the Small Landholders (Scotland) Act, 1911. 1ST DIVISION. Land Court.

The landlord objected to the competency of the application on the ground that the holding, being permanent grass park used for the purposes of a business not primarily agricultural or pastoral, was excluded from the Act by section 26 (3) (*g*) * thereof.

After hearing evidence and inspecting the holding, the Land Court issued an interlocutor which, *inter alia*, repelled the objection, found the applicant to be a statutory small tenant, and fixed the period of the renewal of his tenancy and the equitable rent.

* Section 26 (3) (*g*) of the Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49) is quoted in the rubric.

Section 32 (1), which defines a statutory small tenant, enacts that such tenant must be, *inter alia*, "a tenant from year to year, or leaseholder, not otherwise disqualified in terms of the Act."

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At the request of the landlord a case was stated for the opinion of the First Division.

The case set forth:—"The holding in respect of which the application was made consists of two fields, one extending to ten acres, and the other to three and a half acres, held by the applicant on yearly tenancy at a rent of £20. He became tenant of the first field about eighteen years ago, and of the second field some years later. There was no written lease. The tenant was not at liberty to break up any part of these fields without the landlord's consent. A part of the holding extending to about one acre had been formerly broken up by him with such consent, but at and since the commencement of the Small Landholders Act, these fields have been in permanent pasture. The fences are maintained by the tenant. There are no buildings on the holding. The holding is used by the applicant for the grazing and feeding of his stock. His regular stock consists of five cows and a horse. He cuts hay on the field of three and a half acres, and feeds his stock with it. The applicant is, and has for the last twenty-two years been, a dairykeeper, supplying the village of Muirkirk with milk. In his dairy business he sells milk produced by his own five cows, and the milk of other ten cows belonging to neighbouring farmers which he buys from them. His horse is used for the purposes of his holding, and also for conveying the milk to the village of Muirkirk."

The question of law was:—"Whether on the facts above set forth, the Scottish Land Court was bound to hold that the said subjects were permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral within the meaning of section 26 (3) (*g*) of the Small Landholders (Scotland) Act, 1911, and therefore excluded from the operation of the Act?"

The case was heard before the First Division (consisting of the Lord President, Lord Skerrington, and Lord Ormidale) on 4th December 1913.

Argued for the appellant;—The business of the applicant was primarily commercial, viz., that of selling milk, and could by no stretch of language be described as "primarily agricultural or pastoral." The only purpose for which he held the grass parks was in order to supply milk for this business. That he had no other purpose in view was clearly shown by the fact that he not only used all the milk produced on his holding in the course of his business, but had also to buy a large quantity—in fact the greater part of the total amount he required—from outside sources. "Primarily" meant "chiefly" or "mainly," and even if a dairy business could in any sense be described as pastoral it could not be described as "mainly" or "chiefly" pastoral; especially a business such as the applicant's, in which the major portion of the milk was purchased and was not produced upon his holding. The applicant was in exactly the same position as the butcher or cattledealer, mentioned in the section under consideration, who rented a park to feed the beasts which he sold to his customers. If the word "primarily" referred to time, then undoubtedly the applicant's business was not primarily pastoral, because he had been a dairykeeper selling milk several years before the date at which he became tenant of the parks.

There was no appearance for the respondent.

At advising on 12th December 1913,—

Lord President.—The question in this case is whether the applicant

is a statutory small tenant within the meaning of the Scottish Small Landholders Act, 1911.

He is a tenant from year to year of two fields extending to 13½ acres. These fields are now and have for some time back been laid down in permanent pasture. He uses them for the purpose of feeding five cows, the milk of which he sells. It is contended that he does not come within the meaning of this Act, and that he cannot be denominated a statutory small tenant, in respect that he holds the fields for a business which is not primarily pastoral, and that he is, therefore, excluded from the benefit of the Act by virtue of the provisions contained in section 26 (3) (*g*).

I am of opinion that this contention is unsound, that the applicant is exactly in the position of a small dairy farmer who grazes cows upon his fields and sells the milk from a dairy situate on his farm, and therefore that the business which he carries on is not merely primarily pastoral but is exclusively pastoral.

The contrary is maintained on the ground that he not only sells milk which is yielded by the five cows fed in these two fields, but also the milk from ten cows which are grazed elsewhere. In my opinion that circumstance has no bearing on the question which we have to consider. He is, as I think, none the less engaged in a business which is purely pastoral, so far as the tenancy of these two fields is concerned, because he also sells milk given by cows that are fed on other fields. It appears to me that we have really nothing to do with the destination of the milk yielded by the cows that are fed upon the fields in question, and that we have before us a typical case of a small dairy farmer.

The exception to which section 26 (3) (*g*) applies is, I think, the case of a man carrying on the business of butcher, who hires grass fields in the vicinity of his slaughter-house into which he temporarily turns cattle on their way from the grazing to the slaughter-house, for custody or keeping, or feeding, as the case may be—a purpose which is strictly subordinate to and incidental to his business as a butcher. But when a man grazes cows upon a field and sells the milk, whether it be from a dairy on or off the holding, and whether he sells milk from cows grazed elsewhere as well as from cows grazed on the holding, it appears to me that he is using his field for a purely pastoral purpose.

I am of opinion, therefore, that the final order pronounced by the Land Court in this case was correct, and that we ought to answer the question of law put to us in the negative.

Lord Skerrington.—The respondent is a dairykeeper at Kirkburnhead, Muirkirk, and he was, on 1st April 1912, tenant under the appellant of two fields of 10 and 3½ acres respectively, which were then and have since been in permanent pasture. The Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), is declared by section 26 (3) (*g*) not to apply to a person who is tenant of "any land . . . being permanent grass park held for the purposes of a business or calling not primarily agricultural or pastoral, including that of butcher, cattle-dealer, and the like." The Land Court has decided that the respondent's holding does not fall under this exception, and has accordingly found that

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he is a statutory small tenant, and, as such, entitled to have an equitable rent fixed and his tenancy renewed in terms of section 32 of the Act. The appellant contends that, on the facts set forth in the case, the Land Court was bound to hold that the permanent grass parks in question were held by the respondent for the purposes of a business which was not primarily agricultural or pastoral.

The milk which the respondent retails in the village of Muirkirk comes from two sources. He buys the milk of ten cows from neighbouring farmers, and he owns five cows which graze on his holding, and which are also fed on the hay which he cuts on the 3½ acre field. In addition to the five cows the respondent has a horse which is grazed and fed on the holding. It is used for the purposes of the holding, and also for conveying "the milk," which I understand to mean the produce of the whole fifteen cows, to the village of Muirkirk. Nothing, in my opinion, turns upon this point. From the foregoing statement it will be seen that the respondent carries on what may be regarded as two businesses, though I prefer to regard them as two branches or departments of the same business. One department is purely commercial, and consists in the purchase of milk and its resale at a profit. So far as appears, the respondent does not separate the cream from the milk which he buys, nor does he churn any part of it into butter. The other department is akin to the business of a dairy farmer, and consists in the production and sale of milk obtained from cows which belong to the respondent, which graze upon the holding, and which also eat the hay grown and cut upon one of the parks. I should not describe the respondent as a dairy farmer, because on such farms there are generally buildings for the accommodation of the tenant and his live stock, and also ground which can be cultivated in order to produce food stuffs other than meadow grass. But this distinction does not seem to me to be material so far as regards the present question.

The appellant's counsel argued that the respondent's business was not "primarily agricultural or pastoral," in the first place because the commercial part of it was of older standing than the other department, and in the second place because two-thirds of the milk sold in the business was procured by purchase and not by anything akin to farming. In my view the word "primarily" as used in this part of the statute does not refer either to the date at which a particular branch of a business was established, or to the special manner in which the owner of the business chooses to conduct it. The statute, in my opinion, regards certain businesses as not being primarily agricultural or pastoral because they are not ordinarily so regarded, and because they do not ordinarily involve the occupation of land for agricultural or pastoral purposes. For example, the business of a butcher is not generally regarded as either agricultural or pastoral, although a butcher may find it convenient to rent a field as a resting-place for his stock on their way from the market to the slaughter-house. Again, a village butcher might sell no meat except what came from animals which he himself had kept or bred upon a small holding. In such a case the time and capital expended on the keeping or breeding of live stock might much exceed that expended upon their slaughter and the sale of their meat. I do not think that considerations of this kind

would be relevant for the purpose of showing that the business of a particular butcher was primarily pastoral. On the other hand, it would not necessarily follow that a grass park was held for the purposes of a butcher's business merely because the tenant happened to be a butcher and occasionally slaughtered a beast which he had kept on his holding. The question would be one of fact for the Land Court.

Applying this view of the meaning of the statute to the facts of the present case, I am of opinion that the grass parks tenanted by the respondent are held by him for the purposes of a business which is primarily pastoral, viz., the sale to the public of milk obtained from cows pastured and fed upon the holding. This business, as ordinarily conducted, does not make it necessary for the tenant to buy and sell milk not produced upon the holding. It is, therefore, primarily a pastoral business, and I do not think it material to inquire whether the milk produced upon the holding is sold along with or even mixed with other milk purchased by the tenant, or whether a separate account is kept of the price of the milk produced on the holding. Further, I do not think it necessary to inquire whether the respondent would continue to produce milk upon his holding if he did not see his way to increase his profits by buying and selling a much larger quantity of milk which had no connection with the holding. For these reasons I think that the question of law should be answered in the negative.

It would be improper to express an opinion upon different cases which may in the future come before the Land Court for decision, but obviously everything must depend upon the special facts of each particular case. Different considerations might apply if a tenant did not sell the milk produced upon his holding, but consumed it in some business not primarily pastoral which he carried on elsewhere, *e.g.* as an hotel-keeper or as a manufacturer; or again, if the tenant being the owner of a large herd of cows did not allocate to the holding a stock suitable to its size but used the holding as a supplementary food supply for the whole of his herd.

LORD ORMIDALE.—The question submitted for the opinion of this Court arises out of an application by John M'Clymont, who is designed in the case stated by the Land Court as a dairy-keeper, to be declared a statutory small tenant in terms of section 32 of the Small Landholders (Scotland) Act, 1911. The answer to the question depends on the construction or meaning to be given to section 26 (3) (*g*) of that Act, which provides:—[His Lordship quoted the section].

From the facts set forth in the special case it is clear that the holding of the applicant consists of permanent grass park. There is no dispute about that. Can it be predicated of this permanent grass park that it is held for the purposes of a business or calling not primarily agricultural or pastoral? If it can, then the applicant shall not be held an existing yearly tenant. What are the other facts stated in the case? There are no buildings on the holding. The holding is used by the applicant for the grazing and feeding of his stock, which consists of five cows and a horse. "The applicant is and has for the last twenty-two years been a

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dairykeeper, supplying the village of Muirkirk with milk. In his dairy business he sells milk produced by his own five cows, and the milk of other ten cows belonging to neighbouring farmers which he buys from them. His horse is used for the purposes of his holding and also for conveying the milk to the village of Muirkirk."

Now from these facts it appears to me that the applicant has a business or calling, and only one business or calling, that, namely, of selling milk. Does he hold the permanent grass park for the purposes of that business or calling? In my opinion he does. The only purpose for which he grazes the permanent grass park with cows is to obtain from them milk to be sold to the customers of his dairy.

Can it be said that this business or calling of selling milk as carried on by the applicant is primarily pastoral? In my opinion it cannot. The greater part of the milk which he sells is purchased by him in the first instance, and then resold to his customers. It seems to me that with respect to that milk his business is a purely commercial or mercantile undertaking or venture, and cannot be described in any sense as primarily agricultural or pastoral, and certainly not in any other sense than the business of the butcher or cattle-dealer referred to in the statute can be so described. If so, does the fact that in addition to the milk which is bought in the first instance from other people he sells milk which is the produce of cows belonging to himself and grazed on the permanent pasture held by him make any difference? In my opinion it does not. It seems to me that it is a mere accident that some of the milk retailed by him to his customers is the produce of cows belonging to the applicant, provided that the true inference from the facts stated is that the milk is disposed of by him along with other milk in the course of a business which is, to borrow a word from the statute, primarily mercantile or commercial—and such is the only inference which it seems to me is warranted by the circumstances disclosed in the present case. I do not read the facts set forth as instructing that the applicant is a dairy farmer, and I offer no opinion one way or another as to the applicability of the section to such. I am prepared to answer the question of law submitted to this Court in the affirmative.

THE COURT answered the question of law in the negative.

CONNELL & CAMPBELL, S.S.C., Agents.

No. 21.
Dec. 5, 1913.
Church of Scotland Endowment Committee v. Provident Association of London, Limited.

REVEREND HENRY COWAN, D.D., AND OTHERS (Trustees of the Endowment Committee of the General Assembly of the Church of Scotland), Pursuers (Respondents).—*Constable, K.C.—D. M. Wilson.*
THE PROVIDENT ASSOCIATION OF LONDON, LIMITED, AND OTHERS, Defenders (Reclaimers).—*Chree, K.C.—Lippe—Dykes.*

Contract—Constitution—Right in security—Ground-annual—Contract by a party purporting to create a ground-annual in favour of himself.

Held that a contract, entered into by a proprietor of lands as first party and himself as second party, purporting to create a ground-annual in favour of himself was ineffectual, in respect that a man cannot by any deed constitute a debt by himself to himself.

Right in Security—Real burden—Ground-annual—Constitution—Assignation of invalid ground-annual—Disposition in security—Absence of express personal obligation.

By a deed in the form of a contract of ground-annual (containing a personal obligation) the owner of land purported to dispone it to himself in consideration of the payment by himself to himself of a ground-annual, which was declared to be a real burden on the land and in security of which he reconveyed the land to himself. By subsequent recorded deed he disponed for value to third parties the ground-annual and security-subjects specified in the prior deed. The later deed contained no personal obligation.

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Held that the pursuers were entitled to succeed on both of the grounds stated.

Observed per Lord Dundas: "Ground-annual is not a *vox signata*; I think it simply means a perpetual rentcharge secured in some effectual fashion as a real burden on land."

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Now from these facts it appears to me that the applicant has a business or calling, and only one business or calling, that, namely, of selling milk. Does he hold the permanent grass park for the purposes of that business or calling? In my opinion he does. The only purpose for which he grazes the permanent grass park with cows is to obtain from them milk to be sold to the customers of his dairy.

Can it be said that this business or calling of selling milk as carried on by the applicant is primarily pastoral? In my opinion it cannot. The greater part of the milk which he sells is purchased by him in the first instance, and then resold to his customers. It seems to me that with respect to that milk his business is a purely commercial or mercantile undertaking or venture, and cannot be described in any sense as primarily agricultural or pastoral, and certainly not in any other sense than the business of the butcher or cattle-dealer referred to in the statute can be so described. If so, does the fact that in addition to the milk which is bought in the first instance from other people he sells milk which is the produce of cows belonging to himself and grazed on the permanent pasture held by him make any difference? In my opinion it does not. It seems to me that it is a mere accident that some of the milk retailed by him to his customers is the produce of cows belonging to the applicant, provided that the true inference from the facts stated is that the milk is disposed of by him along with other milk in the course of a business which is, to borrow a word from the statute, primarily mercantile or commercial—and such is the only inference which it seems to me is warranted by the circumstances disclosed in the present case. I do not read the facts set forth as instructing that the applicant is a dairy farmer, and I offer no opinion one way or another as to the applicability of the section to such. I am prepared to answer the question of law submitted to this Court in the affirmative.

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Held that a contract, entered into by a proprietor of lands as first party and himself as second party, purporting to create a ground-annual in favour of himself was ineffectual, in respect that a man cannot by any deed constitute a debt by himself to himself.

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the said Division of the General Register of Sasines, 11th, both days of December 1883, or otherwise and alternatively under and in terms of the said disposition and assignation, a ground-annual of £4, 5s. 11d. to be uplifted and taken furth of and from All and Whole that piece of ground on the south side of Gilmore Place, Edinburgh, upon which the self-contained dwelling-house, forming number 55 thereof, is built, with the plot in front thereof and the garden ground behind, being the subjects disponed in the third place in the above-mentioned disposition and assignation, was validly and effectually constituted a real burden on the said subjects, and that the pursuers as trustees foresaid are now in right thereof, *or otherwise and alternatively, it Ought and Should be Found and Declared, by decree foresaid, that under and in virtue of the said disposition and assignation the pursuers and their successors in office as trustees for behoof of said Committee are validly and effectually infeft, as from the date of recording the said disposition and assignation, in the said piece of ground, and that in real security for the payment by the said Peter Simpson and his heirs and executors and personal representatives whomsoever to the pursuers and their successors in office as trustees foresaid of the yearly sum of £4, 5s. 11d. . . .*"*

The contract of ground-annual referred to in the summons was in these terms:—"It is contracted and agreed between Peter Simpson, Solicitor before the Supreme Courts, Edinburgh, heritable proprietor of the areas of ground hereinarter disponed, of the first part, and the said Peter Simpson, of the second part, in manner following, viz., The said Peter Simpson, of the first part, in consideration of the ground-annuals and other prestations hereinafter undertaken by the said Peter Simpson, of the second part, has sold and hereby sells and dispones to and in favour of the said Peter Simpson, of the second part, and his heirs and assignees whomsoever, heritably and irredeemably, in the first place, . . . In the third place, All and Whole that piece of ground on the south side of Gilmore Place upon which the self-contained dwelling-house, forming number 55 thereof, is built, with the plot in front thereof and the garden ground behind, . . . And declaring that these presents are granted and the foresaid pieces of ground are disponed with and under the real and preferable lien and burden of the payment by the said Peter Simpson of the second part and his foresaids to the said Peter Simpson of the first part and his heirs and assignees whomsoever of the yearly ground-annual following, viz., of £4, 5s. 11d. sterling to be uplifted and taken by the said Peter Simpson of the first part and his foresaids furth of and from each of the pieces of ground before disponed in the first, second, third, and fourth places, and whole houses and buildings erected or to be erected thereon, or furth of any part or portion thereof, and readiest rents, maills, and duties of the same; . . . And the said Peter Simpson of the first part grants warrandice; For which causes and on the other part the said Peter Simpson of the second part binds himself and his foresaids to make payment to the said Peter Simpson of the first part and his foresaids of the foresaid several ground-annuals of £4, 5s. 11d. sterling for each of the said pieces of ground first, second, third, and fourth before disponed; . . . And for further security to the said Peter Simpson of the first part and his foresaids

* The portion of the summons printed in italics was added by amendment by leave of the Lord Ordinary on 12th November 1912.

of the payment of the said several ground-annuals, . . . the said Peter Simpson of the second part, . . . hereby assigns, dispones and makes over to and in favour of the said Peter Simpson of the first part and his foresaids not only All and Whole the yearly ground-annuals, viz., of £4, 5s. 11d. . . . but also All and Whole the said pieces of ground and buildings erected or to be erected thereon, . . . and that in real security to the said Peter Simpson of the first part and his foresaids of the payment of the said yearly ground-annuals. . . ."

The disposition and assignation referred to in the summons was in these terms:—"I, Peter Simpson, Solicitor before the Supreme Courts, Edinburgh, in consideration of the sum of £702, 3s. 1d. sterling, now paid to me by the General Assembly of the Church of Scotland's Committee for the endowment of Chapels of Ease, by the hands of George Baillie Wilson, their treasurer, of which sum I hereby acknowledge the receipt, and discharge the said Committee, do hereby sell, assign, and dispone to and in favour of Thomas Graham Murray, Writer to the Signet, convener, the Reverend Henry Cowan, minister of New Greyfriars, Edinburgh, vice-convener, and the said George Baillie Wilson, treasurer of the said Committee, and to their respective successors in office, any two of them being a quorum, as trustees for behoof of said Committee, and to their assignees whomsoever, heritably and irredeemably, not only the yearly ground-annuals following, *videlicet*, of £4, 5s. 11d. sterling, to be uplifted and taken by the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson, and their respective successors in office, as trustees foresaid, and their assignees and disponees, in virtue of a contract of ground-annual entered into between me, the said Peter Simpson, on the one part, and me, the said Peter Simpson, on the other part, dated the 3rd . . . December 1883, furth of and from each of the pieces of ground after disponed in the first, second, third, and fourth places, and whole houses and buildings erected or to be erected thereon, or furth of any part or portion thereof, and readiest rents, maills, and duties of the same . . . commencing the first term's uplifting of said respective ground-annuals at the term of Whitsunday 1884 for the half year preceding, and the next term's uplifting at Martinmas thereafter, and so forth at the said two terms in all time coming, and with penalty, interest, and consequents, all as specified in the said contract of ground-annual, and herein held as repeated *brevitatis causa*, with the said contract itself and whole clauses and obligations therein contained, and all action, diligence, and execution competent; but also, in the first place, . . . In the third place, All and Whole that piece of ground on the south side of Gilmore Place upon which the self-contained dwelling-house forming No. 55 thereof is built, with the plot in front thereof and the garden ground behind . . . with the pertinents of the said several pieces of ground hereby disponed, and my whole right, title, and interest present and future therein: But always with and under the real liens, burdens, declarations, conditions, obligations, provisions, and limitations specified in the said contract of ground-annual dated and recorded as aforesaid, and that in real security to the said Thomas Graham Murray, the Reverend Henry Cowan, and George Baillie Wilson, as trustees foresaid, and their foresaids, of the payment of the said yearly ground-annuals, half-yearly payments thereof, interest and penalties before specified or referred to, and of the performance of the obliga-

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tions and prestations incumbent on the said second party to the said contract of ground-annual; With entry as at the term of Martinmas 1883, notwithstanding the date hereof."

The pursuers averred that the deceased Peter Simpson, S.S.C., had executed the deeds referred to in the summons, that the defenders were his singular successors and as such the present proprietors of 55 Gilmore Place, and that they refused to pay the ground-annual or to recognise the pursuers' right thereto.

The pursuers pleaded;—In respect that under and by virtue of the deeds libelled, or otherwise and alternatively under the deed second libelled, a ground-annual of £4, 5s. 11d. to be uplifted from said subjects at 55 Gilmore Place, Edinburgh, was validly and effectually constituted a real burden on the said subjects, and that the pursuers, as trustees foresaid, are now in right thereof, the pursuers are entitled to decree of declarator as craved.

The defenders pleaded;—In respect that no ground-annual has been validly constituted a real burden on said subjects in virtue of the deeds libelled, or either of them, the defenders should be assoilzied from the conclusions of the summons.

On 12th November 1912 the Lord Ordinary (Skerrington) pronounced this interlocutor:—"Finds and declares in terms of the second alternative conclusion of the summons as amended, and decerns: *Quoad ultra*, dismisses the conclusions of the summons, and decerns."*

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* "OPINION.—The pursuers ask for declarator that a ground-annual of £4, 5s. 11d. has been validly and effectually constituted a real burden over certain heritable subjects now belonging to the defenders, and that the pursuers are now in right thereof. They found primarily upon a so-called contract of ground-annual, dated 3rd, and duly recorded in the Register of Sasines 6th December 1883. This deed professes to create a number of ground-annuals affecting various properties, but the present action is concerned only with one ground-annual which was intended to form a burden upon the subjects disponed *in the third place*. The so-called contract is in the elaborate and artificial form usually adopted in transactions of this kind. The owner of the heritable subjects sells them to a purchaser in consideration of the ground-annual and other prestations undertaken by the purchaser, and he dispones the subjects to the purchaser under the real burden of the payment of a yearly ground-annual and also of the maintenance and insurance of the buildings, &c. On his part the purchaser binds himself personally to pay the ground-annual and to perform the other prestations. In security for these personal obligations he dispones to the seller not only a yearly ground-annual of the same amount as that already reserved, but also the heritable subjects themselves. In the present case, however, it is apparent upon the face of the deed that the transaction which it professes to record was imaginary and non-existent because the so-called seller and the so-called purchaser were one and the same person, viz., "Peter Simpson, S.S.C., Edinburgh, heritable proprietor of the areas of ground hereinafter disponed *of the first part*, and the said Peter Simpson *of the second part*." It follows that the so-called contract is null and void in all its clauses. In particular, the new infeftment in favour of Mr Simpson and the qualification of that infeftment by the real burden of a ground-annual in his own favour are nullities. Even if the deed had not taken the form of a meaningless contract, the practical result, so far as regards the present question, would have been the same. Mr Simpson could competently dispone his property to himself as institute, and he could (I assume) qualify this new infeftment by reserving what Mr Duff calls a "real lien" in favour of a third party (Feudal Conveyancing, p. 195); but he could

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The defenders reclaimed, and the case was heard before the Second Division (without Lord Salvesen) on 25th and 26th November 1913.

Argued for the reclaimers;—The so-called contract of ground-annual between Peter Simpson and himself was inept and ineffectual to constitute a ground-annual, or to create a real burden or any obligation of any kind. The disposition and assignation, which *ex facie* of its terms did nothing but transfer a non-existent burden, was equally inept and effected nothing. The Lord Ordinary had read too much into it. The Court could only consider what a document did, and not what it attempted or intended to do.[1] The disposition contained no personal obligation, either express or implied, and therefore was incapable of creating a ground-annual. This consideration was also fatal to the Lord Ordinary's ground of judgment, since there could not be a disposition of the land in security of an obligation which had never been entered into. Moreover, the payment in ques-

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not effectually create a real burden in his own favour either by reservation or by constitution so as to affect a heritable subject of which he was absolute owner, any more than he could create a servitude in his own favour. It is, of course, a different question whether a ground-annual which has once been effectually created is extinguished, or, on the other hand, is only suspended, in the event of the person vested in the minor right or burden acquiring the higher right of property. See *Murray* v. *Parlane's Trustee*, (1890) 18 R. 287; *King* v. *Johnston*, 1908 S. C. 684.

"For the foregoing reasons I am of opinion that the so-called contract of ground-annual did not effectually create any real burden over the subjects now belonging to the defenders. Accordingly Mr Simpson remained absolute owner of the heritable subjects under his original title until his death in 1906.

"It now remains to consider the effect of the disposition and assignation, dated 8th, and recorded in the General Register of Sasines 11th December 1883, which he granted in favour of the pursuers in consideration of the payment of £702, 3s. 1d. It is obvious that when this deed was granted and accepted both parties had in view nothing more than a transfer to the pursuers of the rights which they assumed to be vested in Mr Simpson, as the first party to the contract of ground-annual already referred to. It does not, however, follow that a disposition of heritage may not operate in a manner different from that which the parties had in view provided it contains words habile to effect some other operation. Thus a bond and disposition in security which was granted by a person who was believed to have a feudal title to the subjects, and which was intended to create an ordinary heritable security, was held to operate as an assignation of a *jus crediti* which was all that the granter had to convey, and the recording of the bond was held to operate as intimation of the assignation. *Edmond* v. *Magistrates of Aberdeen*, 18 D. 47, *aff.* 3 Macq. 116."

[After narrating the terms of the disposition and assignation]—"I do not think that it is possible to construe the foregoing conveyance of a ground-annual as constituting and creating a new ground-annual, or as anything more than an assignation to the pursuers of the ground-annual (by reservation) which Mr Simpson had attempted to create by the contract of 3rd December 1883, and of the relative personal obligations, and of the ground-annual which he had attempted to constitute by way of security. These supposed rights being non-existent, the disposition and assignation was to that extent inoperative. I am, however, of opinion that the disposition and assignation, being an onerous deed, contained not expressly but by implication an unqualified acknowledgment on the part of Mr Simpson to

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[1] Ballachulish Slate Quarries v. Menzies, (1908) 45 S. L. R. 667.

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tion could not be a real burden on the land, since it did not appear in the defenders' titles.[1]

Argued for the respondents;—These parties did not now maintain that a valid ground-annual was created by the original deed. Their case was, first, that by the disposition and assignation the land was validly burdened with a ground-annual, or alternatively, second, that they were infeft in the land in security of a personal obligation impliedly contained in that deed, since in that deed Peter Simpson acknowledged or adopted his personal obligation in the so-called contract of ground-annual, and disponed the land in security thereof. (1) All the essentials of a ground-annual[2] were to be found in the disposition. A clause of personal obligation was not required, and the old form of a bond of annualrent did not contain it.[3] The deed was intended to transfer a right, but its terms were also apt to create it, and it should be construed in the way best calculated to give effect

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the effect that he stood from its date debtor to the pursuers for payment of the ground-annuals and performance of the various prestations undertaken by him as the second party to the so-called contract in his own favour as the first party. Mr Simpson could not, in my opinion, have successfully disputed his personal liability for the ground-annual and prestations in a question with the pursuers. It is true that he did not of new bind and oblige himself to pay the ground-annuals and to perform the prestations, but an acknowledgment of indebtedness is sufficient to constitute a debt and to give validity to a conveyance of heritable subjects in security thereof. If the true construction of the disposition and assignation is what I have stated, then it is immaterial that the present question arises with singular successors, because the deed was duly recorded in the Register of Sasines, and it was their duty to make up their minds as to its meaning and effect. The granter had the full and unrestricted right of property in the subjects now belonging to the defenders, and he conveyed them to the pursuers in security for certain pecuniary and other obligations incumbent on him as 'the second party to the said contract of ground-annual.' The disposition and assignation itself sets forth plainly and fully the amount of the ground-annuals for which Mr Simpson acknowledged liability, the terms of payment, and the lands affected. It is, however, doubtful whether apart from statute the intended security is not ineffectual so far as regards the interest and penalties, and the various obligations *ad factum præstandum*, as regards all of which the disposition and assignation is insufficient in detail when taken by itself, and in regard to which it must be supplemented by a reference to the recorded contract of ground-annual. Probably the defect (if any) is cured by section 32 of the Conveyancing (Scotland) Act, 1874, but the question was not fully argued, and it hardly arises under the conclusions as framed.

"I am prepared to affirm that the ground-annual mentioned in the summons is in a certain sense a real burden over the defenders' property, but I prefer to pronounce a decree declaring that under and in virtue of the disposition and assignation mentioned in the summons the pursuers, as trustees, and their successors in office and their assignees whomsoever, hold a valid and effectual conveyance of the heritable subjects described in the summons in real security for the payment by the late Peter Simpson, S.S.C., Edin-

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[1] Magistrates of Arbroath v. Dickson, (1872) 10 Macph. 630; Magistrates of Perth v. Stewart, (1830) 9 S. 225, (1835) 13 S. 1100.

[2] Bell's Prin. sec. 861.

[3] Bell's Lectures on Conveyancing, (3rd ed.) vol. ii., p. 1155, Juridical Styles, (3rd ed.) vol. i., pp. 216-218, (4th ed.) pp. 631, 634, 660; Duff's Feudal Conveyancing, pp. 262, 273.

to the real wishes of the parties.[1] (2) The disposition implied a personal obligation on Peter Simpson and his heirs to make payment of the sum in question. The deed being onerous, the unqualified acknowledgment by the granter of the existence of the debt specified in the prior deed (which though *per se* of no effect, could be referred to for its terms[2]), amounted to a guarantee that the debt existed,[3] and a homologation of the obligation which that deed contained.[4] The defenders were put on their guard by the recording of the disposition, and could not found on the absence of any reference to the ground-annual in their own titles.[5]

At advising on 5th December 1913,—

Lord Dundas.—The question here raised is whether the pursuers have a good real security upon the property of the defenders for a ground-annual of £4, 5s. 11d. per annum. The case, however, involves a larger pecuniary amount than would thus appear; because there are other ground-annuals, the validity of which will stand or fall according to our decision.

It is quite clear that the attempt made by Mr Simpson to create these ground-annuals by means of a so-called contract with himself was ineffectual. A man cannot by any deed constitute a debt by himself to himself, with or without security. The so-called contract,—a piece of conveyancing which I confess I do not appreciate at all,—is plainly inept and void as an operative instrument. The real question arises upon the second deed, whereby Mr Simpson for onerous causes, sold, assigned, and disponed to the pursuers not only (*inter alia*) the ground-annual in question,—which he and they appear to have thought he had created by his former deed,—but also the lands, of which (upon the assumption that the first deed was invalid) he was unrestricted owner, in real security of the ground-annual so conveyed.

It was very forcibly argued for the defenders that, inasmuch as the first deed was admittedly inept and had not constituted any ground-annual at all, it follows that there was no ground-annual to be trans-

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burgh, of the yearly ground-annual of £4, 5s. 11d., payable half-yearly, commencing the first term's payment at the term of Whitsunday 1884 for the half year preceding, and the next term's payment at Martinmas thereafter, and so forth at the said two terms in all time coming."

[1] Edmond v. Magistrates of Aberdeen, (1855) 18 D. 47, *aff.* 3 Macq. 116; M'Cutcheon v. M'William, (1876) 3 R. 565; Glen v. Scales's Trustee, (1881) 9 R. 317; Cattanach's Trustee v. Jamieson, (1884) 11 R. 972; Glasgow Feuing and Building Co., Limited, v. Watson's Trustees, (1887) 14 R. 610; Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co., Limited, (1906) 8 F. 915; Goodtitle v. Bailey, (1777) 2 Coup. 597, *per* Lord Mansfield, C.J., at p. 600; Roe v. Tranmarr, (1758) Willes, 682; Monypenny v. Monypenny, (1859) 3 De G. & J. 572, *per* Chelmsford, L.C., at p. 589; Gwyn v. Neath Canal Navigation Co., (1868) L. R., 3 Ex. 209, *per* Kelly, C.B., at p. 215; *In re* Johnston Foreign Patents Co., Limited, [1904] 2 Ch. 234; Norton on Deeds, p. 46.

[2] Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 32.

[3] Bell's Prin. sec. 1469, Bell's Com., (7th ed.) vol. i., p. 689.

[4] Bell's Com., (7th ed.) vol. i., p. 141.

[5] Stodart v. Dalzell, (1876) 4 R. 236.

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Lord Dundas.

mitted by the second deed, which accordingly carried nothing whatever to the pursuers. The pursuers, on the other hand, while not attempting to support the validity of the first deed as creating a ground-annual or anything at all, maintained (1) that a ground-annual may quite well be constituted a real burden on land without any personal obligation; and that, disregarding the first deed altogether, the second deed did by its own effect create a valid real burden, by way of ground-annual or perpetual rentcharge, in their favour; and alternatively (2) that, although the first deed was inept as a contract between Mr Simpson and the pursuers, yet, by the second deed, Mr Simpson did, by plain implication, adopt and re-enact the personal obligation ineptly undertaken by the first deed, to the effect of binding himself and his heirs for payment of the ground-annual to the pursuers, and did further dispone to them, in security of the obligation, the lands which, on the assumption that the first deed was ineffectual, belonged absolutely to himself. The Lord Ordinary's interlocutor gives effect only to the second of the pursuers' alternative contentions. I think they would be entitled to succeed upon either of them.

A ground-annual is a right of very ancient origin. It appears to have been resorted to only where subfeu rights were not available, either because the lands were held on burgage tenure, or because the titles expressly prohibited subinfeudation. But "ground-annual" is not a *vox signata;* I think it simply means a perpetual rentcharge secured in some effectual fashion as a real burden on land. That the second deed was designed to transfer, not to create, the charge is clear; but none the less, I think (differing in this from the Lord Ordinary) that it is by its own terms sufficient to create such a charge. It is not doubtful that charges for money, either for principal sums or by way of annuity, may be secured upon land without any personal obligation at all. Bonds of annuity under the Aberdeen Act afford a familiar example of this; and indeed, as regards ground-annuals themselves, the practice of introducing a personal obligation and disposition in security is, I apprehend, of comparatively recent origin—(see, *e.g.*, Bell's Conveyancing (3rd ed.) pp. 1156-7). If, then, an owner of land shall, by deed and for a price, sell and dispone to another a ground-annual of a definite sum per annum, to be uplifted and taken from the land at specified terms in each year in all time coming, I think that such a deed would constitute a valid real burden for the said amount. The present case is not precisely that which I have figured; because the second deed does throughout refer to the ground-annual as to be uplifted and taken "in virtue of" and "as specified in" the former (admittedly inept) deed. But I do not think the mere fact of such reference,—manifestly introduced because the parties thought they were transferring a right already created,—is sufficient to render void and ineffectual the second deed, the terms of which are otherwise quite sufficient to constitute, as well as to transfer, the charge. The question is not what was intended to be effected by the deed, but what was legally effected by it. The Lord Chancellor (Chelmsford) in *Monypenny* v. *Monypenny*[1] said:

[1] 3 De G. & J. 572, at p. 589.

"It is undoubted law that a deed that is intended and made to one purpose may enure to another, for if it will not take effect that way it is intended, it may take effect another way"; and there are numerous decisions, Scots and English, to that effect. I should be prepared, therefore, to hold that the pursuers are entitled to decree in terms of the alternative branch of the first conclusion of their summons.

But I think that the second conclusion, introduced by amendment as alternative to the whole of the first conclusion, is also well founded. The Lord Ordinary has given effect to it, and I agree with him. Mr Simpson professed, by the second deed, to assign to the pursuers for value certain obligations undertaken by himself to himself. One who professes to assign a debt to another for value is held to warrant *debitum subesse*; and the cedent is thus himself personally liable to the assignee for the amount of the debt, even if in fact there was no debt due to the cedent. That seems to be the case here. I think that, upon a fair reading of the second deed, Mr Simpson did by it render himself and his heirs debtors to the pursuers in the personal obligation contained in the so-called contract, which he purported to assign; and that, in a question with himself, the pursuers were entitled to hold him and his heirs to performance of that obligation. I consider further that the second deed amounts to an adoption and homologation by Mr Simpson of the personal obligation contained in the first deed; and he disponed not only this obligation but also the lands in real security thereof. It seems to me, therefore, that the lands are validly charged with the real burden of this annual payment to the pursuers, although they have passed into the hands of the defenders as singular successors.

For these reasons, I am for adhering to the interlocutor reclaimed against. The pursuers' counsel were careful to explain that they were content with that interlocutor, and did not reclaim against it; though they argued that, if the Court were not prepared to sustain the Lord Ordinary's basis of judgment, they were entitled in that event, as I think they would be, to decree in terms of the alternative branch of the first conclusion of their summons.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT adhered.

MENZIES & THOMSON, W.S.—MACKENZIE & FORTUNE, S.S.C.—JAMES P. NIVEN, Solicitor—Agents.

No. 22.
Dec. 12, 1913.

ALFRED DONALD MACKINTOSH AND OTHERS (The Countess-Dowager of Seafield's Trustees), Appellants.—*Murray, K.C.*—*D. P. Fleming.* JOHN M'CURRACH, Respondent.—*W. Mitchell.*

Seafield's Trustees v. M'Currach.

Lease—Small holdings—"Lotted" lands—Statutory small tenants—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49).

Held that the provisions of the Small Landholders (Scotland) Act, 1911, applied to "lotted lands," not equipped with buildings, which had been voluntarily laid out by the proprietor of an estate for occupation as agricultural subjects by householders in an adjoining village, and that a yearly tenant of three of these lots was a statutory small tenant within the meaning of the Act.

1ST DIVISION. Land Court.

ON 30th January 1913 John M'Currach, tenant of lots Nos. 21, 22, and 39 of the lotted lands of Fordyce, of which the trustees of the late Countess-Dowager of Seafield were the proprietors, lodged an application with the Land Court for an order determining whether he was a "landholder" or a "statutory small tenant" under the Small Landholders (Scotland) Act with regard to these lots, and for an order fixing a fair rent for them.

The Land Court having pronounced an order finding that the applicant was a statutory small tenant, the proprietors asked for and obtained a special case for the opinion of the First Division of the Court of Session.

The case set forth, *inter alia*;—

"2. The respondent's application was duly served on the appellants, who lodged answers. Answer 1 stated: 'The respondents admit that the applicant is a tenant of certain portions of lotted land situated in the parish of Fordyce belonging to them as trustees of the late Countess-Dowager of Seafield. The extent of the applicant's holding is 11 acres 21 poles, and the annual rent now payable is £23, 12s., a reduction of £2 having been given to the applicant at Martinmas 1905.' The answers contained no plea that the subjects occupied by the applicant were not a holding within the meaning of the Small Landholders (Scotland) Act, 1911, but at the hearing at Elgin on 4th March 1913 the appellants objected that the lands in question did not fall under the Small Landholders (Scotland) Act, 1911, in respect that the said lands were 'lotted lands.'

"3. The respondent became yearly tenant at Martinmas 1894, of part of lot 21 and of lot 22 of the lotted lands of Fordyce, which were let to him at the former rent of £11, 18s. At Martinmas 1896 he became yearly tenant of the other part of the said lot No. 21 at the former rent of £6, 12s., which brought his gross rent to £18, 10s. As from Martinmas 1905 the above rent of £18, 10s. was reduced to £16; and at that same term, on the Reverend John Charles M'Gregor relinquishing his tenancy of lot No. 39, the respondent applied for and became yearly tenant of that lot at the former rent of £7, 12s., which, added to the said rent of £16, made up the present annual rent of £23, 12s. for a total area of 11 acres 21 poles or thereby. Since Martinmas 1905 the respondent has possessed and cultivated the said 11 acres and 21 poles as one agricultural subject, as tenant from year to year, on the six-shift rotation. His ordinary stock has consisted of two cows, one horse, and also two calves during part of the year.

"4. The lotted lands, of which the said 11 acres 21 poles in question form part, are lands which have been laid out by the appellants'

predecessors over seventy years ago for occupation as agricultural subjects by householders in Fordyce. The holders of these lands have usually had their houses, with offices, &c., in Fordyce. These houses are usually held by them under feu-charters or long leases. Some of the lots are held by persons who occupy houses in the village as ordinary tenants from feuars or lessees under long tacks. All the lotted lands are held by the tenants thereof under leases of one year or upwards, which are distinct from and have no relation with the leases or titles of their houses and offices in Fordyce. All of them, including the respondent, reside within two miles of their respective holdings. About seventy years ago, the lotted lands extended to 190 acres; the present extent is 150 acres. These 40 acres have been added to adjoining farms. The original lots have been divided or combined from time to time. Considerable expenditure was made on these lands by the appellants' predecessors, chiefly in connection with drainage, between 1861 and 1912.

"5. On 13th May 1913 the appellants received intimation that the following final order had been pronounced in the application by the Land Court:—*Edinburgh, 8th May* 1913.—'The Land Court having resumed consideration of this application, repel the objection taken for the respondents, that the Act of 1911 does not apply to the applicant's holding; find that the applicant is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to the applicant as tenant has been established; therefore find that he is entitled, in virtue of the 32nd section of the Act of 1911, to a renewal of his tenancy, and to have an equitable rent fixed; and having considered all the circumstances of the case, holding, and district, fix and determine the period of renewal at seven years, and the equitable annual rent payable by the applicant at £16, 10s. sterling, each to run from the term of Whitsunday 1912. . . ."*

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* "NOTE.—The applicant's holding is made up of lots of land let to him at different dates from 1894 to 1905. He entered on the tenancy of lot 22 and part of lot 21 at Martinmas 1894, the rent being £11, 18s., and of another part of lot 21 at Martinmas 1896, the rent being £6, 12s., and of lot 39 at Martinmas 1905, the rent being £7, 12s. In each case the tenancy was from year to year, and the first rent became payable at the Martinmas succeeding the term of entry. Since 1905 he has possessed and worked these originally separate lots as one holding at the total rent of £23, 12s., payable at Martinmas of each year for the crop of that year. There are no buildings on the holding. The applicant has resided and resides in the village of Fordyce, within two miles of the holding. His dwelling-house and offices are held on a separate title, and are not included in the holding, as specified in the application.

"There is no dispute that he is a tenant from year to year of these subjects in respect of which he claims. This *prima facie* satisfies the requirements of the Act of 1911. It is clear that he is not a landholder, as his predecessors in the different lots were not members of his family, and though he aided the creation of some permanent improvements on the land since his entry, this aid is comparatively small. It is equally clear that he is a statutory small tenant in and of this holding, unless the respondents' special plea is sustained. That special plea is that this holding consists of 'lotted lands,' and that 'lotted lands' are, or ought by construction to be, excluded from the operation of the Small Landholders Acts.

"'Lotted lands' mean simply lands which are laid out or lotted by an

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At advising on 12th December 1913,—

LORD PRESIDENT.—The applicant in this case is a tenant of lotted lands in the immediate vicinity of the village of Fordyce, and the question we have to consider is whether or no he is a statutory tenant within the meaning of the Scottish Small Landholders Act.

Now I venture to ask why not, and all Mr Murray's ingenuity, although it is great, and his research through the clauses of this Act, which was most industrious, failed to give a satisfactory answer to that question. I am of opinion, therefore, that the final order pronounced by the Land Court is correct, and for the grounds of my opinion I refer to the very full and clear note, which the Land Court have appended to their final order and to which I have nothing to add.

LORD JOHNSTON.—I think it is unfortunate that this Act should interfere with the well-intentioned efforts of land owners, made long ago and at great expense, to supply lotted lands to the inhabitants of villages, but I can find nothing in the statute which warrants the particular pieces of land in question being withdrawn from its application. It is worthy of notice as a comment upon the anticipations of those who passed the Act that apparently these lotted lands have not continued to be appreciated, as lotted lands, by the people of this village, for two things have happened; in the first place, a considerable portion of the original lotted lands have had to be resumed and handed over to the tenant of an adjoining farm; and, in the second place, this particular tenant has, in 1894, 1896, and 1905, gradually amassed into his own hands three holdings or rather four, because one of them was at the time divided, and now cultivates them, not for the greater comfort of himself and his family as an adjunct to his ordinary occupation, but as his regular business. This looks as if there was no demand for allotments properly so-called in this village, or else as if having ceased to be regarded as ordinary allotments this particular tenant has secured these lots by outbidding his neighbours, affording therefore the best criterion of their market value.

LORD MACKENZIE.—I am of the same opinion. I had difficulty in following the argument presented for the appellants—certainly not because of any want of clearness of statement on the part of Mr Murray. I understood him to admit that the Commissioners' statement in their note is correct, viz.:—"It is beyond doubt that these Fordyce 'lotted lands' do not come within any of the express exclusions in section 26 of the Act of

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villagers were equally beneficial, and could be more readily worked by co-operation. Accordingly, for residence on the holding, the Act of 1911 substituted residence 'within two miles of' the holding as one of the conditions required to bring a holding within the Act.

"The applicant's rent-account shows arrears to the extent of two years' rent, amounting to £47, 4s. as at Martinmas 1912, including rent for crop 1912. He was under the impression that he was only one year's rent in arrear. This was due to his having, for some years, been allowed to pay his rent within the year after it had become due. The applicant promised, and is apparently able, to pay all his arrears, and the objection to renewal on the ground of his existing arrears was not pressed."

1911. Any 'small holding' under the Small Holdings Act, 1892, or any allotment under the Allotments (Scotland) Act, 1892, or the Local Government (Scotland) Act, 1894, is no doubt excluded by subsection 3 (*e*) of that section. This subsection refers only to holdings and allotments formed on land which a public authority has acquired either by agreement or compulsorily, and subject to special regulations with regard to the tenure, rights, and obligations of the holders under the statutes expressly cited in the subsection. The formation or preservation of small holdings by public authority was regulated or extended in England by a series of statutes from 1601 to 1908, in Scotland much later—by the Crofters Acts, the Acts above cited, and the Act of 1911." Accordingly he addressed himself to what seemed to me the hopeless task of saying that by implication they were excluded by reason of the operation of certain subsections of section 26. It is impossible to come to that conclusion.

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LORD SKERRINGTON concurred.

THE COURT answered the question of law in the affirmative.

MACKENZIE, INNES, & LOGAN, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

No. 23.

JOHN CHARLES STEWART AND OTHERS (Francis Pott Stewart's Trustees), First Parties.—*D. P. Fleming.*
JAMES TODD STEWART AND OTHERS (Trustees of John and Robert Stewart), Second and Third Parties.—*Blackburn, K.C.*—*Maconochie.*
ROBERT STEWART AND OTHERS, Fourth Parties.—*Murray, K.C.*—*Maclaren.*
JOHN CHARLES STEWART AND ANOTHER, Fifth Parties.—*Moncrieff, K.C.*—*R. C. Henderson.*
MRS LOUISA GERTRUDE STEWART OR SWINBURNE AND OTHERS, Sixth Parties.—*Fleming, K.C.*—*J. A. Inglis.*
MRS AGNES CRAIG MOORE OR STEWART OR BATTCOCK AND ANOTHER, Seventh Parties.—*Constable, K.C.*—*Kemp.*

Dec. 12, 1913.
Stewart's Trustees v. Battcock.

Succession—Heritable and moveable—Jus relictæ—Debenture stock—Provision in deed creating stock that the stock should be personal estate.

Held that a provision in a trust-deed, under which the debenture stock of a company was issued, that the stock "shall be, and shall have the incidents of, personal estate," did not have the effect of making the stock moveable in a question as to *jus relictæ*.

2D DIVISION.

ON 18th December 1912 a special case was presented to the Second Division of the Court of Session for the determination of certain questions which had arisen under the trust-disposition and settlement of the late Francis Pott Stewart, Craigweil, Ayr, who died on 26th November 1890. The trustees acting under this trust-disposition and settlement were the *first parties* to the case; the testamentary trustees and children of the testator's brothers, John and Robert Stewart, were the *second, third, fourth, fifth,* and *sixth parties;* and Mrs Agnes Craig Moore or Stewart or Battcock, the testator's widow, and her second husband, William F. Battcock, to whom she was married on 22nd June 1895, were the *seventh parties.*

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By his trust-disposition and settlement the testator directed his trustees to pay to his widow an alimentary annuity of £1000, which was to be reduced to £500 in the event of her entering into a second marriage, and further directed them on her death to divide and pay the residue of his estate in terms which, as the Court held in this case, suspended vesting until that event. The income of the estate was more than sufficient to pay the widow's annuity, and the trustees accumulated the surplus till 26th November 1911 when the period of twenty-one years from the testator's death, after which accumulation was forbidden by the Thellusson Act, expired. It was decided in the case that the surplus income accruing after that date during the widow's lifetime fell into intestacy.

The seventh question was—"In the event of" it being decided that the surplus income fell into intestacy "is the widow entitled to *jus relictæ* (*a*) out of the income so falling into intestacy and in particular, (*b*) out of the income of" certain investments "mentioned in statement 12 or any of them?"

This report deals only with the widow's claim to *jus relictæ* out of one of these investments, an investment of £6000; and the statement in article 12 of the case as to this investment was as follows:—"The estate of the testator at the time of his death, consisted, *inter alia*, of £6000 4¼ per cent Mortgage Debenture Stock of the Distillers Company, Limited. This stock is secured over certain heritable and leasehold property of the company in terms of or in manner set forth in the deed of agreement, dated 13th, 14th, and 15th days of April 1887, executed by and between the said company of the one part and certain trustees for the holders of the said stock of the other part, and was redeemable in the company's option after 1st January 1907, on six months' notice, at £110 per cent. A copy of this agreement is printed in the appendix, and held to form part of this case." In the deed of agreement referred to it was declared that "the said stock shall be, and shall have the incidents of, personal estate."

The case was heard on 4th and 5th December 1913, before the Second Division (without Lord Salvesen) when counsel for the seventh parties maintained that by reason of this declaration the stock must be treated as moveable in all respects, and that the widow's right of *jus relictæ* attached to it.* Counsel for the other parties (except the first parties) contended that under the Act 1661, cap. 32, the stock was heritable *quoad jus relictæ*, and that the declaration in the deed of agreement did not have the effect of making it moveable in a question with the widow.[1]

At advising on 12th December 1913,—

LORD DUNDAS.—[In dealing with the widow's claim for *jus relictæ* said]—

* Sec. 23 of the Companies Clauses Act, 1863 (26 and 27 Vict. cap. 118), was not referred to at the hearing. That section enacts:—"Debenture stock, with the interest thereon, shall be a charge upon the undertaking of the company, prior to all shares or stock of the company, and shall be transmissible and transferable in the same manner, and according to the same regulations and provisions, as other stock of the company, and shall in all other respects have the incidents of personal estate."

[1] Downie v. Downie's Trustees, (1866) 4 Macph. 1067; Dawson's Trustees v. Dawson, (1896) 23 R. 1006; Bennett's Executrix v. Bennett's Executors, 1907 S. C. 598: Stark v. Stark, 1910 S. C. 397; Heath v. Grant's Trustees, 1913 S. C. 78, were referred to.

The trust-estate, at the testator's death, consisted, *inter alia*, of (*a*) £6000 4½ per cent Mortgage Debenture Stock of the Distillers Company, Limited; (*b*) Debenture bonds, bearing interest at various rates payable half-yearly by the New Zealand and Australian Land Company, Limited; and (*c*) a sum of £10,000, being balance due to the testator of a loan by him to his brother Robert at interest for ten years from 1888, under an agreement, which is printed in the appendix. All these items bore interest for a tract of time current at the testator's death. They are, therefore, *prima facie*, moveable *quoad* his succession, but heritable in a question of his widow's rights. But a special argument was presented for the widow in regard to the mortgage debenture stock of the Distillers Company. The agreement between that company and trustees for the stockholders is printed *ad longum* in the appendix. The holders are given preferable security over the company's heritable property. The terms of the conditions of issue of the stock are set forth in Schedule A annexed to the agreement. Clause 2 of the agreement, after providing that the stockholders shall have and be subject to the whole rights, privileges, obligations, and others specified in the conditions of issue in Schedule A, ends with the words,—"The said stock shall be, and shall have the incidents of, personal estate." Counsel for the widow founded upon these words as importing that this stock is declared to be, for all purposes, personal estate; and argued that it must, therefore, be subject to *jus relictæ* in a question with the widow of a deceased stockholder. It seems to me improbable that the framers of this agreement had any such case in mind, or had any intention to effect a variation on the application of the general law of the land. I think it is more reasonable to suppose that the words quoted—though redundant, perhaps, and unnecessary—were introduced in order to make as clear as possible what is expressly stated in article 10 of Schedule A, viz., that executors of a deceased stockholder were alone to be recognised by the company as having any title to the share registered in his name. But, however this may be, the words appear to me to be, in any view, too wide and vague to achieve the purpose for which they are founded on by counsel for the widow. "Personal estate" or its "incidents" might refer equally well to estate personal at common law, or to estate made personal by the statute 1661, cap. 32. But the latter view would not suit the widow's contention at all; it would exclude her claim. I think, though the point is novel, and a little puzzling, that her argument must fail. I am therefore for answering branch (*b*) of the seventh question in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT answered head (*b*) of question 7 in the negative.

WEBSTER, WILL, & Co., W.S.—FRASER, STODART, & BALLINGALL, W.S.—CUMMING & DUFF, S.S.C.—WISHART & SANDERSON, W.S.—Agents.

No. 24.

Dec. 12, 1913.

Veitch's Trustees v. Rutherford.

WILLIAM GEORGE TURNBULL AND OTHERS (William Veitch's Trustees), First Parties.—*Hamilton.*
MRS AGNES RIDDELL TURNBULL OR RUTHERFORD AND ANOTHER, Second Parties.—*Moncrieff, K.C.—J. H. Henderson.*
MRS JANE ELLIOT TURNBULL OR BROWN AND ANOTHER, Third Parties.—*Shiell.*
WILLIAM GEORGE TURNBULL AND OTHERS, Fourth Parties.—*Macquisten.*

Succession—Vesting—Fee or liferent—Gift of fee followed by limiting provision—Repugnancy.

A testator by his will appointed an executor, and disposed of the residue of his estate by leaving it to two persons "for behoof of" Mrs R. and Mrs B., and enjoined on these two persons "not to put a shilling at risk during the life of the two ladies." There was no further disposal of the residue.

Held that the residue was vested in fee in the two ladies equally, and that they were entitled to immediate payment thereof.

1ST DIVISION. ON 26th September 1912 a special case was presented for the determination of the effect of a provision in the will of the late Reverend William Veitch, LL.D.

The testator died on 8th July 1885 leaving a holograph will dated 4th July 1878, and other subsidiary testamentary writings. By this will and other writings he disposed of a certain heritable property, and bequeathed pecuniary legacies to certain individuals and institutions. The will concluded with this provision:—"The residue I leave to my relation and friend Prof. Wm. Rutherford and Mr Wm. Turnbull, Spittal, for behoof of Mrs John Rutherford, Thickside, and Mrs Bywater (Annie Rutherford), and enjoin on them to put not a shilling at risk during the life of the two ladies. I appoint Mr Dalziel Pearson, W.S., 128 Geo. Street, Edinburgh, to administer this my Will." Neither the will nor the other writings contained any further directions with regard to the residue.

After the testator's death in 1885 the executor appointed by the will paid over the residue of the trust-estate to Professor Rutherford and Mr Turnbull, as trustees under the residuary clause. Professor Rutherford died, and another trustee was assumed, in 1899, to act along with Mr Turnbull on this trust.

The parties to the case were the trustees, original and assumed, acting under the trust created by the residuary clause, *first parties;* the beneficiaries under that clause, viz., Mrs John Rutherford and Mrs Bywater, *second parties;* the representatives of the next of kin and heirs *in mobilibus* of the testator at the date of his death, *third parties;* and the surviving original trustee under the residuary clause, Mr Turnbull, and the representatives of Professor Rutherford, the deceased trustee thereunder, *fourth parties.*

The case stated:—"III. . . . The trustees since the said residue was paid over to them in 1885 have held and invested the capital thereof which, at the present value of the investments, amounts to about £6400, and have paid the annual income to the said Mrs Rutherford and Mrs Bywater equally. Questions have now arisen as to the extent of the rights competent to the said Mrs Rutherford and Mrs Bywater, and as to the disposal of the capital.

"IV. The second parties hereto . . . maintain that under the

said will the residue of the testator's estate has vested in them in fee, and that they are now entitled to have the same paid to them equally. Alternatively they maintain that the said residue has vested in them in fee, subject only to the limitation that during their lifetime it falls to be administered by the first parties for their respective use and behoof. . . .

"VII. The first, third, and fourth parties maintain that under the said will the second parties are not now entitled to have the said residue paid to them, but are entitled only to the liferent of said residue. . . ."

The questions of law for the opinion of the Court were, *inter alia*:—"(1) Is the residue vested in fee in the second parties equally? (2) If the first question be answered in the affirmative, (*a*) are the second parties now entitled to payment of the said residue equally between them, or (*b*) does it fall to be administered by the first parties during their lifetime for their respective use and behoof?"

The case was heard before the First Division (without Lord Skerrington) on 31st October 1913.

Argued for the second parties;—The gift of the residue to the trustees "for behoof of" these parties was equivalent to a direct gift of fee to them, as there was no disposal of the fee in any other way or to any other persons. The direction with regard to not risking a shilling during their lives was not effectual to restrict the interest already given to one of liferent.[1] It could only have effect as an instruction to the trustees with regard to the investment of the funds so long as they held them. The second parties were further entitled, if they so desired, to immediate payment of the fund equally between them.[2] This was not a case of a "protected" fee or of a fee limited by the imposition of a trust to secure further purposes.[3] It fell within the rule of *Miller's Trustees*,[4] and not within that applied in the cases of *Chambers' Trustees* v. *Smiths*[5] and *Christie's Trustees* v. *Murray's Trustees*.[6]

Argued for the first parties;—It was the duty of these parties to hold the residue and to pay only the income thereof to the second parties. The first parties were not the testator's general testamentary trustees, but were specially appointed to administer the residue. The words "for behoof of" were vague, and did not necessarily imply a gift of fee to the two ladies. The plain meaning of the whole residue clause was that the second parties were to have a liferent only. The first parties were to invest the residue in a particular way "for behoof" of the beneficiaries. The demand for immediate payment was clearly inconsistent with this direction.

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[1] Miller's Trustees v. Miller, (1890) 18 R. 301; Greenlees' Trustees v. Greenlees, (1894) 22 R. 136 (as contrasted with Forrest's Trustees v. Reid, (1904) 7 F. 142, *per* Lord Adam, at p. 145); Ballantyne's Trustees v. Kidd, (1898) 25 R. 261; Gillies' Trustees v. Hodge, (1900) 3 F. 238; Yuill's Trustees v. Thomson, (1902) 4 F. 815.

[2] Miller's Trustees v. Miller, 18 R. 301; Greenlees' Trustees v. Greenlees, 22 R. 136; Ballantyne's Trustees v. Kidd, 25 R. 261; Barber v. Finlater, (1835) 13 S. 422.

[3] Tweeddale's Trustees v. Tweeddale, (1905) 8 F. 264; Gibson's Trustees v. Ross, (1877) 4 R. 1038; Massy v. Scott's Trustees, (1872) 11 Macph. 173.

[4] 18 R. 301.

[5] (1878) 5 R. (H. L.) 151.

[6] (1889) 16 R. 913.

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Counsel for the third and fourth parties adopted the argument of the first parties, and for the third parties it was further argued that the fee fell to be dealt with as intestate succession of the deceased.

At advising on 12th December 1913,—

LORD PRESIDENT.—I regard the questions raised in this special case as completely covered by authority, and I should regret if any further doubt were thrown upon the principle of law laid down and applied by the judgment of the whole Court in the case of *Yuill's Trustees*.[1] That principle I take to be this, that "when a vested, unqualified, and indefeasible right of fee is given to a beneficiary of full age, he is entitled to payment of the provision notwithstanding any direction to the trustees to retain the capital of the provision, and to pay over the income periodically, or to apply the capital or income in some way for his benefit."[2] And I think that in that case Lord Moncreiff was quite right when he said that the sentence I have quoted was "simply a short statement of the grounds of judgment of Lord Rutherfurd Clark and Lord M'Laren in the case of *Miller's Trustees*,"[3] for when I turn to *Miller's Trustees*,[3] I find that Lord Rutherfurd Clark thus laid down the principle, "I do not think that the law allows of any restriction on the owner of an absolute fee, and in my opinion the direction that the trustees shall manage the estate till Mr Miller reaches twenty-five is just as repugnant to the right of fee which is vested in him as a direction to manage the estate till he reaches any other age, or it might be till his death." And Lord M'Laren, in the same case, says: "It seems to me that a beneficiary who has an estate in fee has by the very terms of the gift the same right of divesting the trustees, and so putting an end to the trust, which the truster himself possessed."

Now we have here before us, as I think, a clear case for the application of the principle so laid down, for the residue clause of Dr Veitch's holograph settlement runs thus: "The residue I leave to my relation and friend Prof. William Rutherford and Mr William Turnbull, Spittal, for behoof of Mrs John Rutherford, Thickside, and Mrs Bywater (Annie Rutherford), and enjoin them to put not a shilling at risk during the life of the two ladies." I cannot construe these words otherwise than as conferring a clear, unqualified, and indefeasible right of fee on these two ladies. And it is nothing to the purpose to say that these words are followed by an injunction to the trustees to put not a shilling at risk during the life of the two ladies, because that is no more than a direction to place the money in a safe investment where no loss can take place. It is, I think, impossible to maintain that the import of these words is to reduce the right of fee to a right of mere liferent, and, if they have not that effect, then it was not maintained to us that they had any other effect. The first and third parties to this case were, I think, well advised in not maintaining, in face of the judgment in *Yuill's Trustees*[1] and *Miller's Trustees*,[3] that the effect of these words was to enable the trustees to retain and to manage this vested provision.

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[1] Yuill's Trustees v. Thomson, 4 F. 815.

[2] *Ibid*, at p. 819.

[3] 18 R. 301.

It appears to me, as the result of the authorities to which I have referred and as the result of the principle which I take to be firmly imbedded in our law, that a beneficiary cannot be denied an immediate payment of his provision unless there are trust purposes in the settlement to secure which it is essential that the trustees retain in their own hands the right which is vested in the beneficiary. Now, in the case before us there are no such trust purposes, and therefore I think that these ladies are entitled to the immediate payment of the provision made for them in the residue clause of this will.

I propose to your Lordships, therefore, turning to the questions, that we should answer the first question in the affirmative, the first part of the second question in the affirmative, and the second part of the second question in the negative. The third question is superseded and the fourth question is abandoned.

Lord Johnston.—The testator left the residue of his estate to two trustees for behoof of two ladies, Mrs John Rutherford and Mrs Bywater, and enjoined them, the trustees, "to put not a shilling at risk during the life of the two ladies." The testator's will was holograph, and evidently prepared by himself. I cannot have any doubt that the testator intended a joint fee vesting *a morte*, and not a liferent, and that he desired merely that the trustees should keep the money safely invested for the ladies during their lives. Such a trust superimposed on a fee is repugnant, and can receive no effect, however valuable the constitution of such a trust might be to many a fiar.

As the two ladies both survived the testator, though the bequest was joint, they each took a vested interest in one-half, and no question of accretion arose—[His Lordship then pointed out that, in the circumstances of the case, the bequest did not fall under the *jus mariti* of the ladies' husbands].

The first question and the first branch of the second question therefore fall to be answered in the affirmative. The other questions do not require answer.

Lord Mackenzie.—I think it follows from the authorities which were cited that the questions in this case should be answered in the way your Lordship proposes.

The Court answered the first question in the affirmative, the first branch of the second question in the affirmative, and the second branch of the second question in the negative.

Mackenzie & Wyllie, W.S.—Bell, Bannerman, & Finlay, W.S.—Sharpe & Young, W.S.—J. D. Rutherford, W.S.—Agents.

No. 25.

Dec. 13, 1913.

MacDougall's Trustee v. Ironside.

WILLIAM B. GALBRAITH (MacDougall's Trustee), Pursuer (Respondent).—*Anderson, K.C.—Marshall.*
WILLIAM IRONSIDE AND ANOTHER, Defenders (Reclaimers).—*Macmillan, K.C.—Maitland.*

Bankruptcy—Effect—Illegal preference at common law—Voluntary assignation in security granted by insolvent—Reduction—Necessity of averring granter's knowledge of his insolvency.

The trustee in a sequestration brought an action of reduction, on the ground of fraud at common law, of an assignation in security voluntarily granted by the bankrupt in favour of two persons who were joint agents for a bank to which he was indebted, and one of whom was also his law-agent. The pursuer averred that at the date of the assignation the bankrupt was insolvent; that the defenders, the two assignees, were aware of this, but concealed the fact from him; that the assignation was obtained by the defenders in order to secure the debt to the bank; and that its effect was, with another contemporaneous assignation to the bank, to strip the bankrupt of his whole assets.

Held (*rev.* judgment of Lord Skerrington) that, as it was not averred that the bankrupt was at the date of the assignation aware of his insolvency, the pursuer's averments were irrelevant; and action *dismissed*.

2D DIVISION. Lord Skerrington.

ON 6th May 1913 W. B. Galbraith, trustee on the sequestrated estates of Hugh MacDougall, builder, Oban, brought an action against William Ironside and Peter Moir, Oban, concluding for reduction of an assignation by MacDougall in their favour of a bond and disposition for £2000 held by him.

The pursuer averred that MacDougall's estate was sequestrated on 12th February 1913. His further averments (as amended) were as follows:—(Cond. 2) "Prior to the sequestration of his estates the said Hugh MacDougall carried on business in Oban for a period of twelve years or thereby. During that time his law-agents were Messrs Hosack & Sutherland, solicitors in Oban, of which firm Mr John D. Sutherland and the defender William Ironside until the end of March 1912, and thereafter the said William Ironside, were the sole partners. Mr Sutherland was also the agent of the Royal Bank of Scotland's Branch in Oban, at which bank the said Hugh MacDougall kept his bank account. The said firm of Hosack & Sutherland were thus intimately acquainted with MacDougall's entire business affairs and with his financial position from the time he commenced business onwards." (Cond. 3) "About the month of October 1910, the said John D. Sutherland recommended the said Hugh MacDougall to erect a building of shops and dwelling-houses at Kinlochleven. At that time MacDougall's entire capital amounted only to £600 but, on the representation of Mr Sutherland that he would procure a loan for him, MacDougall proceeded with the erection of the tenement. Mr Sutherland failed to procure a loan, but MacDougall succeeded in finishing the property with the assistance of an overdraft from his bankers. On its completion the property was sold for £3000, of which £1000 was paid in cash and the bond and disposition in security described in the conclusions of the summons was taken in payment of the balance. The £1000 received in cash was paid to the said John D. Sutherland, and to the extent of £100 it was applied in paying his firm's business accounts and the balance of £900 was placed to the credit of MacDougall's bank account.

After placing this amount to the credit of the account it still stood at debit to the amount of £885, 3s. 5d. This was on 11th November 1911." (Cond. 4) "In the month of February 1911, Messrs Hosack & Sutherland asked the said Hugh MacDougall to manage the Ardshiel Granite Quarries which had formerly been worked by the Quarrier Company, Limited, of which company Messrs Hosack & Sutherland were the law-agents. Having implicit confidence in and relying, as they well knew, on the advice of his law-agents, and believing the arrangement which they had proposed to him was for his benefit, the said Hugh MacDougall entered into a contract of copartnery with the said Quarrier Company, under which he was to manage the quarries, receiving an annual salary and a certain share of profits. He was also at this time induced by the said Messrs Hosack & Sutherland to contribute £250 to the capital of the Quarrier Company, but no information whatever was furnished to him by the said Hosack & Sutherland as to the financial position of that company although they were fully conversant therewith. MacDougall was promised by them balance-sheets relating to the quarries, but they were never furnished, and he was thus kept entirely in ignorance regarding the financial workings of the concern. He, however, trusted to his law-agents, one of whom was also his banker. The said partnership agreement was invalid and void and null in respect that the Quarrier Company had no power under its memorandum and articles to enter into any such partnership, but Messrs Hosack & Sutherland, in breach of their duty to MacDougall as his agents, failed to inform him of this." (Cond. 5) "Towards the end of March 1912, Mr Sutherland retired from the said firm of Messrs Hosack & Sutherland, and also from the agency of the said bank. Mr Ironside was thus left sole partner of the said firm of Messrs Hosack & Sutherland, and he, along with the other defender Peter Moir, was then appointed joint agent at Oban of the said Royal Bank of Scotland in succession to Mr Sutherland." (Cond. 6) "A few days before Mr Sutherland's retiral from business the said Hugh MacDougall called for him to discuss his private affairs, when he was assured by Mr Sutherland that these would be put all right before he retired from the business. At this time the said Hugh MacDougall's account with the Royal Bank was overdrawn, but he had no information at the time as to the state of the Quarrier Company's account, nor did he consider that he had any responsibility therefor. About the beginning of April he had some communications from the defender William Ironside as to his personal overdraft, and Mr Ironside suggested an assignment to the bank of certain policies of insurance amounting to £400 on MacDougall's life. Later, Mr Ironside suggested that MacDougall should assign to himself and the other defender the £2000 bond which MacDougall held over the property at Kinlochleven. Having implicit confidence in his law-agents and bankers, MacDougall agreed to do so, and on 16th April 1912 called at the defenders' office and signed an assignation of the bond. Prior thereto, he had received a letter from Mr Ironside dated 12th April, marked 'private,' in which it was stated:—'You of course will get a back-letter from Mr Moir and myself stating the purpose for which the assignation is granted. The acceptance of this assignation must not prejudice the position taken up by the bank that your overdraft must be considerably reduced.' MacDougall understood, and was led by the defenders to understand, that the assignation referred to his

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individual overdraft, and that he would receive a back-letter from the defenders setting forth the purpose for which the deed had been granted. No such letter was, however, granted. At the same time the life policies before referred to were assigned to the Royal Bank, and thereupon MacDougall was stripped of his whole available assets. The amount of his overdraft at the bank on 12th April was £1131, 12s. 6d. Throughout these transactions Mr Ironside was agent for MacDougall, the Quarrier Company, and for the bank. The said Hugh MacDougall was insolvent at the date of granting the said assignation, and he remained in a state of insolvency down to the date of his bankruptcy. The object in obtaining the assignation of the said bond was to enable the defenders to obtain security for the said Hugh MacDougall's overdrafts, and thus to protect the said bank and obviate any question as between the bank and themselves. It is believed and averred that the defenders had received instructions from the head office of the bank that the overdrafts must be paid off or secured, and they acted in concert in obtaining the security above mentioned. They were both aware that the said Hugh MacDougall was liable for the overdraft on the Quarrier Company's account, as in fact he was in a question with the bank, and that he was then hopelessly insolvent. But the defender Mr Ironside, who personally carried through the transaction, acting for himself and the other defender, and also as law-agent for the said Hugh MacDougall, fraudulently concealed these facts from the latter, in order to induce him to grant the said assignation which he could not honestly have done. In further pursuance of their scheme the defenders represented to the said Hugh MacDougall that the assignation referred only to his individual overdraft, and in order to prevent the true state of the facts becoming known to him, they failed to execute and deliver to him the back-letter which had been promised in the letter above quoted, stating the purposes for which the assignation was granted. As his law-agent, the defender Mr Ironside had a duty to the said Hugh MacDougall to make a full disclosure to him of the whole facts which were necessary to enable him to decide whether he was warranted in granting the said assignation. This the said defender failed to do, but in breach of his duty took from him an assignation which he had no right to grant. The transaction was an attempt on the part of the defenders to secure the said bank from loss by getting from the said Hugh M'Dougall a conveyance of his whole estate, and thus obtaining an illegal preference to the detriment of MacDougall's other creditors." (Cond. 7) "After this MacDougall went to Copinsay where he was erecting a lighthouse, and did not return to Oban till the end of September or beginning of October 1912. He had then a meeting with the defender Moir, who informed him that it was the purpose of the bank to hold him liable for the whole of the Quarrier Company's overdraft. This overdraft amounted to £1412, 11s. 4d. or thereby, while MacDougall's own overdraft only amounted to £401, 11s. 9d. MacDougall at once protested against the attempt which was being made to make an improper use of the assignments which he had made, but the defender Ironside persisted in the position which he had taken up. Liability for the overdraft of the Quarrier Company at both dates rendered his estates hopelessly insolvent. This was well known to the defenders, who were fully acquainted with MacDougall's entire position." (Cond. 8) "Thereafter MacDougall's creditors began to press him, and, on the recommendation of the defender Ironside, he, on 23rd November 1912,

signed a trust-deed in favour of the pursuer. This deed was superseded by the sequestration which was awarded on 12th February following." (Cond. 9) "At the time when the said assignation was granted in favour of the defenders, the said Hugh MacDougall, having regard to his liabilities as a partner of the said Quarrier Company, was hopelessly insolvent, and this was well known to the defenders. No consideration was given for the said assignation, and the granting and procuring of the said deed was a fraudulent attempt to secure the overdrafts of MacDougall and of the said Quarrier Company to the said bank, and to the prejudice of the just rights of MacDougall's other creditors. The pursuer has called upon the defenders to reassign the said bond to him, but they refuse or delay to do so, and the present action has accordingly become necessary."

The pursuer pleaded, *inter alia*;—(1) The assignation libelled falls to be reduced in respect—(*a*) that it was granted without consideration; (*b*) that at the date thereof the granter was insolvent; and (*c*) that the said deed was procured by the defenders fraudulently in the knowledge of MacDougall's insolvency, and with the intention to defeat, and to the prejudice of, the just rights of his other creditors; (*d*) that the said deed was procured by the defenders while acting as agents for MacDougall, and in breach of their duty towards him.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The assignation sought to be reduced having been granted by MacDougall while solvent, the defenders should be assoilzied. (4) *Esto* that at the date of the granting of said assignation MacDougall was insolvent, said assignation having been granted by him and accepted by the defenders in the *bona fide* belief that he was solvent, the defenders should be assoilzied. (5) The transaction complained of being fair and reasonable in the circumstances, and having been entered into by MacDougall in the ordinary course of business for full consideration and to his benefit, the defenders should be assoilzied.

On 16th July 1913 the Lord Ordinary (Skerrington) allowed a proof before answer.*

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* "OPINION.—This is an action to reduce a security voluntarily granted by an insolvent to a creditor, the ground of reduction being fraud at common law. The relevancy is objected to for the reason that the pursuer refrains from averring that the granter of the security was conscious of his insolvency. The judgment and opinions in the well-known case of *M'Cowan* v. *Wright*, (1853) 15 D. 494, show that such an averment is of the very essence of an action of reduction based upon the ground that a security was granted fraudulently and in order to disappoint the legal rights of the other creditors. In the present case the pursuer alleges that the defenders were aware of the insolvency, but a creditor cannot be guilty of collusion in a case where his debtor acted honestly in giving the security.

"For the foregoing reasons I should have dismissed the action as irrelevant but for certain specialties which make it necessary, in my opinion, to have an inquiry into the facts. The pursuer alleges that the defenders, in whose favour the security was granted, were the law-agent and the banker of the insolvent; that they knew of his insolvency, but for their own purposes industriously concealed the fact from him; and that they thus obtained from him a security which he could not honestly have granted if he had known his true position. I am not prepared to decide as an abstract proposition in law that a creditor owes no duty whatsoever to his fellow

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MacDougall's Trustee v. Ironside.

The defenders having reclaimed, the case was heard before the Second Division on 15th November 1913, when counsel for the reclaimers submitted that the pursuer's averments were irrelevant, as it was not averred that MacDougall, at the date of the assignation, was insolvent and was conscious of his insolvency. Counsel for the pursuer having craved leave to amend his record, the case was continued to enable him to do so; and, the averments having been amended so that they read as printed above, the case was again heard before the Second Division (without Lord Salvesen) on 13th December 1913.

Argued for the reclaimers;—The action was irrelevant. In the case of a gratuitous alienation by an insolvent to a third party fraud was presumed,[1] but this was not so where the deed challenged was one granting security to a creditor. In the latter class of cases it was necessary to show that the deed was executed by the debtor (*a*) voluntarily, (*b*) when he was insolvent, and (*c*) in the knowledge of his insolvency.[2] At one time it was thought that collusion, or at least knowledge of the debtor's insolvency, on the part of the creditor must also be proved, and it was with this point that the cases cited from the Dictionary by the pursuer dealt.[3] As the law now stood, such knowledge or collusion on the part of the creditor was not required, but the other three elements of fraud must be established. In the present case the pursuer, although he had had an opportunity of doing so, did not aver that MacDougall was aware, when he granted the assignation, that he was insolvent; and the action was accordingly bad. The specialties on which the Lord Ordinary founded did not cure this defect. *Esto* that the defenders were aware that MacDougall was insolvent, they were not thereby debarred from dealing with him and taking an assignation[4]; and the averment that they had concealed from him that he was insolvent was irrelevant, as they were under no duty to disclose that fact to him. The further averment that the defender Ironside was MacDougall's law-agent would be material in an action by MacDougall based on some lesion that he had thereby suffered[5]; but here the only parties injured by the assignation were the other creditors, and the averment was therefore irrelevant. The argument founded on the insolvent having parted with all his estate could not help the respondent, for the assignation challenged was in no sense a disposition *omnium bonorum*.

Argued for the respondent;—The Lord Ordinary's interlocutor should be sustained. It was averred that the defenders here took advantage of the information Ironside obtained as MacDougall's law-agent to deceive him and to obtain the assignation. If a creditor carried

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creditors in the matter of obtaining securities from an insolvent, and that accordingly it is impossible to aver or prove a case of the breach of such duty. I shall allow a proof before answer."

[1] Goudy on Bankruptcy, (3rd ed.) 24; Bell's Com., (7th ed.) vol. ii. 170.

[2] Goudy on Bankruptcy, 40; Bell's Com., (7th ed.) vol. ii. 226; M'Cowan v. Wright, (1853) 15 D. 494, *per* Lord Justice-Clerk Hope, at pp. 498, 499, and 504, Lord Cockburn, at p. 510; Thomas v. Thomson, (1866) 5 Macph. 198, *per* Lord Neaves, at p. 201.

[3] Kinloch v. Blair, (1678) M. 889; Cramond v. Bruce & Henry, (1737) M. 893; Marshall's Trustee v. Provan & Co., (1794) M. 1144.

[4] Price & Pierce, Limited, v. Bank of Scotland, 1910 S. C. 1095, *per* Lord President Dunedin, at p. 1118, Lord Kinnear, at p. 1110.

[5] Dick v. Alston, 1913 S. C. (H. L.) 57.

through a transaction to the prejudice of the other creditors in the knowledge that the other party to the transaction was insolvent, the transaction was reducible although that party was not conscious of his insolvency[1]; for the equitable distribution of an insolvent estate which the law sought to secure was equally interfered with whether the insolvent was or was not aware of his condition. In *Thomas* v. *Thomson*[2] Lord Cowan observed: "When a creditor takes securities for prior obligations with his eyes open, and knowing the state of his debtor's affairs, he does what at common law is a fraud, and to the prejudice of other creditors." The fact that the assignation in question comprised MacDougall's whole estate implied knowledge on his part that he was insolvent, besides being a circumstance in itself strongly indicative of fraud.[3]

LORD JUSTICE-CLERK.—The Lord Ordinary in this case observes that he had a difficulty in allowing a proof, and that he did so solely because he considered there were certain specialties in the case. The question we have to decide is whether there are any such specialties as will justify that decision, and I have come to be satisfied, after hearing the very able discussion we have had, that here the pursuer has not stated such a case as entitles him to a proof.

The facts are that Mr MacDougall was in difficulties, to this extent at least, that his bankers were not willing to allow him to remain in the position of having unsecured overdrafts with the bank. They intimated that to him, with the result that they obtained the assignation of a bond. Now, that was all done in the ordinary course of banking business by the joint agents of the branch bank, at which the debtor did his business; it is a transaction such as happens every day, and it generally happens because the bank is beginning to be doubtful whether their debtor is in such circumstances as make it safe for them to go on with the overdrafts without security, and when a bank considers an overdraft too large it is, of course, within its rights in insisting that it should be reduced or in demanding security. It was in such circumstances that the bond was granted. Now, to begin with, was it granted by a man in the knowledge that he was insolvent? There is no case of that kind at all. MacDougall did not believe himself to be insolvent, and, therefore, the idea of collusion between him and the two bank-agents for the purpose of defeating the interests of the other creditors is entirely out of the question. As was pointed out in the course of the debate, it cannot be said that a man is acting in collusion with another unless they both know that what is being done is illegal or fraudulent. If MacDougall did not consider himself to be insolvent he could not commit a fraud in giving security.

Therefore, upon the first blush of the case I see no ground for holding that, where it is not alleged, and cannot be alleged, that the debtor knew

[1] Bell's Com., (7th ed.) vol. ii. 226-229, especially Lord M'Laren's note (1) on p. 229; Jones's Trustee v. Jones, (1888) 15 R. 328, *per* Lord Justice-Clerk Moncreiff, at p. 332; M'Cowan v. Wright, 15 D. 494, *per* Lord Justice-Clerk Hope, at p. 499; Crawford v. Black, (1829) 8 S. 158.

[2] 5 Macph. 198, at p. 201.

[3] Kinloch v. Blair, M. 889; Cramond v. Bruce & Henry, M. 893; Marshall's Trustee v. Provan & Co., M. 1144.

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himself to be insolvent at the time of the transaction, that transaction can be attacked and cut down upon ordinary grounds. But the Lord Ordinary thinks there are special grounds for reduction averred, and these special grounds are two—in the first place that it is alleged that the bank-agents knew that the debtor was insolvent, and in the second place, that one of these two bank-agents happened to be the debtor's personal law-agent. I do not see how these two facts can affect the matter at all. As to the first, Mr Macmillan's argument on that matter was unanswerable. It is not a question of what the creditors knew, but of what the debtor himself knew, and what he in conjunction with them did because he knew and because they knew of his insolvency. As to the other matter, viz., that one of the defenders was the law-agent of the debtor, I do not see how that can affect the case. What was done by the bankers was done by them as agents of and for behoof of the bank, and to hold that an ordinary transaction of banking could not be carried out on the usual footing and with the usual result in a case where one of the bank-agents, or even the bank-agent himself, was a solicitor and was the agent of the person with whom he was dealing, would lead to very grave disturbance in a great deal of business—business which is perfectly usual and regular and occurs every day. Of course there might be an argument that the agent was more likely to be aware of the state of the debtor's affairs. But then, again, whatever the agent here knew, he knew as a bank-agent, and it does not at all follow that he knew that the debtor was insolvent, or that the debtor himself was dealing with the matter on the footing that he was insolvent.

Another point very ingeniously raised by Mr Anderson was that this deed was of the nature of a disposition *omnium bonorum*. Mr Anderson says "that the bond which he transferred to the bank carried the whole of his goods." That is certainly not a thing to be assumed, and it certainly does not appear to be so on the face of the bond. It is quite certain that if this had been a disposition *omnium bonorum* it would not have benefited the bank, because it would have been a distinct declaration of insolvency—a distinct declaration by the debtor that he knew that he was insolvent.

On the whole matter, I have come to the conclusion that we should recall the interlocutor of the Lord Ordinary and dismiss the action.

Lord Dundas.—I concur.

Lord Guthrie.—I am of the same opinion. It is admitted that one of the defects in the previous record, namely, the absence of a clear averment that, at the date of the assignation, MacDougall was insolvent, has now been removed. But what the Lord Ordinary, in the opening paragraph of his opinion, desiderated, namely, an averment that he knew of his insolvency, has not been made and could not be made, because the case of the pursuer is that he thought he was not liable for the overdraft of the Quarrier Company, and without that overdraft he was perfectly solvent.

I think the Lord Ordinary in allowing proof of what he thought a specialty has a little forgotten the position of the parties, because he

says in his second paragraph: "the pursuer alleges that the defenders, in whose favour the security was granted, were the law-agent and the banker of the insolvent; that they knew of his insolvency, but for their own purposes industriously concealed the fact from him." The fact is that one of them, Ironside, was law-agent to MacDougall, that he was also a banker, and that the other, Moir, had no connection with MacDougall in the way of law agency, and was only a banker. Mr Anderson put it, however, that Ironside knew the facts which came to his knowledge as law-agent, and that in some way, rather difficult to follow, Moir was responsible for Ironside. I do not know what might have been the result if that had been properly averred, but I find no such averment. The averment is that they, that is the two bank-agents, were both "aware that the said Hugh MacDougall was liable for the overdraft on the Quarrier Company's account, as in fact he was in a question with the bank, and that he was then hopelessly insolvent." Therefore, even if there might be a special case—I do not know of any in the books—which would entitle the pursuer to proof without an averment that the debtor knew that he was insolvent, I do not find any such specialties here.

In regard to what your Lordship has said about a disposition *omnium bonorum*, that again might raise a question if we had a case requiring us to consider it. But there is here no averment of a disposition *omnium bonorum*. If there were such an averment relevantly made, the conclusion would be obvious, so far as relevancy went, that the debtor must have known that, when he granted such a disposition, he left himself insolvent, because he had no estate remaining. It would also follow, if that were necessary, that the creditors must have known that their debtor had at their instance rendered himself insolvent; but we have no such case made.

THE COURT recalled the Lord Ordinary's interlocutor, and dismissed the action.

MACPHERSON & MACKAY, S.S.C.—DUNDAS & WILSON, C.S.—Agents.

No. 26.

R., Pursuer (Respondent).—*G. Watt, K.C.—Ingram.*
S. AND ANOTHER, Defenders (Reclaimers).—*T. A. Menzies.*

Reparation—Slander—Falsity of slanderous statements admitted in letter of apology—Action of slander for subsequent repetition of same statements—Plea of veritas—Competency—Personal bar.

Held (*rev.* judgment of Lord Skerrington, *diss.* Lord Dundas) that the defender in an action of damages for slander was not barred from pleading *veritas* by having, on a former occasion, written a letter of apology, admitting that similar statements then made by her were false, and undertaking not to repeat them.

ON 19th June 1913 Miss R. brought an action against Mrs S. and her husband, concluding for payment of £400.

The pursuer averred that in November and December 1912, in the presence of certain persons named, the defenders made statements to the effect that the pursuer had had sexual intercourse with N., that she consulted a law-agent, and that on 14th January 1913 he obtained letters of apology from the defenders, the letter from Mrs S. being as

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follows:—"I hereby admit that I have on several occasions made false and slanderous statements reflecting on the moral character of your clients, the R. family, who reside at this address, and particularly against Miss R. These statements, I admit, are entirely unfounded in fact, and I now unreservedly withdraw the same, and apologise for having made same. I further bind myself in future not to repeat any of these statements, nor to molest any of the family in any way. It is agreed that this apology shall not be shown to any person or persons, except those who have heard either directly or indirectly any of the statements made by me." (Cond. 5) "The pursuer, who wished to avoid publicity, hoped that the said letters of 14th January 1913 would effectually put a stop to said slanders. On 15th May 1913, however, the pursuer's father received a letter from the female defender, which is produced and founded on. The letter is as follows:—' . . . You may not be aware that your two sons . . . have insulted me in the stair . . . since the month of January. If they persist in continuing this conduct towards me, I may inform you that I have letters sent to me when I was on holiday last September explaining in *detail* the conduct of your daughter in this stair, which I will show to *every person I know in this district* . . .' Said letter was composed and written by the female defender with the knowledge, assistance, and authority of the other defender, and was dispatched by them in concert for the purpose of further slandering and annoying the pursuer. Said letter is a repetition of the former slander in a particularly offensive way, and the defenders are both liable for its dispatch." The pursuer further averred;—"The statements in the said letter are of and concerning the pursuer, and falsely represent, as they were intended to represent, that she had been guilty of immoral conduct and sexual intercourse, and they were so understood by her."

Defences were lodged for both defenders. With reference to the statements alleged to have been made in 1912, the female defender, after denying that the statements were in the terms or bore the meaning complained of, averred;—(Ans. 2) "In any event, if this defender did make any statements regarding the pursuer in the terms and with the meaning alleged, said statements and said meaning were true. The pursuer, prior to December 1912, frequently misconducted herself and had carnal intercourse with N. at the foot of the said common stair. In particular, she did so on or about 3rd August 1912, on or about 24th August 1912, on or about 31st August and 1st September 1912, and on or about 27th September 1912." With reference to the letter of 14th January she averred;—(Ans. 4) "At the time said letter of apology was signed her husband was very ill and likely to be seriously affected by the worry of proceedings which were threatened by the pursuer. In the circumstances, this defender signed one of the letters referred to in terms insisted upon by the pursuer's agent. The said letter was accepted by the pursuer as a full apology for all statements made by this defender concerning pursuer's conduct." The male defender denied that he was a party to his wife's letter of 15th May 1913.

The female defender pleaded, *inter alia*;—(5) The statements made by this defender regarding the conduct of the pursuer with the said N. being true, this defender is entitled to absolvitor.

The pursuer pleaded, *inter alia*;—(3) The defenders are barred from stating said defences, and decree should be granted.

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The pursuer proposed this issue:—"Whether the defenders, or either and which of them, dispatched a letter to the pursuer's father on or about 15th May 1913, whether the said letter, which is printed in the schedule hereto, was of and concerning the pursuer, and falsely and calumniously represented that the pursuer, being an unmarried person, had been guilty of sexual intercourse,—to the loss, injury, and damage of the pursuer?"

The female defender proposed this counter issue:—"Whether during the months of August and September 1912 the pursuer was guilty of sexual intercourse with a man named N. in the common stair at . . .?"

On 4th November 1913 the Lord Ordinary (Skerrington) approved of the issue proposed by the pursuer and refused the counter issue.*

The defender reclaimed, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 6th December 1913.

Argued for the reclaimer;—This was an action of damages for slander, and not an action for breach of any undertaking contained in the letter of 14th January. Therefore the defender was not pre-

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* "OPINION.—As a result of the discussion the pursuer now proposes a single issue against both defenders, and the latter's counsel admitted that the pursuer was entitled to an issue asking whether the defenders or either and which of them dispatched a letter to the pursuer's father on or about 15th May 1913 representing that the pursuer, being an unmarried person, had been guilty of sexual intercourse. The female defender proposes a counter issue asking whether, during the months of August and September 1912, the pursuer was guilty of sexual intercourse with a certain person. The pursuer maintains that the female defender is barred from stating this defence by her letter of 14th January 1913 addressed to the pursuer's solicitor in which she admitted that she had on several occasions made false and slanderous statements reflecting on the pursuer's moral character, which statements she thereby admitted to be entirely unfounded in fact, and accordingly she withdrew the same and apologised for having made them. It should be noted that the female defender does not aver in so many words that the innuendo said to be conveyed by the letter of 15th May 1913 is true in point of fact. What she does aver in answer 2 is that if, prior to January 1913, she did make any verbal statements regarding the pursuer representing that the latter had been guilty of sexual intercourse, said statements were true. Accordingly she stands in this dilemma; either the record contains no averments of *veritas* applicable to the innuendo said to be conveyed by the letter of 15th May 1913 or, alternatively, the defender must be held to admit that this letter refers to the same incidents which are referred to in the letter of apology of 14th January 1913. In either view the counter issue must be disallowed. A person who represents as a matter of existing fact that he admits the falsehood of defamatory statements, which he has previously made concerning another person, is not entitled to withdraw the admission and to prove the truth of his charges after the person to whom the representation was made has altered his legal position on the faith of it. The female defender avers (answer 4) that [his Lordship quoted answer 4]. If, as this defender alleges, the pursuer accepted the defender's letter of 14th January 1913 as a full apology for all antecedent statements made by the defender concerning the pursuer's conduct, the pursuer thereby debarred herself from claiming damages in respect of these statements and so altered her legal position. It follows that the defender is for ever foreclosed from asserting the truth of these charges which according to her own representation were admitted by her to be false. I accordingly refuse the counter issue."

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vented by any admissions contained in that letter from stating all competent defences to an action of slander. *Veritas* was a complete defence to such an action,[1] and a defender was always entitled to put it forward. In view of the admissions made in the letter of 14th January, it might be difficult to establish the defence, but that was no objection to its competency.[2] No question of bar arose, because the letter had caused no real change in the pursuer's position.[3] The defender was therefore entitled to the counter issue proposed.

Argued for the respondent;—By admitting in the letter of 14th January that the statements were false, the defender had for ever barred herself from maintaining that they were true,[4] unless she could allege—which she had not done—that any fresh information had come to her knowledge. To allow the defender to plead *veritas* would be to permit her to break her contract, for the letter was a contract between the parties whereby, in consideration of the pursuer refraining from taking proceedings, the defender admitted that the statements were false, and undertook not to repeat them.

It was also stated at the bar that since the letter of 14th January was written a material witness for the pursuer had disappeared.

At advising on 18th December 1913,—

Lord Dundas.—I think this case raises a peculiar and a very difficult question. Its difficulty is sufficiently illustrated by the fact that, while I consider that the Lord Ordinary's conclusion is right, I am aware that both my brethren who heard the case differ from that view; and the interlocutor will, therefore, be altered.

The Lord Ordinary seems to have proceeded wholly upon the defender's admission, in her letter of apology of 14th January 1913, that the statements she had made were entirely unfounded in fact. He points to the assertion in answer 4 for Mrs S, that "the said letter was accepted by the pursuer as a full apology for all statements made by this defender concerning pursuer's conduct." This averment was, I suppose, made by Mrs S. in order to support her fourth plea in law that "the pursuer having accepted this defender's apology for all statements made by her concerning the pursuer's conduct, this defender is entitled to absolvitor." The plea thus put forward seems to me to be quite untenable; but the defender's averment remains, for whatever reason it may have been inserted in her record. The Lord Ordinary founds upon it his view that the pursuer, by so accepting the letter of 14th January, "debarred herself from claiming damages in respect of these statements, and so altered her legal position. It follows that the defender is for ever foreclosed from asserting the truth of these charges which according to her own representation were admitted by her to be false." It may well be that the pursuer, by foregoing her action of damages, has been prejudiced in her legal position; I think the presumption is in her favour, and that there

[1] Mackellar v. Duke of Sutherland, (1859) 21 D. 222; Campbell v. Ferguson, (1882) 9 R. 467.

[2] Mangena v. Wright, [1909] 2 K. B. 958, *per* Phillimore, J., at p. 975.

[3] Bell's Prin., sec. 27A; *Ex parte* Adamson, (1878) 8 Ch. D. 807, *per* James, L.J., at p. 817.

[4] Everest and Strode on Estoppel, (2nd ed.) pp. 1-4.

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is no need for specific averment of such alteration. It is, moreover, the case that the pursuer's counsel stated at our bar that her position has in fact been prejudiced owing to the recent disappearance of a material witness. I am disposed, therefore, to agree with the grounds upon which the Lord Ordinary has disallowed the counter issue.

But I think there is a stronger, and, to my mind, a very cogent, reason for adopting this course. In her letter of 14th January 1913, Mrs S. expressly bound herself "in future not to repeat any of these statements, nor to molest any of the family in any way." By her subsequent letter (dated presumably on or about 14th May) she in effect repeats her former statements, and threatens to make public throughout the district letters which she says she had received in the preceding September; and she now desires to plead *veritas*, and to restate, and if possible to substantiate, in open Court, the whole of the injurious statements she originally made, and afterwards admitted to be false. The defender's obligation of silence, contained in her letter of 14th January, forms part of an onerous contract; the counter consideration for the letter was the pursuer's withdrawal of the threatened action of damages. The contract binds both parties. If the pursuer had, in breach of it, raised an action of damages for slander, I do not think we should have allowed it to go to trial. In the same way, I do not think that, standing such a contract, the Court can permit, as by granting the counter issue it would in effect permit, the defender to break a material term of it, in order to enable her to maintain a plea in defence to this action which she could not otherwise put forward.

The point is difficult; but it seems to me that, assuming that the defender's plea of *veritas* is in fact capable of substantiation, she has only herself to blame if, by her own act in writing the letter of 14th January, she has deprived herself of the right to maintain it. For my own part, therefore, I consider that the justice of the matter lies in the direction of refusing the counter issue, and that we ought to adhere to the interlocutor reclaimed against.

Lord Salvesen.—The point raised in this case is an interesting one, and has not previously been the subject of direct decision. The material facts are that the defender on various occasions in the course of the year 1912 slandered the pursuer; that she was called to account for doing so, and that under threat of proceedings she, on 14th January 1913, admitted that the statements complained of were entirely unfounded in fact, withdrew and apologised for having made them, and bound herself in future not to repeat any of them. It is common ground that the delivery of this letter was granted and accepted on the footing that no other proceedings could thereupon be taken in respect of the slanders to which it referred.

It now appears that the defender in a letter addressed to the pursuer's father has again published the same defamatory statements; and she does not allege that any other facts had come to her knowledge since the date when she penned her apology. The pursuer has accordingly brought this action in order to obtain damages in respect of this new wrong, and has obtained an issue to which no objection is taken. The defender, however,

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proposed a counter issue in support of her plea of *veritas*. This issue the Lord Ordinary disallowed on the ground that the defender is "for ever foreclosed from asserting the truth of those charges which, according to her own representation, were admitted by her to be false."

If this action had been laid upon a breach of the defender's undertaking not to repeat any of the defamatory statements, I am disposed to think that it would not have been competent, even in mitigation of damages, to have averred or proved that the statements were in fact true. As between the parties to the agreement, and for the purposes of the same, it must be held to be an admitted fact that the charges were untrue; and as there was an express undertaking by the defender that they were not to be repeated—which undertaking she has violated—I do not see what defence, standing the agreement, she could relevantly have proponed.

But that is not the nature of the action with which we are called upon to deal. The pursuer treats the letter of 15th May not as a breach of the agreement but as a new wrong, and her action is an ordinary one of damages for slander. Her statements would not be relevant to support the conclusions at all unless she averred that the defamatory statements were false; and the issue that the Lord Ordinary has allowed is in the usual form. In these circumstances I cannot agree with the Lord Ordinary in holding that the defender is barred from proving that the statements which she made were in fact true, and of course she would not be permitted to do this without a counter issue. The former letter of apology will be excellent material for cross-examination of the defender, the more so as she does not aver that anything has occurred to change the view to which she therein gave expression. But I can well understand a person giving such a letter under stress of circumstances, or on the advice of a prudent solicitor, while all along retaining the conviction that she was thoroughly justified in publishing the slanders complained of. The pursuer urged that her sole object in bringing this action was to clear her character. If so, I do not see how she can achieve it by closing her adversary's mouth. One can easily figure the case of an apology being given at a time when the granter had not specific evidence to prove the truth of her slanders, and that afterwards she received information which led her to think that she had acted unwisely; but if a letter of apology is a bar in the present case, where no new facts are said to have come to the defender's knowledge, I cannot see why it should not be a bar in every case. The admission that the slanders were unfounded could not be got rid of on the ground of error, for in the case figured there was none. It is true that in the present action the pursuer has founded only on the repetition of the slanders after the apology was delivered, and has apparently done so on the footing that any claim in respect of the defender's prior slanders had been satisfied by the apology. In this, however, she was in error. The defender, who was admittedly in breach of her agreement, could not have founded upon it to the effect of barring a claim in respect of the prior slanders. A party who is in breach of a contract cannot plead the contract as foreclosing the claim which but for it would have been competent.

An appeal was made to the doctrine of personal bar or personal excep-

tion, as stated in Bell's Principles, section 27a. The learned editor of that work says:—"*Rei interventus, i.e.* the occurrence of a real change of position, is in all cases the foundation of the plea." If so, it does not help the pursuer here, because she has not stated on record any respect in which she has been prejudiced by the repetition of the slanders apart from the wrong which the publication of the defamatory statements itself constitutes.

I am accordingly of opinion that the Lord Ordinary has erred in refusing the counter issue, and that we should recall his interlocutor to that extent. As regards the form of the counter issue, I think it must be made as specific as the defender's averments in support of her plea of justification contained in the last sentence of answer 2.

Lord Guthrie.—The defenders take no objection to the pursuer's issue. But the pursuer objects to the counter issue proposed by the female defender. In my opinion that issue, if made specific, in terms of answer 2, should be allowed.

The Lord Ordinary has not disallowed the counter issue merely on the terms of the defender's letter of 14th January 1913, accepted by the pursuer. He does not hold that, apart from alteration of the legal position of the person slandered, the writer of such a letter, on subsequently repeating the slander which it had been undertaken should not be repeated, might not, at least in certain circumstances, be entitled, on the raising of an action of damages for slander, to plead *veritas* and to obtain an issue of *veritas*. The Lord Ordinary holds that "the defender is for ever foreclosed from asserting the truth" of the charge which she had admitted to be false, which she had withdrawn and apologised for, and which she had undertaken not to repeat in future. His Lordship comes to this conclusion because the pursuer by acceptance of the letter "thereby debarred herself from claiming damages in respect of these statements and so altered her legal position." But if these two things are to be taken as counterparts, it must be because the pursuer, by acceptance of the letter, for ever debarred herself from claiming damages in respect of the statements referred to in the letter. The summons, which does not found as ground for damages on the slanders referred to in the defender's letter of 14th January 1913, seems to proceed on this hypothesis. I think this view is unsound. If the defender breaks the undertaking in respect of which the pursuer agreed not to claim damages, I see no reason why the pursuer should not thereafter found on the original statements in an action of damages for slander.

But the pursuer raised the wider question, whether, in any circumstances, the writer of such a letter as the one in question would be entitled to plead *veritas* in an action of damages raised for subsequently repeating the slanders. The question is new, and there are considerations both ways. But I see no sufficient reason for holding that, in the circumstances supposed, an exception ought to be introduced to the recognised rule—No falsehood, no slander. Cases may be figured in which such an exception would work gross injustice. Innocent persons may, to their ruin, be compelled by threats of actions of damages to brand themselves

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as slanderers, because they are unable, from want of evidence, to prove the truth of injurious accusations they have made. In such a case, on sufficient evidence subsequently appearing, the most obvious course open to them for clearing their character is to withdraw their admission, and assert the truth of the very injurious statements which they had undertaken not to repeat. In such a case it would be most unjust if their mouths were shut. It is true that no such special circumstances are averred here, although it appears that the letter was written under threats of proceedings, and it is not said that the defender had any separate legal advice. But in any event, in this case, as in the one supposed, there is the same essential element, namely, that no one ought to be made liable in damages for injurious statements, which are, if false, slanderous, without an opportunity of showing that they are true, and therefore not slanderous.

At first sight it looks as if this view not only ignored the sacredness of a deliberate and onerous contract but supplied a motive for a person, in the position of the writer of the letter of 14th January 1913, breaking his contract. But it must be observed that the defender, who has admittedly broken her contract, is in this case not taking advantage of her so acting to take proceedings, but is defending her position against attack, and, in so doing, is only asking to be allowed to put the Court in possession of the facts which, apart from the objection taken by the pursuer to their admission, are clearly relevant. In many cases a defender has rights, and is entitled to privileges, not open to a pursuer. But however this may be, the difficulty does not seem to me to arise in this action of damages for slander. If the pursuer had sued the defender for damages for breach of contract the defence of *veritas* would probably be irrelevant, and might not be allowed to be proved, except if, and in so far as, the pursuer's general character might arise for consideration in a question of amount of damages.

THE COURT recalled the interlocutor reclaimed against, and allowed the issue for the pursuer and the counter issue for the defender, the latter being amended to the effect of deleting the words "during the months of August and September 1912," and substituting the precise dates specified in answer 2.

J. GEORGE REID, Solicitor—C. STRACHAN PETRIE, Solicitor—Agents.

No. 27.

Dec. 19, 1913.

Mackay v. Mackay.

ENEAS MACKAY, Pursuer (Reclaimer).—*Chree, K.C.*—*Wark.*
MRS ANNIE MACLEAN SHARP OR MACKAY, Defender (Respondent).—*W. Mitchell.*

Title to sue—Assignation by executors before confirmation—Title of assignee to sue.

The trustees and executors of a deceased, acting under his trust-disposition and settlement which contained a general disposition in their favour, granted an assignation of certain copyrights forming part of his estate, before they had obtained confirmation. The assignee having brought an action in respect of infringement of the copyrights—

Held (*rev.* judgment of Lord Ormidale) that he had a good title to sue, although confirmation would have to be expede by the trustees before he could extract a decree for payment.

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Mackay v. Mackay.

1st Division. Ld. Ormidale.

On 7th March 1912 Eneas Mackay, bookseller and publisher in Stirling, brought an action against Mrs Annie Maclean Sharp or Mackay, owner and publisher of the *Celtic Monthly*, in which he craved that the defender should be ordained to produce "a full and complete account of the profits made by the defender from the insertion in the *Celtic Monthly* for September 1911, published by the defender, under the heading of 'John Mackenzie on the Beauties of Gaelic Poetry,' of a part of a memoir or biography of John Mackenzie, editor of the *Beauties of Gaelic Poetry*, printed in the *Celtic Magazine* for April 1877, the copyright of which biography belongs to the pursuer, and to make payment to the pursuer of the sum of £100 sterling, or such other sum as shall be ascertained to be the amount of said profits. . . ."

The pursuer averred that the biography or memoir mentioned in the summons had been written, and published in the *Celtic Magazine* in 1877, by Alexander Mackenzie, who was the proprietor of that magazine and of the copyright of the biography in question. Alexander Mackenzie died in 1898.

He further averred:—"By assignation dated 3rd, 4th, and 5th March 1903, the pursuer acquired from the trustees of the said Alexander Mackenzie the absolute copyright in and for the United Kingdom of Great Britain and Ireland, and in and for His Majesty's Colonies and Dominions abroad, of and in certain works of the said Alexander Mackenzie, including *inter alia* the *Celtic Magazine*, and all the right and interest of said trustees to and in the same and all future impressions of the said works. He thus acquired right by assignation to the whole copyright of said biography or memoir, and he is registered as proprietor of the copyright thereof, conform to certificate of the Registering Officer appointed by the Stationers Company, No. 18654, dated 20th September 1911. . . ."

The defender averred in answer, *inter alia*:—"It is believed and averred that the said trustees never confirmed to the copyright of said article, and that they were not *in titulo* to grant said assignation"; and pleaded;—(1) No title to sue.

On 16th November 1912 the Lord Ordinary (Ormidale) sustained the defender's plea of "No title to sue," and dismissed the action.*

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* "Opinion.—The first plea in law for the defender is 'no title to sue.' The averment on which that plea is based is that the trustees who granted the assignation on which the pursuer founds his right to insist in the action never confirmed to the copyright of the article in question. It was admitted at the bar that this averment was true in fact. The pursuer, however, maintained that confirmation was not necessary to support his title to raise the action, although it would require to be expede before any decree for payment could be extracted.

"Now I do not think that it can be disputed that actual confirmation to a sum sued for, though necessary as a title to uplift and discharge, is not a requisite to instruct a title to sue, or that a general disposition unconfirmed is a good legal title to sue for a sum of money—M'Laren, Wills and Succession, section 1616, and cases there cited. Accordingly, if the present had been an action at the instance of Mr Mackenzie's trustees for a sum of money alleged to be due to the defunct their title to sue would have been undoubted, although they could not have obtained final decree without expeding confirmation.

"But the pursuer here is not Mr Mackenzie's trustees, and he is not suing for a debt due to the defunct. He is in effect seeking to recover damages for

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The pursuer reclaimed, and the case was heard before the First Division on 18th and 19th December 1913.

Argued for the reclaimer;—The trustees from whom the pursuer had obtained his assignation were not only the executors, they were the general disponees of the late Mr Mackenzie. As such they could competently transmit to the pursuer a good title to sue in respect of the breach of copyright.[1] It was conceded that confirmation might have to be expede before the pursuer could extract decree for payment, but in virtue of his assignation he was in a position to force the trustees to confirm. In any case, the defect in the pursuer's title to sue caused by the want of confirmation had now been remedied, as confirmation had been obtained.

Argued for the respondent;—The trustees from whom the pursuer had obtained his assignation had no real right in Mr Mackenzie's estate before confirmation. They had only a *jus ad rem*, a right to recover the estate, but no right to administer or deal with any part of it.[2] The assignation to the pursuer was therefore bad, and subsequent confirmation did not cure its initial radical defect.

Lord President.—I think this interlocutor cannot be supported. The Lord Ordinary, it appears to me, has proceeded too fast in sustaining the plea of no title to sue. The law of the case is completely covered by authority.

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an alleged infringement of a copyright to which he maintains an exclusive right in virtue of an assignation by the trustees of the deceased owner of the copyright. In my opinion the trustees were not *in titulo* to grant an effective assignation of the copyright prior to taking out confirmation. The general disposition gave them no doubt a *jus ad rem* to the copyright, but before intromitting with it, and disposing of it, they were bound to complete their title to it; just as in the case of a debt due to their author they would have required to have completed their title to it in order to vest them with the *plenum jus* and to enable them effectively to intromit with the sum recovered.

"Assuming that, if the trustees were to expede confirmation now, the confirmation would—I do not require to decide that it would—retroact so as to cure the defect in the assignation, the pursuer is not himself in a position to expede confirmation, and that consideration of itself in a question between him and the defender appears to me to warrant my sustaining the plea of 'no title to sue.'

"The precise ground on which the Lords decided the case of *Smith* v. *Grieve*, M. *sub voce* Substitute and Conditional Institute App. No. 1, does not appear from the interlocutor, but both in it and in the later case of *Robertson* v. *Gilchrist*, 6 S. 446, the disposition was not to trustees, but direct to the disponee who was found entitled to transmit without confirmation.

"I shall accordingly sustain the first plea in law for the defender and dismiss the action."

[1] M'Laren on Wills, (3rd ed.) p. 871, sec. 1604; Bell's Lectures on Conveyancing, (3rd ed.) ii., p. 1132; Smith v. Grieve, (1801) M. App. 1, *s. v.* Substitute and Conditional Institute; Robertson v. Gilchrist, (1828) 6 S. 446; Chalmers' Trustees v. Watson, (1860) 22 D. 1060, *per* Lord Ivory, at p. 1064; Titles to Lands Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 127, and Sched. K K; Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 64.

[2] Erskine, Inst. iii. 9, 30; M'Laren on Wills, (3rd ed.) pp. 870 and 878, sec. 1602 and 1617; Act anent the Confirmation of Testaments, 1690, cap. 26.

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The pursuer seeks here decree of count and reckoning in respect of the infringement of an alleged copyright, or alternatively for damages, and the title on which he founds is an assignation, dated in March 1903, granted by the testamentary trustees of a certain Alexander Mackenzie who was the proprietor of the copyright. The defender meets that case by an averment in the following terms: "It is believed and averred that the said trustees never confirmed to the copyright of the article, and that they were not *in titulo* to grant the said assignation," and on that averment their first plea is founded. It is true that the testamentary trustees of Alexander Mackenzie were not confirmed at the date when they granted the assignation in favour of the pursuer, but I think it clear that, by virtue of the general conveyance contained in his trust-disposition and settlement, dated 8th January 1898, the trustees had a beneficial interest in the copyright vested in them and transmissible by them. No doubt confirmation was required in order that they might secure an active title to intromit with and administer the estate, but it seems to me to be perfectly clear that if they subsequently obtained confirmation the defect in their title could be effectively cured, and the cure would draw back to the date of the assignation.

So much seems to have been conceded by the pursuer before the Lord Ordinary, for I find from his Lordship's note that he says that the pursuer maintained that confirmation was not necessary to support his title to raise the action, although it would require to be expede before any decree for payment could be extracted. This contention on the part of the pursuer is, I think, well founded in law, for by virtue of the assignation which he had received from the testamentary trustees, I consider that he was vested with the right to demand that the trustees should complete their title by expeding confirmation. That was his right, and he was in a position to exercise that right, and he stood before the Lord Ordinary bound to exercise that right before seeking decree in this action.

The Lord Ordinary appears to me, in the reasoning contained in his note, to have stated with perfect accuracy the whole law of the case. He says distinctly that actual confirmation is not a requisite to instruct a title to sue, and that it cannot be contended that a general disposition unconfirmed is not a good title to sue. But he goes on to make this observation—"Assuming that, if the trustees were to expede confirmation now, the confirmation would . . . retroact so as to cure the defect in the assignation, the pursuer is not himself in a position to expede confirmation, and that consideration of itself in a question between him and the defender appears to me to warrant my sustaining the plea of 'no title to sue.'" I am of opinion that that did not warrant the Lord Ordinary in sustaining the plea of no title to sue, and that, although no doubt the pursuer himself was not in a position to expede confirmation, he was, by virtue of the assignation (which I assume was granted for valuable consideration), entitled to demand that the trustees should complete their title by expeding confirmation. In these circumstances I think the pursuer was well entitled to maintain that his title was a good one to sue this action, although, no doubt, before he obtained extract he would be bound to have

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the title of his authors completed so as to make it effective in any question with the defender.

I am therefore for recalling the Lord Ordinary's interlocutor and remitting to him to proceed with the case.

LORD JOHNSTON.—Since this case was opened to us I have never been able to understand how an assignation granted by executors unconfirmed cannot be validated by the retroactive effect of confirmation afterwards obtained, but must be treated as an entirely invalid and null deed, which would necessitate the execution of a new assignation after confirmation. On these grounds I think the Lord Ordinary should have proceeded with the case.

LORD MACKENZIE and LORD SKERRINGTON concurred.

THE COURT recalled the interlocutor reclaimed against, repelled the first plea in law for the defender, and remitted to the Lord Ordinary to proceed.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—FYFE, IRELAND, & Co., W.S.—Agents.

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Lister's Judicial Factor v. Syme.

ARTHUR HUGH LISTER (Judicial Factor on Lord Lister's Trust-Estate), First Party.—*J. H. Millar.*
LUCY MARIA ANDERSON SYME, Second Party.—*J. H. Millar.*
MAJOR-GENERAL JOHN MACVICAR BURN AND ANOTHER, Third and Fourth Parties.—*Blackburn, K.C.—Lord Kinross.*

Foreign—Succession — Marriage-contract — Construction — Destination to "next of kin"—Marriage-contract executed in Scotland—Spouses dying domiciled in England—Lex loci contractus or lex domicilii.

An antenuptial contract of marriage was entered into between an Englishman residing in Scotland and a Scotswoman. The contract was prepared by a Scottish solicitor, was in Scottish form, and contained a provision that a fund provided by the wife should, after her death failing issue, belong to her "next of kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, and the wife died domiciled there.

Circumstances in which *held* (*diss.* Lord Johnston) that it was the intention of the parties to the contract that the wife's next of kin entitled to succeed to the fund should be ascertained according to the law of Scotland, and accordingly that brothers and sisters of the half blood were excluded.

1ST DIVISION. ON 3rd December 1912 a special case was presented for the opinion and judgment of the Court as to the construction of a clause contained in the antenuptial contract of marriage entered into between Joseph Lister, afterwards (and herein referred to as) Lord Lister, and Miss Agnes Syme, afterwards (and herein referred to as) Lady Lister. The question of law was whether a destination to Lady Lister's next of kin contained in this contract fell to be construed according to the law of England or according to the law of Scotland.

The parties to the marriage-contract were—(1) Lord Lister, therein designed as of No. 3 Rutland Street, Edinburgh, Fellow of the Royal College of Surgeons; (2) Lady Lister; (3) Joseph Jackson Lister, of

Upton House, Stratford, Essex, Lord Lister's father; and (4) James Syme, of Millbank House, Edinburgh, Professor of Clinical Surgery in the University of Edinburgh, Lady Lister's father. The contract was in Scottish form, was prepared by a firm of Scottish solicitors, and contained a clause of consent by all parties to its registration in the Books of Council and Session. It was executed by Lord and Lady Lister, and by Professor Syme, in Scottish form, in Edinburgh on 18th April, and by Joseph Jackson Lister, in English form, in London on 19th April 1856.

The trustees appointed to act under the contract were—Arthur Lister, of Bradford, Yorkshire, woolstapler; Rickman Godlee, barrister, London; Professor Syme; and David Syme, advocate, Sheriff-substitute of Kinross, and the acceptors and survivors.

By the contract the father of each of the spouses bound himself to pay to the trustees a sum of £2000, to be applied by them on certain trusts for the benefit of the spouses. In particular, the trustees were directed to pay the income of the £2000 contributed by Professor Syme to Lady Lister during her lifetime and after her death to Lord Lister, should he survive her. With regard to the capital of each sum of £2000 the trustees were directed, after the death of the survivor of the spouses, to divide the same amongst the children of the marriage, as set forth in the contract. With regard to the capital of the £2000 provided by Professor Syme, the trustees were directed to hold the same during the life of the spouses and of the survivor of them, "but subject to this provision, it is hereby declared that if no child of the said intended marriage shall become absolutely entitled to the funds hereby placed in trust under and in terms of the foregoing provisions then and in that case the sum of £2000 which is to be advanced by the said James Syme, the fourth party hereto, or the funds, shares, stocks, or securities in or on which the same may be then invested shall in such case belong absolutely to the said Agnes Syme, and subject to her appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next of kin, excluding her husband."

The contract also contained the following provision:—"And in consideration of the obligation hereby undertaken by the said James Syme, the fourth party hereto, the said Agnes Syme with the advice and consent of the said Joseph Lister, her promised husband, hereby renounces and discharges the said James Syme and his executors of all claim competent to her through his death, either for legitim or bairns' part of gear, or for executry or as one of the next of kin of her late mother, or under the contract of marriage of her said parents, or otherwise, the goodwill of her said father alone excepted: And the said Agnes Syme hereby accepts the provisions hereby made in her favour in full of terce of lands, half or third of moveables, *jus relictæ* and dower, and all which she could ask or claim through the decease of the said Joseph Lister, or which her executors or next of kin could claim by and through her predecease: And it is hereby agreed and declared that the foregoing provisions in favour of the issue of the said intended marriage are and shall be held, accepted, and declared to be in full of all that they and each and any of them could ask or claim as legitim or bairns' part, or otherwise by and through the death of their father or as executors or next of kin, or otherwise by and through the death of their mother; and all parties consent to the

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registration hereof in the Books of Council and Session or others competent for preservation, as well as for execution in common form." *

The case stated:—"(3) The said Professor James Syme (Lady Lister's father), who settled £2000 as above mentioned on his daughter under the said contract of marriage, was the son of Scottish parents, and was born at Edinburgh on 7th November 1799. He died at Edinburgh domiciled in Scotland on 26th June 1870. (4) The said Joseph Lister (Lord Lister) was the son of English parents. He was born at Upton, Essex, on 5th April 1827, and he was educated in England. He came to Scotland in pursuance of his profession about the year 1852, and at the date of his marriage (1856) he resided in Edinburgh, and till 1877 he resided and carried on his profession first in Glasgow and afterwards in Edinburgh. In 1877 Lord Lister returned to England, and he resided in London till his death in 1912. Lord Lister was at his death a domiciled Englishman. (5) The said Miss Agnes Syme (Lady Lister) was born in Scotland and was the daughter of a domiciled Scotsman, but she acquired an English domicile on her husband taking up his residence in England. She died at Rapallo, Italy, on 12th April 1893 intestate and domiciled in England. (6) There was no issue of the marriage between Lord and Lady Lister, and Lady Lister did not exercise her power of appointment. The said trust funds therefore fall under the said contract of marriage to 'her next of kin.' (7) Lady Lister was survived by her husband, Lord Lister (who died 10th February 1912), and by her full sister the second party, by her half sister Mrs Jemima Syme or Burn, wife of the third party, and by her half brother Mr James Syme, of Millbank."

It was then narrated that the trustees nominated under the marriage-contract entered into possession and management of the trust funds, but that they all predeceased Lord Lister, the survivor of the spouses, without any appointment of new trustees having been made; that the last survivor of them died in July 1908; and that his executors, in accordance with the English practice, acted as trustees under the marriage-contract until Lord Lister's death, after which Arthur Hugh Lister was appointed to be judicial factor on the marriage-contract trust-estate.

The judicial factor was the *first party* to the case; Lady Lister's full sister, Miss Lucy Maria Anderson Syme, was the *second party;* Lady Lister's half-sister and half-brother, Mrs Burn and Mr James Syme, having predeceased Lord Lister, their respective representatives, Major-General John Macvicar Burn and Captain John William Jeffreys, were respectively *third* and *fourth parties* to the case.

The case proceeded:—"15. The question has arisen between the parties to this case as to who are Lady Lister's 'next of kin,' and, in default of issue and of any appointment or disposal by Lady Lister, entitled as such to the said trust funds settled by Lady Lister's father under the said contract of marriage. This renders it necessary to ascertain authoritatively whether the said contract of marriage is to

* The contract, in dealing with the shares of children of the marriage, contained a provision requiring a child, in certain circumstances, to bring "his or her appointed part or share into hotchpot." It also contained a provision that the £2000 to be provided by Lord Lister's father should, under certain circumstances, belong absolutely to Lord Lister "and his executors and administrators."

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be construed according to the law of Scotland or according to the law of England. The parties to the special case are agreed that by the law of England (if the said contract falls to be construed according to the law of England) Lady Lister's next of kin at the date of her death were her full sister, the second party, her half-brother, Mr James Syme, and her half-sister, Mrs Burn, and that these parties or their representatives are entitled to share the trust funds equally *per stirpes*. If, on the other hand, the said contract falls to be construed according to the law of Scotland, the parties to the case are agreed that the second party is entitled to the whole trust funds as Lady Lister's sister-german and as such sole next of kin at the date of her death, to the exclusion of the other parties as representing her sister consanguinean and her brother consanguinean."

The contentions of the parties were stated as follows:—"16. The first party submits no contention on the question at issue between the second, third, and fourth parties. The second party contends that in respect (1) that Lord and Lady Lister were both resident in Scotland at the date of the marriage; (2) that the contract of marriage is in the Scottish form, and was prepared by a Scottish solicitor; and (3) that Lady Lister's father was a domiciled Scotsman, and the marriage trust funds now in dispute were settled by him, the said marriage-contract, and in particular the destination of the said funds, must be construed according to Scots law; and that consequently the term 'her next of kin' in the said contract of marriage means Lady Lister's next of kin at the date of her death according to the law of Scotland. The third and fourth parties contend that the bequest to Lady Lister's 'next of kin' is a testamentary provision and not one of the essential portions of the contract between the spouses. That as there is no contrary intention expressed in the marriage-contract the 'next of kin' should be ascertained according to the law of England as the law of the country of Lady Lister's domicile at the date of her death."

The question of law, as amended at the hearing, was:—"Does the destination to the next of kin of Miss Syme contained in the aforesaid contract of marriage fall to be construed in the sense attached to that expression by the law of Scotland to the exclusion of the half-blood, or in the sense attached to that expression by the law of England to the inclusion of the half-blood?"

The case was heard before the First Division on 10th and 11th December 1913.

Argued for the second party;—Whether the clause under construction was to be regarded as contractual or as testamentary the result was the same—Lady Lister's next of kin must be ascertained according to the rules of the law of Scotland. (1) Assuming the provision to be contractual then, according to the general rule applicable to the construction of contracts, the *lex loci contractus* must be applied to its construction.[1] The Court in deciding such questions would always pay particular regard to indications of intention,[2] and there

[1] Bar, Private International Law, (2nd ed.) 423; Dicey, Conflict of Laws, (2nd ed., 1908) pp. 637-9; Story, Conflict of Laws, (8th ed., 1883) p. 372; Jacobs, Marcus, & Co. v. Crédit Lyonnais, (1884) 12 Q. B. D. 589, *per* Bowen, L.J., at p. 599; Corbet v. Waddell, (1879) 7 R. 200.

[2] Surman v. Fitzgerald, [1904] 1 Ch. 573, *per* Cozens Hardy, L.J., at pp. 587-8; Chamberlain v. Napier, (1880) 15 Ch. Div. 614, *per* Hall, V.-C., at p. 630.

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was ample indication here, in the Scottish form of the deed and in the preponderance of technical expressions of the law of Scotland, of an intention that the law of Scotland should be applied. The destination to the wife's next of kin bore a special meaning involving an appeal to Scottish law for its construction; it was not equivalent to a general disposition to heirs *in mobilibus*,[1] who might be ascertained according to various systems of law. The exclusion of the husband was no indication that the parties had in view the possibility of the application of English law to the construction of the contract, for the husband was not one of the wife's next of kin according to the law of that country.[2] (2) Again, on the assumption that the clause was to be regarded as testamentary in character, the same rule of construction must, in the circumstances, be applied.[3] If it should be decided that the law of Scotland must regulate this matter, then it was the municipal law of Scotland, the law which would have been applicable had the parties died domiciled in Scotland, which must be applied,[4] and not the law of Scotland in the larger sense, which included a set of dogmas of private international law, the application of which would identify Lady Lister's next of kin according to her domicile at the date of her death.[5] A change of domicile subsequent to execution did not alter the construction of a testamentary deed.[6]

Argued for the third and fourth parties;—The question was simply one of intention, and the facts stated or admitted in the case showed that the parties to the contract intended that this destination should be construed, in the event which had occurred, according to the law of England. The destination was not one in which the contracting parties had any interest. It could not come into operation until after the death of Lady Lister, and then only in the event of her dying intestate. The destination was not to *personæ delectæ*, but to a general class, the members of which could not be ascertained until after her death. The provision was therefore clearly testamentary and not contractual, and it was testamentary of Lady Lister, who had acquired the capital sum in question from her father for the consideration of the abandonment of her legal rights. It was therefore testamentary of a domiciled Englishwoman. According to the ordinary rule of construction the law of the domicile at the date of the

[1] Gregory's Trustees v. Allison, (1889) 16 R. (H. L.) 10; Hannay's Trustees v. Graham, 1913 S. C. 476, *per* Lord Dundas, at pp. 477-8.

[2] Jarman on Wills, (6th ed.) vol. ii. 1604-6 and 1633; Statute of Distributions, 1670 (22 and 23 Car. II. cap. 10); Statute of Frauds, 1676 (29 Car. II. cap. 3); Bailey v. Wright, (1811) 18 Ves. 49, 18 R. R. 151; Milne v. Gilbart, (1852) 2 De G., M., & G. 715, and (1854) 5 De G., M., & G. 510.

[3] M'Laren on Wills, (3rd ed.) vol. i. pp. 30, 32, 35, *et seq.*; Dicey, Conflict of Laws, (2nd ed.) pp. 679-80; Westlake, Private International Law, (5th ed.) sec. 122, referring to Trotter v. Trotter, (1829) 4 Bl. N. R. 502, 3 W. & S. 407; Thomson's Trustees v. Alexander, (1851) 14 D. 217; Mitchell & Baxter v. Davies, (1875) 3 R. 208; Brown's Trustees v. Brown, (1890) 17 R. 1174; Griffith's Judicial Factor v. Griffith's Executors, (1905) 7 F. 470.

[4] Stair v. Head, (1844) 6 D. 904.

[5] Minority of consulted Judges in Stair v. Head, 6 D. 904.

[6] Wills Act, 1861 (24 and 25 Vict. cap. 114), sec. 3; *In re* Groos, [1904] P. 267; Dicey, Conflict of Laws, (2nd ed.) p. 680.

testator's death should be applied.[1] In any event there was a presumption in favour of the application of the law of the domicile of the testator as at his death to regulate matters of moveable succession, unless another intention could be clearly read from the deed under construction. No such intention was indicated *in gremio* of this deed, indeed there were indications in the deed that the parties contemplated the application of a law other than that of Scotland to its construction. Such indications were to be found in the use in several instances of terms of art of English law. Further, the exclusion of the husband from the next of kin, which was meaningless in Scots law, showed that the parties intended to provide for circumstances in which another law might have to be applied. The fact that the destination was allowed to stand unchanged after a change of domicile was in itself an indication of intention to submit to the application of the law of England.

At advising on 19th December 1913,—

LORD PRESIDENT.—Lord Lister died in February 1912 a domiciled Englishman. At the date of his death he was in the enjoyment of the income of the capital sum of £2000 which had been settled on Lady Lister by her father in the antenuptial marriage-contract of the parties, dated as far back as April 1856. The income of the same sum had been enjoyed by Lady Lister until the date of her death in April 1893. And the question that now arises relates to the disposal of the capital sum of £2000, and that depends upon the construction of a certain clause in the marriage-contract. That deed was prepared by a Scotch conveyancer, is in Scotch form, and was executed in Scotland by Lady Lister at the time when she was a domiciled Scotswoman. It directs that, subject to the right of the spouses in the income, and in the event of no child of the marriage succeeding to the capital, the £2000 should belong absolutely to Agnes Syme and subject to her appointment and disposal, "but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next of kin, excluding her husband." Lady Lister died without having executed any deed of appointment, a domiciled Englishwoman; and there were no children of the marriage. Now, it is agreed between the parties that the capital sum in question passes to the next of kin of Lady Lister ascertained at her death, but the question is—Who are they? Are they to be ascertained according to the law of Scotland, or are they to be ascertained according to the law of England?

I am of opinion that the sum in question belongs to the next of kin of Lady Lister at her death ascertained according to the law of Scotland. I read the clause in the marriage-contract as testamentary and not contractual, but I may say in passing that I should have reached exactly the same conclusion had I regarded the clause as contractual. Indeed, we were invited by counsel for the third and fourth parties in this case to consider it as one in which a domiciled Scotswoman executed a will in

[1] M'Laren on Wills, (3rd ed.) i. pp. 30 *et seq.*; Purvis' Trustees v. Purvis, (1861) 23 D. 812, at p. 830; Smith v. Smiths, (1891) 18 R. 1036.

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Scotland, in Scotch form, in favour of her next of kin and died a domiciled Englishwoman. I am willing so to regard it; and, on that assumption, the question at once arises—What was the intention of the testatrix as evinced by the words used in her settlement? I entertain no doubt that, at the date when she executed her deed, Lady Lister contemplated that her next of kin, by the law of Scotland, should have the bequest. In the absence of any indication to the contrary, we are not entitled to assume that she intended, as the objects of her bounty, persons to be chosen and selected according to the law of a foreign country with which, presumably, she was not familiar. Equally clearly, I think, we are not entitled to assume that when she changed her domicile she intended to change the objects of her bequest, unless she expressed a clear intention to that effect. Now, down to the time of her death, it was within her power by such a deed as is mentioned in the marriage-contract to direct the destination of this £2000 whithersoever she desired. But she did not avail herself of the power so conferred, and that leads, I think irresistibly, to the conclusion that she was perfectly satisfied with the will which she had already made, and in that frame of mind she remained until the day of her death.

Apart altogether, therefore, from the authority of decided cases, I come to the conclusion that we must have regard entirely to the intention of the testatrix as disclosed in the deed which she made. But, in coming to this conclusion, I think I am following the authority of the cases on this point which were cited to us in the very able and elaborate argument with which we were favoured. I refer especially to the reasoning of Lord Ivory in the case of *Lord Stair* v. *Head*,[1] of Lord President Inglis in the case of *Mitchell & Baxter* v. *Davies*,[2] and of Lord Fraser, concurred in by Lord Adam and, I think, by Lord M'Laren, in *Brown's Trustees* v. *Brown*,[3] and, adopting the words of Lord Fraser in that last-mentioned case, with a variation appropriate to the circumstances, I am inclined to say that at the time when the marriage-contract was executed by Agnes Syme she knew nothing about the law of England and was thinking only about the law of her own land.

Apart altogether from the authority of the decided cases, I should have reached exactly the same conclusion as the result of express statutory enactment, for the third section of the Wills Act, 1861,[4] provides as follows: "No will or other testamentary instrument shall be held to be revoked or to have become invalid nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same," on which clause Professor Dicey's apt and, as I think, accurate comment is: "It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile."

I, therefore, interpret this clause of the marriage-contract exactly as if Lady Lister had died a domiciled Scotswoman; and, in accordance with that opinion, I think we ought to answer the question put to us, in the

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[1] 6 D. 904.
[2] 3 R. 208.
[3] 17 R. 1174.
[4] 24 and 25 Vict. cap. 114, sec. 3.

form to which I understand it is to be altered, to the effect that the next of kin of Lady Lister fall to be ascertained according to the law of Scotland, and that the second party to this case is entitled to have the capital sum of the £2000 in question.

LORD JOHNSTON.—I regret I cannot come to the same conclusion that your Lordship has reached, but I desire to say that my difficulty arises not on the law—as to which I think we are entirely agreed—but in the application of that law to the particular document.

By a clause in Lord and Lady Lister's marriage-contract her fortune, in the circumstances which have occurred, passes to "her next of kin." Are the individuals so designated to be ascertained according to the law of Scotland or of England? The former excludes, and the latter includes, the half blood. Lady Lister left a sister by the full blood, and a brother and sister by the half blood. Hence the question. There may be other distinctions between the two systems of law, but the above is stated as the only distinction affecting the question raised in the present case.

I take first the facts as regards domicile. Lady Lister was the daughter of Professor Syme, and her domicile at the date of the execution of her marriage-contract, 1856, was Scotland. Whatever the domicile of the marriage from 1856 to 1877, and I think it was Scottish, it was, from 1877 to Lady Lister's death in 1893, English. Lord Lister was born in Essex, in England, of English parents in 1827. In 1852, at the age of twenty-five, he came to Scotland in pursuance of his profession, and at the date of his marriage, 1856, he was living at 3 Rutland Street, Edinburgh. Between 1856 and 1877 he practised in Glasgow and in Edinburgh. He returned to England in 1877, and resided in London till Lady Lister's death in 1893, and in fact till his own in 1912.

I have mentioned these facts in detail because many of them have a bearing upon the construction of Lord and Lady Lister's marriage-contract. Under that deed Professor Syme, who was a party to it, settled £2000 upon his daughter. I do not need to refer to the special terms—the settlement being a mutual settlement, and the respective fathers of the spouses making provision for them—further than to say that failing issue of the marriage, which event happened, it was declared that the provision made for Lady Lister by her father should "belong absolutely to the said Agnes Syme, and subject to her appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next of kin, excluding her husband." Lady Lister left no deed appointing or disposing. But as, in consideration of the above-mentioned provision, Lady Lister discharged her father of her legitim, the consequent settlement on her next of kin must be deemed and taken to be her settlement; and, while her settlement of the fund *quoad ultra* is contractual, this part I conceive to be testamentary. One more fact—two of the trustees were English and two were Scottish, so that nothing bearing on the domicile of the trust can be deduced from the selection of trustees.

In these circumstances the next of kin "take expressly in the character of grantees under the deed, and by force of the specific provisions on their

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behalf therein contained"—*per* Lord Ivory in *Stair* v. *Head*.[1] They are, in fact, conditionally instituted to the issue of the marriage. But it is necessary to construe the deed in order to ascertain the meaning of next of kin, which, though a common expression, is in law a term of art, because the law assigns a particular meaning to it, and a meaning which differs in different countries. Writing as a domiciled Scotswoman, the *prima facie* presumption is that Lady Lister used the term in the sense attributed to it by the law of her own country. And if there was nothing special in the deed to counteract this presumption, I should agree that it must prevail. But as Lord President Inglis pointed out in *Mitchell & Baxter's* case,[2] "the real question, as in every testamentary deed, is, what was the intention of the testator" or grantor? The fact of domicile is not "absolutely conclusive." "It might be his intention that his settlement should be construed by the law of a different country, and that intention might be expressed in his will. If so, the law of that country would regulate the construction . . . of his settlement."—See also *Brown's Trustees*.[3] Not only do I think that the intention may be expressed, but that it may equally be implied.

There are here *indicia* from which a different intention may be, I think must be, implied. It cannot but be observed, on a careful perusal of the marriage-contract, that the parties or their advisers foresaw that the future matrimonial domicile was a matter of doubt. I do not speak merely as wise after the fact, but because the doubt was in the circumstances reasonable, and is betrayed by the terms of the contract itself. It bears on the face of it to have been prepared by those who had in their mind's eye the law both of Scotland and of England, for at three different places, at least, English words of style are introduced, separately or as alternatives for Scottish equivalents, viz., "hotchpot," "executors and administrators," "will," and "dower." And more pregnant still, it contains two provisions intended, I think, to meet the possibility of the domicile of the marriage at the dissolution being English. These are, I think, of importance.

The first is the ulterior destination to Lady Lister's "next of kin, *excluding her husband*." Why should he be excluded in these general terms? If the law of Scotland alone was looked to, her husband's *jus mariti* would have been renounced or excluded. But by the law of England a surviving husband has possible rights of a different character, much more nearly rights of succession, though it may be not technically such.—*Milne* v. *Gilbart*.[4] It is true that any such claim was avoided by the destination to the next of kin, who thus took as conditional institutes, and not merely *ab intestato*—*Brown's Trustees*.[3] But that case had not arisen at the date of the marriage-contract, and it was not unreasonable that it should be regarded as better *ob majorem cautelam* expressly to exclude it. Hence was used the expression "excluding her husband," an expression apt to apply with effect, whether the domicile at the dissolution of the marriage was Scottish or English. The second is the acceptance of her provisions from

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[1] 6 D., at p. 921. [2] 3 R., at p. 211. [3] 17 R. 1174.
[4] 2 De G., M., & G. 715, and 5 De G., M., & G. 510, 95 R. R. 300.

her husband by Lady Lister as in satisfaction not only of terce and *jus relictæ* but of dower—again providing against the possibility of the domicile being English at the date of the dissolution of the marriage.

From these considerations I think that I am bound to draw the conclusion that Lady Lister's intention was that her next of kin should succeed, in the event which happened, according as these might be pointed out by the law of the domicile ultimately adopted by the spouses, whether Scottish or English. That she did not look further and contemplate that the domicile might be neither Scottish nor English, does not affect the construction of the settlement in the circumstances which she did contemplate.

I am therefore of opinion that the next of kin, according to the law of England, are entitled to succeed.

Lord Mackenzie.—[After narrating the facts, and quoting the clause of the marriage-contract disposing of the capital of Lady Lister's £2000] —It is evident that the clause under consideration is not one under which the husband takes any interest. He is expressly excluded. The destination to next of kin only takes place in default of any other appointment of the fund by Lady Lister. None of the parties to the marriage-contract except Lady Lister has any interest in the clause in question. It is of the nature of a testamentary bequest. The intention of the person making the bequest has therefore to be ascertained. Did Lady Lister mean that on her death the law of Scotland was to be applied in fixing who her next of kin were, or did she mean that they were to be ascertained by the law of the country in which she happened to be domiciled at her death? I come to the conclusion that the reasoning contained in the opinion of Lord Ivory in the case of the *Earl of Stair* v. *Head*[1] is applicable. No doubt in that case there was an express declaration that the import and effect of the deed "shall be construed and regulated by the law of Scotland." In the present case this is to be implied from the language of the deed and the position of the parties as above set forth. There do occur in the contract certain expressions more appropriate to the law of England than to the law of Scotland, viz., the reference to hotchpot, the destination of the husband's fund to his executors and administrators, and the reference to dower. The latter phrase is, however, used in conjunction with terce and *jus relictæ*. The destination to the next of kin is a special destination. Next of kin is not equivalent to heirs *in mobilibus*. The words "excluding her husband" were founded on as indicating an intention to exclude the paramount right which a husband has under the law of England, but they serve a purpose in this deed under the law of Scotland because, although the *jus mariti* is excluded from the liferent of the wife, there is no exclusion, express or implied, of the *jus mariti* after Lady Lister's death.

As is pointed out by the Lord President in the case of *Mitchell & Baxter* v. *Davies*,[2] this is not a question of the law of succession, but a question of the construction of a deed. The real question, as in every

[1] 6 D., at p. 921. [2] 3 R., at p. 212.

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testamentary deed, is what was the intention of the testatrix? I may also refer to the reasoning of the Lord Ordinary (Lord Fraser) in *Brown's Trustees*.[1] I am of opinion that in this case next of kin means next of kin at the date of death as fixed by the law of Scotland, and that accordingly the second party is entitled to the whole trust funds. The construction of the settlement is not altered by any subsequent change of domicile. The provisions of Lord Kingsdown's Act (24 and 25 Vict. cap. 114), section 3, are declaratory of the law.

LORD SKERRINGTON.—Although the destination of the sum of £2000 to the next of kin of the future Lady Lister was defeasible and gratuitous, it formed a term of the contract between her and her father whereby she induced him to come under an obligation to pay £2000 to the trustees of the marriage-contract. It was also a term of the contract between her and her father on the one hand, and her future husband on the other, whereby he renounced his rights as a husband as regards this fund. The present case resembles that of *Gregory's Trustees* v. *Allison*,[2] in which Lord Watson attached importance to the fact that the deed which he had to construe was a contract and not a will, which might be held to speak as from the death of the testator. The clause in the marriage-contract which has to be interpreted begins by conferring upon Lady Lister a power of "appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease." The distinction between a *mortis causa* deed and a will was, in the year 1856, one of great importance in Scots law and was familiar to Scottish lawyers, but it depended upon technicalities peculiar to our system which have no place in English law. In default of appointment or disposal the clause declared that Lady Lister's fortune should "belong to her next of kin, excluding her husband." Lord M'Laren lays it down[3] that a bequest in such terms operates in favour of the persons who at common law would have been entitled *ab intestato* to the moveable succession of the *propositus*. In other words, relations through the mother would be absolutely excluded; descendants would exclude collaterals and ascendants; collaterals would exclude ascendants; and the full blood would exclude the half blood. These are highly technical and arbitrary rules. The special case does not state, and I do not profess to know, how such a bequest would operate according to the law of England; but I cannot assume that the effect would be the same as in Scotland with the single exception that the half blood would rank along with the full blood—which is the only difference mentioned in the special case. There is authority for the view that in England the children and the parents of the *propositus* are held to be in an equal degree of kindred, and that they take jointly—*Withy* v. *Mangles*.[4]

I can discover nothing in the marriage-contract to indicate that the expression "next of kin," as used in the clause under construction, was not used in the sense in which it is intelligible to Scottish lawyers. It

[1] 17 R. 1174.
[2] 16 R. (H. L.) 10.
[3] Wills and Succession, (3rd ed.) ii. p. 765.
[4] (1843) 10 Cl. & Fin. 215.

seems unlikely that the parties, after using technical words of Scots law in the earlier part of the clause, should have used the expression "next of kin" in any but the technical sense intelligible to Scottish lawyers. Further, I cannot believe that the parties, and in particular Lady Lister and her father, desired that their contract should take effect according to the rules of some foreign system of jurisprudence (either English or colonial or foreign), of the operation of which they were utterly ignorant.

In my opinion the persons entitled to benefit are those who were Lady Lister's next of kin (as defined by the law of Scotland) at the date when the provision vested, *i.e.*, at her death.

THE COURT answered the question of law in the affirmative of the first alternative and in the negative of the second alternative thereof.

W. & J. COOK, W.S.—RUSSELL & DUNLOP, W.S.—Agents.

THE MOST HONOURABLE GAVIN, MARQUIS OF BREADALBANE, Appellant.—*Wilson, K.C.—Wilton.*
DONALD ROBERTSON, Respondent.—*Chree, K.C.—Aitchison.*

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Lease—Small holdings—"Present rent"—Tenant's share of fire insurance premium—Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), sections 13 and 26 (3) (a).

The Small Landholders (Scotland) Act, 1911, section 13, defines "present rent" as "the yearly rent, including money and any prestations other than money." And section 26 (3) enacts that a person shall not be held an existing yearly tenant or a qualified leaseholder in respect of "(*a*) any land the present rent of which within the meaning of this Act exceeds fifty pounds in money . . ."

A tenant whose yearly rent was £50 also made to his landlord an annual payment of 1s. 10d., being his proportion of a premium of insurance over certain buildings on his holding.

Held (*diss.* Lord Johnston) that this payment of 1s. 10d. did not fall to be taken into account in computing the tenant's "present rent" within the meaning of section 26 (3) (*a*) of the Act.

1ST DIVISION. Land Court.

IN an application to the Land Court, under the Small Landholders (Scotland) Act, 1911, by Donald Robertson for an order fixing a fair rent for the holding of Easter Moiearlanich, of which Robertson was the tenant from year to year and the Marquis of Breadalbane was the proprietor, the Land Court granted the application, and, at the request of the landlord, stated a case for appeal.

The case set forth, *inter alia*,—"(4) The holding, exclusive of common pasture, exceeds fifty acres. The sum entered in the Valuation-roll for the county of Perth as the rent of the applicant's holding for the year current at the commencement of the said Act was £50, 1s. 10d. per annum. This 1s. 10d. represents the proportion payable by the said Donald Robertson of the premium of an insurance policy against fire, effected by the respondent, the proprietor, over a large number of farm buildings upon the estate, which policy includes the byre and stable occupied by the said Donald Robertson. This insurance policy was effected many years later than the reduction of the rent of £58 by the sum of £8 [which, as stated in a previous paragraph of the case, had taken place in 1885]. There was no proof

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of any specific agreement by the tenant to pay the said 1s. 10d., but this sum was charged to and paid by him yearly each year from 1905 to 1912 inclusive. The rent was payable half-yearly at Whitsunday and Martinmas, and the said 1s. 10d. was collected yearly along with the Whitsunday rent. The notices to pay and receipts for payment produced by the tenant which relate to a Martinmas term contain only 'half year's rent of possessions at Moiearlanich Twenty-five pounds,' while those which relate to a Whitsunday term contain separately (first) 'half year's rent of possessions at Moiearlanich Twenty-five pounds,' and (second) 'Insurance on buildings for year One shilling and tenpence.' (5) The application came before the Scottish Land Court for hearing at Killin on 28th March 1913. At the hearing the proprietor (respondent therein) appeared by an agent, and objected to the competency of the application, in respect that the applicant, being tenant of a holding exceeding (exclusive of common pasture) fifty acres in extent, and also exceeding £50 of yearly rent, was not, as at 1st April 1912, an 'existing yearly tenant' within the meaning of the said Act, and particularly of section 26, subsections (3) (*a*) and (10) and section 13 (*b*) thereof, and was therefore neither a landholder nor a statutory small tenant within the meaning of the Small Landholders (Scotland) Acts, 1886 to 1911. (6) On 18th June 1913 the following final order was issued by the Land Court:—'Edinburgh, 18th June 1913.—The Land Court, having resumed consideration of this application, repel the objections to the competency stated for the respondent under reference to the annexed note: Find that the applicant is a statutory small tenant in and of the holding described in the application. . . .' (7) It is maintained by the proprietor that the said final order is erroneous in point of law, in so far as it repels the objection to competency founded on the rent of the holding exceeding £50 and the extent of the holding exceeding fifty acres. It is maintained by the proprietor that in determining whether the applicant is an existing yearly tenant under the Small Landholders (Scotland) Act, 1911, the proportion of insurance premium payable by the applicant must be taken into account in computing the 'present rent' of the holding within the meaning of section 13 and section 26, subsection 3 (*a*), of said Act."

The questions of law for the opinion of the Court included the following:—"(1) Whether in computing the applicant's 'present rent' within the meaning of section 26, subsection (3) (*a*) of the said Act, the said proportion of insurance premium payable by the applicant ought to have been taken into account?"

The case was heard before the First Division on 26th and 27th November 1913.

Argued for the appellant;—Sections 13 and 26 (3) of the Small Landholders Act, read together, provided in effect that "present rent" must be ascertained by adding together all prestations made in respect of the occupany of the holding, whether these were in money or in kind, including (1) nominal rent; (2) other money payments; (3) payments in kind. The payment of a premium of insurance fell within the second of these categories. In practice it had rightly been treated as a payment of the nature of rent,—the Valuation-roll was prepared on this basis, and the present Act accepted as the annual value of a holding the figure entered in the Valuation-roll.[1] It was

[1] Secs. 7 (16) and 33 (2).

clearly established by authority that payment of a premium of insurance was part of the consideration for which the tenant occupied his holding.[1] The obligation to make such a payment was one undertaken solely for the benefit of the landlord, and was in fact nothing else than an addition to the rent.[2]

Argued for the respondent;—Neither at common law nor by statute was there authority for treating this payment as part of the rent of the subject. The two classes of payment were essentially different,—rent being a return paid by the tenant to the landlord in respect of the use of the subjects,[3] the insurance premium being a contribution to a fund to be applied to the restoration of the subjects in the event of their destruction. The landlord would not be entitled to sequestrate for non-payment of premiums,[4] or to bring an action of removing on that account.[5] Nor had the common law position of rent been altered by statute. It was defined in section 13 of the Act of 1911 (the words being taken from the Crofters Holdings (Scotland) Act, 1886,[6] section 4), as including yearly rent, *i.e.*, in accordance with the test above given, the return made in respect of the use of the subjects, whether this was in money or in kind. The present payment was not one made for the use of the subjects, and was therefore not included in the yearly rent. The distinction between payment of a premium of insurance and payment of rent was recognised in kindred legislation.[7] In the present case the parties had treated the two payments as being separate and distinct. It was not to be assumed against the respondent that there was a contract under which he was bound to pay the premium, but, conceding that there was such a contract, it was separate from and only collateral to that of the lease. The payments were made at different intervals, and treated as separate payments in the receipts granted. It was not the case that the premiums were paid entirely in the landlord's interest. He was bound to apply them to insurance as a condition of exacting their payment to him.

At advising on 19th December 1913,—

Lord President.—The applicant in this case is tenant of a holding which extends to more than 50 acres, and, accordingly, he cannot be considered to be a statutory small tenant within the meaning of the Small Landholders (Scotland) Act if the present rent of his holding exceeds £50 in money.

Now, when we turn to the entry in the Valuation-roll, we find that the applicant's rent for the holding for the year current at the commencement of the Act was £50, 1s. 10d. per annum. But then this 1s. 10d. represents the proportion payable by the tenant of the premium of an

[1] Walker, (1862) 24 D. 1453; Armour on Valuation, (2nd ed.) p. 149; Wood's Lectures, p. 132.

[2] Duke of Hamilton's Trustees v. Fleming, (1870) 9 Macph. 329, *per* Lord President Inglis, at p. 335, and Lord Ardmillan, at p. 338; Rankine on Leases, (2nd ed.) pp. 220-1.

[3] Rankine on Leases, (2nd ed.) p. 287.

[4] Bennie v. Mack, (1832) 10 S. 255.

[5] Morton v. Murray's Representatives, (1793) M. 13,872.

[6] 49 and 50 Vict. cap. 29.

[7] Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), sec. 6.

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insurance policy against fire effected by the appellant over a large number of farm buildings upon the estate, which policy includes the byre and stable occupied by the respondent. This rent of £50 was payable half-yearly at Whitsunday and Martinmas, the said sum of 1s. 10d. being collected yearly along with the Whitsunday rent. The question which rises sharply, therefore, is this—Is the insurance premium of 1s. 10d. to be taken into account in computing the "present rent" of the holding?

I am of opinion that it is not; that rent is one thing and insurance premium a totally different thing. Rent is a payment by the tenant for the use and possession of the land and buildings, whereas the insurance premium is paid in order to secure reinstatement of the buildings and indemnification in the case of loss by fire. And I find, on turning to the note appended to the final order, that the Land Court considered that rent means the return in money, or in produce, or in kind, due by the tenant for his possession and use of the subjects let to him by the landlord, which is in substance really the definition of rent which you find in a familiar text-book —Professor Rankine's work on "Leases"—where he defines rent thus[1]: "Rent in law as distinguished from political economy is the return in money, produce, or other moveables, due by a tenant for the possession and use of the subject of a lease." In short, these two payments are made for a totally different purpose. They are payments which differ in quality, and the parties to this agreement obviously so regarded them, for the case distinctly sets out that the notices to pay and the receipts for payment produced by the tenant which relate to a Martinmas term contain only "half year's rent of possessions at Moiearlanich twenty-five pounds"; while those which relate to a Whitsunday term contain separately (first) "half year's rent for possessions at Moiearlanich twenty-five pounds," and (second) "Insurance on buildings for one year one shilling and tenpence." Parties, therefore, were able quite clearly to distinguish between the two payments, the one rent and the other insurance premium. Now, the best definition I can find of insurance is that given by Lord Justice-Clerk Moncreiff in the case of the *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Company*,[2] where he says insurance "is a contract belonging to a very ordinary class, by which the insurer undertakes, in consideration of the payment of an estimated equivalent beforehand, to make up to the insured any loss he may sustain by the occurrence of an uncertain contingency." The uncertain contingency in this case is fire, and the pre-estimated equivalent for indemnification is the fire insurance premium. I think, therefore, holding the opinion that the quality of the two payments is entirely different, that it is unnecessary to consider—because immaterial to decide—whether the tenant would be entitled to compel the landlord to devote the money received from the insurance company, if a fire took place, to the re-instatement of the premises. In the general case it is clear, I think, that he would not; but that in no way affects the quality of the payment. The payment is none the less a payment to secure re-instatement or indemnification in case of

[1] Rankine on Leases, (2nd ed.) p. 287.
[2] (1883) 11 R. 287, at p. 303.

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loss by fire because the tenant would not be entitled to compel the landlord so to apply it.

We were referred in the course of the discussion to the case of the *Duke of Hamilton's Trustees* v. *Fleming*,[1] not for the decision pronounced by the Court in that case, but because of certain dicta of the Judges of this Division, which were said to support the contention that a payment for the use and possession of subjects was exactly the same as a payment in order to secure reinstatement of the subjects in the event of loss by fire. I am of opinion that the dicta in that case do not support that view. The judgment in the case was on a totally different point from that which is raised for our consideration here. The tenant obliged himself—he was the tenant of a mill with machinery—to have the whole houses and machinery constantly insured in some respectable insurance office to the extent of £1200 sterling, the policy to be taken in name of the proprietor, he relieving the tenant of one-half of the premium of insurance. Lord President Inglis, in construing that clause, a fire having taken place and the landlord having recovered the insurance money, says, "It appears to me that this insurance is for the interest of the landlord only. It is a common stipulation, particularly in agricultural leases, and the obligation of the tenant to pay the whole or the half of the premium is just an addition to his rent." I think it quite clear that it is an addition to his rent. The two payments—insurance premium and rent—are certainly similar in this regard that they are both paid at the Whitsunday term by the tenant to the landlord, but that in no way alters the quality of the payment; and I accept, therefore, without hesitation the dictum of the Lord President to the effect that the payment of half of the insurance premium is just an addition to the tenant's rent. But he does not say nor does he indicate that a premium of insurance is rent. And, in the same way, Lord Deas, in expressing his opinion, differing on the main question from the Lord President, says, "The whole insurance is on the buildings and machinery, both being the property of the landlord, and the words of the policy show that it was effected for the sole behoof of the landlord. The tenant pays a portion of the premium, that is, his rent is increased by that amount, but that does not entitle him to participate in the benefit of this insurance." I think we are all agreed that the rent is increased by the amount of 1s. 10d. per annum here. But that does not lead to the inference that the two payments are of the same quality and the same kind. Lord Ardmillan further expresses his opinion on this part of the case thus:—"Neither landlord nor tenant was bound to rebuild; and, apart from special obligation, neither party was bound in law to insure. The obligation to insure contained in the lease is in favour of the landlord; the payment of half the premium by the tenant was just an additional rent." Now, if by the expression "additional rent" Lord Ardmillan means what the Lord President in, I think, more accurate language expresses by the phrase "an addition to the rent," I am well content; but if he means by the use of the words "additional rent" that a payment for the use and possession of subjects is exactly the same as a payment in

[1] 9 Macph. 329.

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order to secure reinstatement of the subjects in the event of loss by fire, then I respectfully differ. Lord Kinloch in his opinion uses this expression, "Though half the premium was to be paid by the tenant, this was in substance nothing more than so much additional rent, just as the payment of so much of the landlord's taxes might be"—a statement which is not objectionable in itself, because, in substance, it is a money payment, though in quality it is entirely different, because made for an entirely different purpose.

A capital test, as it appears to me, would be this—not whether the tenant would be entitled to demand exhibition of the receipt for the premium before he pays the 1s. 10d., which I think he would, but this—whether the landlord's hypothec at the time it existed would have covered an obligation by the tenant in his favour to pay an insurance premium—whether, in short, a landlord could take out sequestration, where the rent was paid, for an unpaid premium of insurance. I do not think anyone would maintain that the landlord's rights could be so extended; and reading between the lines in Lord Moncreiff's opinion in the case cited to us of *Bennie* v. *Mack*,[1] I can quite clearly see that he would not have so held. On the whole matter I come to the same conclusion as the Land Court, that the two payments were entirely different in quality; that the payment of the insurance premium was a personal contract apart from the contract of lease; and, accordingly, that we ought to answer the first question which is put to us in the negative, and find it unnecessary to answer the second question.

Lord Johnston.—A statutory small tenant, coupling section 26 (3) and (10) with section 32 of the Small Landholders Act, 1911, is a tenant from year to year or a leaseholder—(first) who has not provided the buildings and permanent improvements on the holding, or the greater part of them, and (second) the present rent of whose holding, within the meaning of the Act, does not exceed £50 in money, or if the rent does exceed £50 in money, whose holding does not exceed 50 acres in extent.

The respondent here conforms to the first condition. The question is, does he comply with the second? and that is answered if we know what is his present rent within the meaning of the Act, for there is no question that his farm does exceed 50 acres in extent. The only definition of "present rent" is found in section 13, and it is very awkwardly expressed, especially in relation to section 26 (3). For the one speaks of the consideration as being "money, and any prestations other than money," while the other speaks of it as if it was "money" only. They cannot both be "present rent," unless the consideration first referred to is to be reduced to money. Whether this can be done in the ordinary case under the Act is not for our determination here.

In the present case we are relieved of this difficulty. If the appellant is right on the facts, there is, putting it at the lowest for him, a consideration given for this lease in money and in a prestation, which sounds to be in money, because it is to pay something in money for the appellant's benefit.

[1] 10 S. 255.

Dec. 19, 1913.

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Ld. Johnston.

Where I think that the Land Court has been misled is in approaching the case on the assumption that the present rent of section 26 (3) was only the money part of the present rent of section 13 to the exclusion of considerations other than money, and further on the assumption that the additional prestation or consideration here, though sounding in money, might be also excluded, because it was an ancillary consideration, or for some other reason that I cannot suggest. In point of fact, what has been paid for some years past for the farm is £50 and 1s. 10d., the latter being half the share of the premium, on a covering policy of insurance over the buildings, effeiring to this particular holding. As the case is stated, I must assume that it has been paid as matter of obligation. The case has been inadequately prepared and stated, and, if desired, I should not be averse to sending it back for further inquiry and restatement. But, on the case as stated, I must take the facts as I have given them.

The Land Court have held that only the £50 falls to be considered as rent under the statute. I think that their judgment is not well founded. We are, in my opinion, foreclosed by contrary precedent, which the Land Court have ignored.

I cannot get rid of the decision in *Walker's* case,[1] by merely saying, as the Land Court do, that an obligation to pay insurance premiums may, for the purposes of the Valuation Acts, be treated as a consideration other than the stipulated rent, because I find the Judges of the Valuation Appeal Court in that case arriving at their determination, not on anything special to the Valuation Acts, but on the general consideration expressed by them thus: "In respect that by the lease the subjects are let not merely for the money stipulated for, but for the further consideration of the tenant insuring the buildings."

And I find that, in the more important case of *Duke of Hamilton* v. *Fleming*,[2] the opinions of the Judges are entirely consistent with the finding in *Walker's* case,[1] and explain at more length the principle on which *Walker's* case,[1] and the case in which they were then sitting, proceed. The Lord President (Inglis) speaks to the effect that the obligation of the tenant to pay the whole or part of the insurance is just an addition to his rent; and why, because the insurance is entirely for the benefit of the landlord. There is, unless it is specially provided by the lease, no obligation on the landlord to give the tenant any share of the sum recovered, or to rebuild. He may put the sum in his pocket, and the tenant's only remedy is to abandon the subjects, which *ex hypothesi* have been destroyed by an act of God. Lord Deas considers "that the insurance was for the benefit of the landlord alone . . . The tenant pays a portion of the premium—that is, his rent is increased by that amount, but that does not entitle him to participate in the benefit of this insurance." Lords Ardmillan and Kinloch express themselves in similar, though even stronger terms. I cannot ignore these judgments, or regard their Lordships' opinions as *obiter*, or as otherwise than the foundation of their judgment on the second branch of the case before them. And if the facts here are as I have assumed them, there was being paid, in the year the Act came into

[1] 24 D. 1453. [2] 9 Macph. 329.

Dec. 19, 1913.

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force, as consideration for the lease of these lands, a sum of £50, 1s. 10d., and if so, the Act does not apply to this farm.

I was, at the discussion, inclined to the view that the stipulation that the landlord should insure, and the tenant repay half the premium, was based on the assumption that they had both an interest in reinstatement, and taking the broad axe to it, that that interest might be regarded as justifying the premium being shared equally, and further, and consequently, inclined to the view that there was an implied obligation on the landlord to devote the policy money to reinstatement. Had my impression been well founded, it would have led to a different conclusion on the question at issue. But a more careful perusal of the case of *Duke of Hamilton*[1] has satisfied me that my impression was erroneous. Its premiss, indeed, was faulty. For the Lord President (Inglis) says in that case: "The obligation to insure is put upon him (the tenant) for the obvious reason that, as the occupant, he is the party more immediately concerned with the occurrence of fire." Any doubt that there might have been on the point has been resolved by the recent decision of *Clark* v. *Hume*.[2]

LORD MACKENZIE.—I am of opinion that the Land Court have come to the right conclusion. The term "rent," as used in the statute, is the return due by the tenant for the possession and use of the subject of the lease. That in the present case is £50. The 1s. 10d. is payable under a collateral contract, by which, if and when the landlord produces the receipt vouching payment of the premium of insurance, the tenant is under obligation to relieve him to that extent. It is not necessary to affirm that there is an obligation on the landlord to expend the proceeds of the policy in rebuilding in case of fire. It is enough to say that the tenant pays in the expectation that, in point of fact, the money will be so applied.

LORD SKERRINGTON.—In my opinion the legal inferences which ought to be drawn from the facts stated in the special case, and particularly from the terms of the receipt, are as follows, viz.:—(1) that the landlord was under no obligation to insure the buildings on the holding against fire, but that if he chose to do so the tenant was bound to repay to him the annual premium amounting to 1s. 10d.; (2) that if the landlord chose so to insure, he insured his own interest only and not that of the tenant; and (3) that if the landlord received payment of the insurance money he came under no obligation towards the tenant to restore the buildings. These propositions follow from the decisions in *Hamilton's Trustees* v. *Fleming*,[1] and *Clark* v. *Hume*.[2] I may here observe that the conditional character of the tenant's obligation to pay the premium of 1s. 10d. per annum as contrasted with the absolute obligation to pay £25 each half year in name of "rent" is not necessarily inconsistent with the view that the true rent of the holding was £50, 1s. 10d. Over and above an absolute obligation to pay a fixed rent in money or in kind a tenant is occasionally taken bound to perform services, but that only if required by the landlord. Such services are part of the rent.

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[1] 9 Macph. 329. [2] (1902) 5 F. 252.

So far, I do not think that I have said anything inconsistent with the contentions put forward at the debate by counsel on both sides. The landlord's counsel, however, went a step further and argued that as a matter of law the rent of the subjects must be held to be £50, 1s. 10d. although the receipt states the rent at only £50. If the parties regarded the larger sum as the annual value of the subjects to a tenant, the only explanation why part of the rent should have been payable conditionally must have been the trifling amount involved. It seems, however, more probable and also more consistent with the language of the receipt that the tenant expected to receive some benefit in the event of the landlord insuring the buildings, and that he regarded such benefit as worth 1s. 10d. per annum, although he did not think it necessary to secure it either by a trust or by a contract. The yearly tenant of a small farm might reasonably be apprehensive that in the event of the buildings being destroyed by fire his landlord might not think it worth his while to advance money in order to restore them, but might prefer to terminate the yearly lease and to add the ground to another of his farms. In such a case the existence or non-existence of a policy of insurance in favour of the landlord might determine his line of action in the matter of rebuilding. Accordingly it is impossible to infer as a matter of law that the tenant in the present case would have agreed to pay a rent of £50, 1s. 10d. for the subjects. On the contrary, the proper legal inference, in my view, is that the tenant agreed to pay the yearly sum of 1s. 10d. not as a part of the consideration for the right to occupy and use the heritable subjects, but in return for something which was not in its nature heritable. Of course it might be the fact, and might be proved, that in the special circumstances of this particular case the insurance was not regarded by the tenant as of any value to him, and that, if he had not been required to pay 1s. 10d. as the annual premium, he would have been willing to pay that sum as an addition to his rent. But that fact, even if proved or admitted, would not lead to the conclusion that the sum of 1s. 10d. mentioned in the receipt was paid as part of the rent. The only result would be to demonstrate that the rent agreed upon between the parties was too low and did not represent the amount at which the subjects might reasonably be expected to let from year to year. In short, the obligation to pay the yearly premium would, on investigation, be found to be a "consideration other than rent" within the meaning of the Valuation Acts. The Valuation Appeal Court so decided in the case of *Walker*.[1]

For these reasons I agree with the result arrived at by the Land Court. There are expressions in the opinions of the Judges in the case of *Hamilton's Trustees*[2] to the effect that a payment by a tenant for insuring the buildings is "an addition to the rent" or "additional rent," but they are merely *obiter*. All that the Court had to decide was whether the tenant had or had not a legal interest in the insurance money. Further, I have not overlooked the fact that the question to be decided turns primarily upon the meaning of the statutory definition of the word "rent," or of the expression "yearly rent," contained in section 13 of the Small Land-

[1] 24 D. 1453.

[2] 9 Macph. 329.

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holders (Scotland) Act, 1911, which supersedes section 4 of the Crofters Holdings (Scotland) Act, 1886. These definitions were, in my opinion, intended to include every form of rent, viz., money, kind, and services, but did not otherwise enlarge the ordinary and popular conception of the word.

THE COURT answered the first question of law in the negative.

DAVIDSON & SYME, W.S.—BALFOUR & MANSON, S.S.C.—Agents.

No. 30.

Jan. 6, 1914.

Aitken v. Robson.

THOMAS AITKEN, Petitioner.—*A. J. P. Menzies.*
WILLIAM ROBSON, Respondent.—*Hamilton.*

Bankruptcy—Sequestration—Discharge of bankrupt—Nobile Officium—Trustee elected but not confirmed—Petition to nobile officium by bankrupt for discharge and reinvestment—Competency.

At a statutory meeting for the election of a trustee in a sequestration the creditors elected a trustee and fixed the amount for which he should find security, but did not decide on the sufficiency of the caution offered, and consequently the Sheriff refused to confirm the election. No further steps having been taken in the sequestration for seven years, the bankrupt (who had paid no dividend) presented a petition to the *nobile officium* of the Court, praying for his discharge, for reinvestment in his estates, and to have the sequestration declared at an end. The petition was opposed by one of the creditors.

The Court *held* the application competent, and in the circumstances *granted* the prayer for discharge, but *quoad ultra dismissed* the petition.

2D DIVISION. ON the 22nd November 1906 Thomas Aitken's estates were sequestrated by the Lord Ordinary on the Bills on the petition of a creditor, William Robson, S.S.C. At a statutory meeting held on 3rd December 1906 the creditors elected a trustee and fixed the sum for which he should find security, but did not decide on the sufficiency of the caution offered as directed by section 72 of the Bankruptcy (Scotland) Act, 1856. In consequence, when the proceedings were reported to the Sheriff under section 70, he refused to confirm the election, and no bond of caution was ever lodged with the Sheriff-clerk.

No further steps were taken in the sequestration until 3rd November 1913, when the bankrupt presented a petition to the *nobile officium* of the Court, in which he craved the Court "to find the petitioner entitled to his discharge, and to discharge him accordingly of all debts and obligations contracted by him or for which he was liable at the date of the sequestration of his estates, to declare the said sequestration to be at an end, and to declare the petitioner reinvested in his estates; further, to grant warrant for recording the said deliverance in the Register of Sequestrations and in the Register of Inhibitions."

The petitioner averred:—"That if the sequestration proceedings had followed their normal course the petitioner would now have been entitled to apply for and to obtain his discharge, for although he has not paid his creditors 5s. per £1 on the amount of his indebtedness to them he is prepared to satisfy the Court that his failure to do so has arisen from circumstances for which he cannot justly be held responsible, all in terms of the provisions of the foresaid statute and also of the Bankruptcy and Cessio Act, 1881, section 6.

"That, owing to the failure to find security for the trustee's intro-

missions as resolved on at the said meeting of creditors and to the failure of the creditors to proceed in the sequestration, the petitioner is deprived of his statutory right to apply in ordinary course for his discharge, or to take any step at all in the sequestration, and he is therefore obliged to make the present application to your Lordships' *nobile officium*. Before doing so he wrote the creditor on whose petition sequestration was awarded to inquire whether he was prepared to proceed with the sequestration, and in answer received the following reply:—'Dear Sir,—We are in receipt of your letter of 7th. As we explained in our letter of 19th May, in our opinion Mr Robson is not in any way responsible for there being no trustee in the sequestration, and we cannot see that there is any obligation upon him to institute proceedings in the matter at his own expense.—Yours truly. . . .'

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"That the petitioner appeared at the foresaid meeting of his creditors held on 3rd December 1906, and delivered to the clerk a state of his affairs, and he has always been ready and willing to perform all the duties and acts incumbent on him in connection with the sequestration so as to entitle him to his discharge in terms of law."

Answers were lodged on behalf of William Robson, which stated, *inter alia*:—"The petitioner has made no offer of any dividend or composition upon his debts, and has taken no steps to have the said sequestration proceeded with, or to obtain a report in terms of the Bankruptcy Acts, or to obtain his discharge in ordinary course, or to entitle him to be reinvested in his estates. The respondent submits that the prayer of the petition should be refused in respect that—(1) the petition is incompetent. (2) The appropriate procedure for obtaining a discharge under the Bankruptcy Statutes is provided by the said statutes. (3) The petitioner's averments are irrelevant and insufficient to support the application. (4) No offer of any dividend or composition upon his debts has been made by the bankrupt. (5) No report has been obtained by the bankrupt in terms of section 146 of the Bankruptcy Act, 1856. (6) The petitioner's averments, so far as material, are unfounded in fact."

The case was heard before the Second Division (without the Lord Justice-Clerk) on 6th January 1914.

Argued for the petitioner;—When in the course of a sequestration any difficulty arose which could not be solved by the statutory procedure, the Court, in the exercise of its *nobile officium*, would interfere to set matters right.[1] Such a situation had arisen in the present case. The trustee elected in 1906 could never act because he had not found caution within seven days of the meeting, and therefore could not now be confirmed by the Sheriff.[2] The creditors would not move, and even if the petitioner could competently apply for the appointment of a new trustee, it was not fair that he should be put to this expense. He was accordingly entitled to decree in terms of the prayer of the petition, or at least so much of it as referred to his discharge.

Argued for the respondent;—The petitioner had not made out a

[1] Steuart v. Chalmers, (1864) 2 Macph. 1216; Anderson, (1866) 4 Macph. 577; White, (1893) 20 R. 600.

[2] Bankruptcy (Scotland) Act, 1913 (3 and 4 Geo. V. cap. 20), sec. 69, which (by sec. 192) superseded the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 75), sec. 72.

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case for the interference of the Court. His petition was incompetent because he had not exhausted the procedure provided by statute. His proper course was to apply for the appointment of a new trustee[1]; or at least the Court should obtain a report from the Accountant of Court, as in the case of *White*.[2] In any event the petitioner was not entitled to be reinvested in his estates, which was a privilege extended only to a bankrupt after composition with his creditors.[3]

LORD DUNDAS.—This case is a peculiar one and is, I think, attended with a certain amount of delicacy. It is a petition by a sequestrated bankrupt for his discharge, and it is put in the form of an appeal to the *nobile officium* of this Court. I respectfully agree with the words of Lord Justice-Clerk Inglis in the case of *Steuart* v. *Chalmers*[4]:—"It is necessary when we are asked to interpone,"—I think that should be interpose—"in the exercise of our *nobile officium*, to set right proceedings in a sequestration which have been misconducted or by accident have got out of shape, to be satisfied, in the first place, that a *dignus nodus* has been made out—a sufficient reason for interfering in the exercise of our *nobile officium;* and, in the second place, that we have parties before us who are justified in presenting the application."

Now what happened here was that as far back as 22nd November 1906 the petitioner's estates were sequestrated on the respondent's petition. On 3rd December 1906 the creditors held their statutory meeting; they elected a trustee, and they fixed the sum for which the trustee should find security, but they did not decide upon the sufficiency of the caution. That seems to have been not so much a mistake or accident as a deliberate failure by the creditors to comply with one of the requisites of section 72 of the Bankruptcy Act, 1856. On the proceedings being reported to the Sheriff he refused to confirm the trustee. Matters have since apparently been at a deadlock and nothing has been done for, roughly speaking, seven years. The creditors, apparently, have not cared to face the expense of getting matters put into order. The bankrupt, on the other hand, cannot get his discharge in the ordinary way, because he cannot get a report from the trustee, which under the statute is a condition precedent to a discharge in the ordinary way being granted. He, therefore, comes to us and asks for his discharge. It is true that in the petition he asks a good deal more; he asks us to declare the sequestration to be at an end, and to declare the petitioner reinvested in his estates, and further to grant warrant for recording the deliverance in the Register of Sequestrations and in the Register of Inhibitions. That part of the prayer was not, however, insisted in by Mr Menzies,—I think quite properly,—and will not be granted.

This unhappy person has been under the ban of sequestration for something like seven years. The respondent's counsel suggests that the proper remedy in these circumstances is not a petition of this nature, or at least is not this petition, but is for the bankrupt, I suppose at his own expense, to get a trustee duly appointed and confirmed, and then go

[1] MacDuff v. Baird, (1892) 20 R. 101.
[2] 20 R. 600.
[3] Bankruptcy Act, 1856, sec. 140.
[4] 2 Macph. 1216, at p. 1218.

through the whole machinery of sequestration down to claiming the desired discharge if he can get it. That is what the respondent indicates in his answers as "the appropriate procedure for obtaining a discharge under the Bankruptcy Statutes . . . provided by the said statutes." I do not think that in the circumstances that would be an appropriate, or a right and equitable, course to adopt. Nor do I think that any good purpose would be served by making a remit, as was done in a previous case, to the Accountant of Court; and Mr Hamilton did not satisfy me that his client would be any better off if such a course were taken, or that he has any sufficient interest to press for it. In the very peculiar circumstances of this case,—because I think it is a very peculiar one, and not on all fours with any case of which I am aware,—I think the proper and the just course will be to grant the prayer of the petition so far as it relates to the discharge, but no further.

Lord Salvesen.—I am very clearly of the same opinion. I think this is a case for the exercise of the *nobile officium* of the Court, because the Bankruptcy Statutes provide no means by which this petitioner can obtain a discharge in his sequestration. The position in which he finds himself is due entirely to the failure of his creditors to proceed with the sequestration; they appointed a trustee but they did not take steps to ensure that sufficient caution should be found by the trustee; and accordingly the Sheriff refused to declare the trustee elected. If the creditors had had any genuine desire to go on with the sequestration they ought to have presented a petition to this Court, or to some other Court having jurisdiction, and there is no doubt that they would then have been able to put the sequestration on a proper footing. They have not chosen to do so, and for the very obvious reason, which is stated in the answers, that they do not believe there are any assets in this sequestration which will justify the expense of the necessary proceedings for their distribution. That being so, they are not entitled to maintain the sequestration against the petitioner, and he, I think, is well warranted in coming to this Court and asking that now after the lapse of seven years he should be granted his discharge.

It is a totally different matter to say that he should be reinvested in his estates; although it may be that if there is any asset which originally vested in the sequestration the petitioner might at some future period take that up on the footing that the whole of the creditors had abandoned this asset. But that is not a matter which falls to be disposed of now, and Mr Hamilton's client, who is a creditor, might have the strongest objection to any such inference being drawn, seeing that one of the assets which is said to exist in the sequestration is a claim against himself. I accordingly appreciate entirely the motive of the respondent in opposing this petition as it was originally framed; but in so far as it is limited to the crave that we should discharge the bankrupt I am prepared to grant it.

I agree with your Lordship in the chair in holding that it would be a futile proceeding to remit the case for inquiry by the Accountant of Court. There may be many cases in which that is the appropriate course,

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but the penalty that the Court is in the habit of imposing upon a bankrupt, who is not able to prove that the bankruptcy was caused by circumstances for which he cannot justly be held responsible, is merely to postpone the time at which the discharge shall take effect. After seven years I cannot imagine that any further penalty would be imposed upon this bankrupt, whatever his conduct may have been; and as to this matter we are left entirely in doubt, because there is no averment by the respondent of a positive kind to the effect that the bankrupt was responsible—culpably responsible—for the state of his affairs. On these grounds I agree with your Lordship.

Lord Guthrie.—I am of the same opinion. It may be true, as the respondent says, that the present petition is not the only method by which the petitioner could attain the end he naturally seeks, namely, to get his discharge. He could adopt the procedure that was followed in *MacDuff* v. *Baird*,[1] namely, to get a trustee appointed to take up the whole matter of new. That procedure, however, seems to me unnecessary, because while it would cause great expense to the petitioner it would serve no interest of the respondent, and the creditors, other than the respondent, have not appeared to oppose.

The Court pronounced this interlocutor:—"Find the petitioner entitled to his discharge: Therefore discharge him accordingly of all debts and obligations contracted by him or for which he was liable at the date of the sequestration of his estates, and decern: *Quoad ultra* dismiss the petition."

R. D. C. M'Kechnie, Solicitor—Robson & M'Lean, W.S.—Agents.

No. 31.

Jan. 9, 1914.

Edwin L. Grant, Pursuer (Appellant).—*A. M. Mackay.*
John Fleming & Company, Limited, Defenders (Respondents).—*Horne, K.C.—J. G. Jameson.*

Grant v. John Fleming & Co., Limited.

Reparation—Negligence—Property—Common stair—Duty of proprietor to provide safe access—Child.

Process—Proof or jury trial—Sheriff Courts (Scotland) Act, 1907 (*7 Edw. VII. cap.* 51), *sec.* 30.

A father brought an action in the Sheriff Court against the proprietor of a tenement for damages for injuries sustained by his pupil daughter, who, while on her way to visit a companion who lived in the tenement, had fallen from the common stair. The pursuer averred that, at the point at which his child had fallen, the balustrade on the stair was not of sufficient height for the protection of children, and also that one of the uprights of the balustrade was wanting and there was a gap sufficient for a child to fall through. He averred that his child fell either through the gap or over the insufficient balustrade; and that the defenders were in breach of their duty as proprietors in failing to provide an access to the houses on the stair which should be safe for the inmates and their visitors, including children.

Held (*diss.* the Lord President) that the pursuer had stated a

[1] 20 R. 101.

relevant case for inquiry as to whether the defenders had discharged their duty to use all reasonable care to provide a safe access. Jan. 9, 1914.

Opinion, *per* the Lord President, that the duty of one having the control of premises is the same towards children as towards adults. *Opinion reserved per* Lord Skerrington. Grant v. John Fleming & Co., Limited.

Held further that the case was unsuitable for jury trial; and cause remitted back to the Sheriff for proof.

1st Division. Sheriff of Aberdeen, Kincardine, and Banff.

In April 1913 Edwin L. Grant, labourer in Aberdeen, brought an action in the Sheriff Court there, as tutor and administrator-in-law for his pupil daughter, Agnes Grant, against John Fleming & Company, Limited, in which he claimed £100 as damages for personal injuries sustained by her.

The defenders were proprietors of certain properties in Links Street, Aberdeen, including No. 18 thereof, and the pursuer averred:—(Cond. 2) "The said properties . . . have back stairs leading up to the first floor of the houses. Said stairs are made of stone and cement, with iron railings and banisters, and on the 17th day of October 1912, and for some time prior thereto, the iron railing on the back stair of No. 18 Links Street was insufficient and defective, and unsafe for the use of the public, and, particularly, for children. In particular, the said iron railing or balustrade on said back stair was, at the turn of the stair at or near where the child fell over as aftermentioned, only 2 feet in height, and thus afforded an insufficient guard for the protection of children using the stair, and, in addition, one of the iron balusters was awanting from the balustrade at or near the point mentioned, allowing a gap in the balustrade sufficient for a child to fall through, and in consequence of said defects, or one or other of them, the child fell as aftermentioned." (Cond. 3) "On or about said date the pursuer's daughter Mary Agnes Grant, aged four years, called at the house 18 Links Street aforesaid, to ask her companion Dorothy Christie, who lived there (a girl about the same age as pursuer's daughter), to come out to play with her, and was coming out of said house 18 Links Street aforesaid along with said Dorothy Christie when, owing to the defective state of the stair railing of said stair, which is a common stair, forming the only access to the tenements in said house 18 Links Street, the said Mary Agnes Grant fell either through the gap or over the insufficient balustrade from the stone steps on to the concreted ground below, severely and permanently injuring her head. Defenders' averments that the child was climbing on the stair railing, and that the accident was due to her fault or negligence, are denied. . . ." (Cond. 5) "It is the defenders' duty, as proprietors of the property in question, to provide accesses to the various floors of their buildings which are safe for the inmates and members of the public visiting or frequenting the houses, including children, of whom there are a large number residing in and near the said property, and in respect of their failure to provide such safe access to the property in question, the defenders are at fault, and are liable in reparation to pursuer as tutor and administrator-in-law for his daughter for the injuries she has received."

The pursuer pleaded;—The pursuer's child having been injured through the fault and negligence of the defenders as condescended on, pursuer is entitled to the damages claimed as tutor and administrator-in-law for his said daughter, with expenses.

The defenders pleaded, *inter alia*;—(1) The action is irrelevant.

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(2) Pursuer's averments are insufficient to support the conclusions of the action. (3) The accident was caused, or materially contributed to, by the child's fault or negligence.

On 29th October 1913 the Sheriff-substitute (Young) allowed a proof before answer.

The pursuer required the case to be remitted to the Court of Session, and proposed an issue of fault in ordinary form for the trial of the cause before a jury.

The case was heard on 6th January 1914 before the First Division (without Lord Johnston), when counsel for the respondents objected to the relevancy of the pursuer's averments, and argued;—(1) This was not a case where the maxim *res ipsa loquitur* applied. Here it was necessary to aver specific fault on the part of the defenders as the cause of the accident,[1] and the pursuer had failed to do so. He had merely averred two alternative causes, without specifying to which the accident was to be attributed; and even these did not exhaust the possibilities of the case. The child might, for instance, have been sliding down the banister and lost its balance, and thus fallen over. (2) There was no averment that the child was on the stair by invitation of the defenders. The child was in fact a mere licensee, and was in the same position as an adult licensee, to whom the defenders owed no duty of protection from an obvious danger, such as was the alleged defect in the balustrade here.[2] (3) The height of the balustrade had been the same throughout its existence, and it was not averred that any complaint had ever been made to the defenders as proprietors of any fault in its condition, either as to height or as to a missing baluster. Responsibility for its condition, therefore, could not be brought home to the defenders, but really rested upon the occupiers of the houses on the stair, who had failed to make any complaint.[3] (4) In any event the pursuer of such an action as the present could not be heard to aver fault generally in order that he might ultimately select a particular fault upon which to rest his case before a jury. Accordingly, if the case were to go to trial at all, it should be remitted to the Sheriff for proof,[4] and that, not only in respect of the difficult questions of law involved, but also on the separate ground that the alleged injury was not of a serious nature.

Argued for the appellant;—(1) On a question of relevancy it was enough that the averments in support of the weaker alternative were sufficient to support the conclusions of the action.[5] Further, the verdict of a jury could competently be sought upon alternative grounds

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[1] Wakelin v. London and South-Western Railway Co., (1886) 12 App. Cas. 41.

[2] Kennedy v. Shotts Iron Co., Limited, 1913 S. C. 1143, Lord Mackenzie, at pp. 1150-1, Lord Ormidale, at p. 1147; Burchell v. Hickisson, (1880) 50 L. J., Q. B. 101, Lindley, J., at p. 102, Lopes, J., at p. 103; Latham v. R. Johnson & Nephew, Limited, [1913] 1 K. B. 398, Farwell, L. J., at p. 407, Hamilton, L. J., at p. 414; Mechan v. Watson, 1907 S. C. 25, Lord M'Laren, at pp. 27-8; Bevan on Negligence, (3rd ed.) i. 452. Lord Mackenzie referred to Stevenson v. Corporation of Glasgow, 1908 S. C. 1034, and Gibson v. Glasgow Police Commissioners, (1893) 20 R. 466.

[3] Mechan v. Watson, 1907 S. C. 25, Lord Kinnear, at p. 29; M'Martin v. Hannay, (1872) 10 Macph. 411; Cameron v. Young, 1908 S. C. (H. L.) 7; Cavalier v. Pope, [1906] A. C. 428.

[4] Kennedy v. Bruce, 1907 S. C. 845, Lord Ardwall, at pp. 848-9.

[5] Hope v. Hope's Trustees, (1898) 1 F. (H. L.) 1, Lord Watson, at p. 3.

of action, *e.g.*, in an action of reduction of a will on the ground either of facility and circumvention or of incapacity. Here the pursuer's child having been found injured by a fall below a point on the defenders' common stair at which there were two defects as averred, a jury might be asked to draw the reasonable inference that the accident was due to one of these defects. (2) The defenders were in fault for neglecting their duty to provide for the safety of the stair as an access to their houses. They were not entitled to leave it in a condition which exposed members of the public who might use it (including children) to any risks, whether concealed or unconcealed. (3) The cases of *Cameron* v. *Young*[1] and *Cavalier* v. *Pope*[2] were distinguishable from the present case, because they were actions upon contract, and were at the instance of strangers to the contract. The former action had been discussed judicially, and had not been found to exclude an action based upon fault such as was here alleged,[3] and such fault afforded a good ground of action in respect of injuries attributable thereto.[4] The cases of *Stevenson* v. *Corporation of Glasgow*[5] and *Mechan* v. *Watson*[6] were also distinguishable, because the scope of the decision in the former case could not be extended to apply to a property of a different nature from that which was there dealt with; and the decision in the latter, which proceeded upon knowledge on the part of a tenant who was suing, did not affect the question of the defenders' liability to a member of the public who could have no knowledge of the defective state of the premises.[7] The case of *Burchell*[8] was distinguishable, because the child injured there had no right to be upon the stair; and the case of *Latham*[9] did not affect the present, because it proceeded upon a consideration of points of English law as to the position of a licensee. In Scotland one who had possession and control was responsible for the safety of such an access as that in question.[10] The pursuer had averred here both original insufficiency of construction, and also supervening defect of long standing. His record contained all the averments desiderated by the Court in the case of *M'Martin* v. *Hannay*,[11] and also those judicially recognised in the recent case of *Kennedy*,[12] a case decided since the record in this action was closed. (4) The law applicable to the case was not doubtful, and the injuries suffered were serious; accordingly there was no reason for remitting it to the Sheriff for proof, and issues for a trial by jury should be allowed.

At advising on 9th January 1914,—

Lord President.—In this case the pursuer's daughter, a child of four years of age, fell through or over the railing upon a common stair leading

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[1] 1908 S. C. (H. L.) 7. [2] [1906] A. C. 428.
[3] Mellon v. Henderson, 1913 S. C. 1207, Lord Hunter, at p. 1209-10.
[4] Kennedy v. Bruce, 1907 S. C. 845.
[5] 1908 S. C. 1034. [6] 1907 S. C. 25.
[7] Fulton v. Anderson, (1884) 22 S. L. R. 100; Miller v. Hancock, [1893] 2 Q. B. 177, Bowen, L. J., at p. 181.
[8] 50 L. J., Q. B. 101. [9] [1913] 1 K. B. 398.
[10] Kennedy v. Shotts Iron Co., Limited, 1913 S. C. 1143, Lord Mackenzie, at p. 1151.
[11] 10 Macph. 411.
[12] 1913 S. C. 1143, *per* Lord Mackenzie, at pp. 1151 and 1153.

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to a house or houses in Aberdeen, and sustained serious personal injury. This action is brought against the proprietors of the property in order to recover damages for the injury so sustained. It is, of course, conceded that the defenders *qua* proprietors are not liable in damages. But then it is alleged on record that the stair was a common stair leading to a number of tenements, and, accordingly, that the defenders ought to be assumed to have had control and possession, and are therefore liable in damages to anyone lawfully using the stair if the injured person can aver and prove fault or negligence on the part of the defenders. This action rests exclusively upon fault. It is so set out in the initial writ and in the only plea in law, and in the proposed issue which we are asked here to approve the question is pointedly put, "Was the pursuer's child injured in consequence of the fault of the defenders." The question we are now to consider is whether there are averments on this record relevant to infer fault and consequent liability on the part of the defenders. I am of opinion, for my part, that there are not.

Apparently the child was lawfully using the stair at the time when the mishap occurred. She was not a trespasser. She was visiting a companion who resided in one of the houses reached by the common stair. In cases such as this the proprietor has a duty to all who are lawfully using his property to take every reasonable precaution to ensure their safety against injury. The law was thus stated as far back as the year 1866 in the well-known case of *Indermaur* v. *Dames*,[1] where Mr Justice Willes, in delivering the judgment of the Court of Exchequer Chamber, said: "With respect to such a visitor at least"—and this child was a visitor on this occasion—"we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." And in almost similar language Lord Kinnear, in the case of *Mechan* v. *Watson*,[2] laid down the law thus: "The theory is that occupiers of premises—not necessarily owners, but occupiers—are bound to take reasonable care that the persons whom they, either expressly or by implication, invite to enter premises are exposed to no dangers which require more than ordinary care on their part to guard against. The principle is that such visitors using reasonable care for their own safety are entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know."

My opinion is that according to the law of Scotland the duty is exactly the same on the part of a proprietor whatsoever be the object or purpose for which the property is being used, provided it is being lawfully used. I draw no distinctions between the objects which different visitors may have in using the property. The one consideration, in my opinion, is: are they using the property lawfully or unlawfully? And further, the duty of a proprietor is, I think, exactly the same whether the injured person is an adult or a child. The law on that subject is nowhere better stated, I think, than in the judgment of Lord Justice Farwell in the case

[1] (1866) L. R., 1 C. P. 274.

[2] 1907 S. C. 25, at pp. 29-30.

of *Latham* v. *R. Johnson & Nephew, Limited*,[1] where he says: "I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian." And the law was laid down in similar terms, in the opinion of Lord Kinnear, in the case which was cited to us of *Stevenson* v. *Corporation of Glasgow*.[2]

Having then in view the rule of law which lays upon the proprietor the duty of taking every reasonable precaution to ensure the safety of all who are lawfully using his premises, I turn to consider whether the pursuer in this case has relevantly averred a breach of that duty, in other words, fault and negligence, without proving which it is impossible for him to recover damages. It is said upon the record that this mishap was the result of one or other of two causes. It is said that either the child fell through a gap in the railing due to the absence of a baluster, or, alternatively, the child fell over the railing in consequence of its insufficient height. It is averred that the railing afforded an insufficient guard for the protection of children. It is carefully not averred that the railing was of insufficient height for the protection of the lieges at large. The averment is confined exclusively to children.

Now, if both of these grounds of liability were relevantly averred, then, in my opinion, the pursuer would be entitled to have the case tried, even although these two did not exhaust all the possible causes of the child's fall, for that would be a matter of evidence. If, on the other hand, both or either of these grounds of fault is not relevantly averred, then, in my opinion, this action cannot go further.

I turn, therefore, to the former of the two alternatives in order to see whether fault is relevantly averred. Now, the only averment is that there was a baluster lacking at the time when the mishap occurred. It is not averred—and I take it, inasmuch as this record has been the subject-matter of careful consideration in the Sheriff Court, having been once, at all events, amended, it is intentionally not averred—that the defenders, the proprietors of the property, knew or ought to have known that the baluster was amissing. It is not alleged—as in every other case it has been—that there was a lack of reasonable inspection, that there was no inspection at all, or that inspection was made and information of danger given and disregarded. The averment upon the record is perfectly consistent with the punctilious discharge by the proprietors of this property of their duty to all those who were lawfully using the property. In short, there is here a bare averment that there was, on the occasion in question, a baluster lacking, and then we are asked to infer liability on the part of the proprietors.

Now, if the proprietors *qua* proprietors are not responsible, if they are not insurers of the safety of those who are lawfully using the property, then, in my opinion, it is insufficient to aver and prove merely the absence of a baluster without going further and saying that it was known to the

[1] [1913] 1 K. B. 398, at p. 407.

[2] 1908 S. C. 1034.

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defenders, or that they ought to have known of the defect, and that they neglected to have it remedied. The authority which was cited to us in support of the contrary proposition, to wit, *M'Martin* v. *Hannay*,[1] does not seem to me to support the argument, for, when that case is examined, it will be found that one of the essential and vital facts upon which the judgment rested was that complaint of the defect was made to the proprietors and that they neglected to attend to it. That appears very clearly in the opinion of Lord Cowan where he thus sums up the facts upon which the judgment of the Court rested[2]: "(1) that the state of disrepair had continued for at least six months; (2) that the gap was quite large enough to permit of a child falling through; (3) that the stone of the step in which the banister had been fixed was itself worn away, which would more readily lead to a child missing its foot; and (4)"—and this is vital—"that the defender's factor and overseer had been warned of the state of matters, and that nothing was done to put the railing into a safe state till after the fatal occurrence had taken place." My reading of the meaning and effect of the judgment in *M'Martin* v. *Hannay*[1] is confirmed by the opinion of Lord M'Laren in *Mechan* v. *Watson*,[3] in which his Lordship, commenting upon and distinguishing the case of *M'Martin*,[1] said the ground of liability in that case "which is very distinctly stated in Lord Cowan's opinion, was that one of the rails of the stair had been displaced, leaving a gap through which a child had fallen, and that the landlord's factor had been called on to repair it, but had done nothing." And Lord Kinnear, summarising *M'Martin* v. *Hannay's* case,[1] comes to a similar conclusion. It appears to me then, that it is not sufficient, in a case such as this, to allege merely that a baluster is awanting. We have no allegation that the stair as originally constructed was without it—merely that a baluster is awanting—and yet the Court and the jury are asked to infer liability on the part of the proprietors who, for aught that appears, have done everything to ensure the complete safety of everybody who has a lawful right to use their property.

If I am right in this view, it is needless to go further and to examine the second ground of liability. But my opinion is that the second ground of liability is in no better position than the first. The second ground of liability is that the railing was of insufficient height, and that it did not afford a sufficient guard for the protection of children using the stair. That is not an allegation of any failure to repair or failure to inspect, or of allowing the property to get into a state of disrepair. It is merely an allegation, at the best, of original faulty construction. Now, it is not said that this insufficiency of height will be any danger whatever to adults. It is not said that the construction is unusual. It is not said that any complaint was ever made by any tenant of the property. It is not said that any accident ever occurred on account of the insufficient height, and it is not said that the insufficient height of the railing was a concealed danger. Obviously it was open and patent to everybody who was using

[1] 10 Macph. 411. [2] *Ibid*, at p. 412.
[3] 1907 S. C. 25, at p. 29.

the property—as open and patent to tenants and visitors as it was to the proprietors themselves. In the absence of any averment of fault or neglect, and with only a simple statement that the railing was of insufficient height to protect children, I am of opinion that there is no allegation relevant to infer liability on the part of the defenders, or to lead us to the conclusion that they were neglectful of the duty imposed upon them to take every reasonable precaution for the safety of those who were lawfully using their property.

I am confirmed in this opinion by the judgment of this Division of the Court in the case of *Mechan* v. *Watson*.[1] In that case, which was decided on relevancy, the allegation was that there was an unusually great interval between the side of the wall and the first of the uprights in a railing, which in consequence left a gap so wide that a child fell through and was injured. Now, the Court held in that case that the averments were insufficient to infer liability on the part of the defenders, and that on more than one ground: in the first place, on the ground of lack of specification; and in the second place (it was a tenant's child that had fallen), on the ground that the tenant was just as much to blame as the landlord; but further, the Court held that the allegation of fault there was wholly insufficient in respect that the insufficiency of the railing was as open and patent to visitors as it was to tenants of the property. For aught that appears in the present case the tenants are perfectly satisfied, as well satisfied as the landlord, with the height of the railing; and it appears to me to be a strong thing to hold that visitors were entitled to complain of an open and patent insufficiency if tenants were precluded from complaining, and, indeed, stated no ground of complaint. Now, when I turn to the opinions expressed in *Mechan* v. *Watson* I find that Lord Pearson very clearly states the second ground of liability to which I have adverted, in the following terms[2]:—"This is not the case of an access, originally safe, being allowed to go out of repair. The fault alleged is in the original design and construction of the railing, and that is a matter which had never been made the subject of a complaint, and was as patent to the pursuer, the tenant, and to all who used the staircase, as it was to the landlord." It is not said that there was any concealed source of danger here or any risk which was not as patent to the visitor using the staircase as to the tenant or the proprietor himself. And, keeping in view that the extent of the proprietor's liability to a child is exactly the same as the extent of his liability to an adult, I am of opinion that this second ground is as irrelevant as the first ground upon which fault is sought to be rested.

If your Lordships take a different view from me on the question of relevancy of averment here, then I am very clearly of opinion that this is not the type of case which ought to go to a jury. I think it is on many grounds wholly unsuitable for trial by jury. It resembles closely two or three other cases which, in this Division and the other Division of the Court, have been regarded as unsuitable for jury trial, and which have been remitted to the Sheriff Court for investigation of the facts. Accordingly,

[1] 1907 S. C. 25.

[2] *Ibid*, at p. 30.

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if your Lordships should be of a different opinion from me upon the question of relevancy, I should propose that this case should be remitted to the Sheriff-substitute to proceed in terms of the interlocutor which is now before us.

LORD MACKENZIE.—In this case the Sheriff-substitute has allowed a proof before answer. I think he followed a course which was safe and proper in the circumstances. I should have been content to allow the case to go back without laying down any propositions in law, but in consequence of what your Lordship in the chair has said I think it right briefly to explain my reasons.

I am averse, in a case of this kind, to going into the law on a question of relevancy. We are here dealing with a branch of the law which has been subjected to great refinement. I may, in justification of that statement, refer to the case of *Indermaur* v *Dames*,[1] cited by your Lordship as applicable to the facts averred in the present case. If, however, the passage which was read by your Lordship from Willes, J., is taken along with the context, it is plain that the visitors there referred to were those only who visited the premises on purposes of business. That is made quite clear in the opinion of Lord Kinnear in the case of *Stevenson*,[2] and it was pointed out to us by Mr Jameson in his argument. Here we are dealing not with a person who was on business but with a child who had gone to call on a companion. I say that in passing as illustrating the care which is necessary before it is attempted to define what law is applicable to cases of this description.

In my opinion both sides were wrong in the contentions they submitted to us. I think that the defenders were wrong in taking advantage of the pursuer's removal of the case for the purpose of asking a jury trial to say that the action is irrelevant; and I think the pursuer was wrong in bringing the case here and asking for a jury trial, because I agree with your Lordship that it is unsuitable for jury trial.

Now, what is the ground of action here? As your Lordship has pointed out it is laid on fault. It is so pleaded, and that was the only case which was argued. There cannot be fault unless you start with a duty. What was the duty? There was no duty *ex dominio solo* (a phrase used by Lord Gifford in the case of *Moffat & Company* v. *Park*,[3] which I took occasion to repeat in the recent case of *Kennedy* v. *Shotts Iron Company*[4]). Therefore you must aver and offer to prove that there was a duty. Now, it is not a matter of controversy what the duty is. The only controversy, as I gather, is whether the pursuer in this case has used exactly appropriate language to define the duty. It is said that condescendence 5, if read critically, might spell an obligation to ensure or guarantee. Now, language exactly the same as that employed in condescendence 5 has been used in previous cases to define the duty incumbent on the owner who is left in possession and control of a common stair. It is a duty to use all reasonable care and diligence. Exactly the same language was used by

[1] L. R., 1 C. P. 274. [2] 1908 S. C. 1034. [3] (1877) 5 R. 13.
[4] 1913 S. C. 1143.

the Master of the Rolls, Lord Esher, in the case of *Miller* v. *Hancock*.[1] The same duty was recognised in the case of *M'Martin* v. *Hannay*,[2] and in *Kennedy* v. *Shotts Iron Company*.[3] There is no question that the duty is to provide and to keep a reasonably safe entrance and exit for the tenants of the premises. There is a proper averment in the present case of what the duty is.

Is there a sufficient averment of a breach of that duty? It is said that the landlords failed in their duty because they failed to provide a rail of sufficient height, that is to say, there was a fault in construction. It is also said that they failed in their duty because they failed to keep the railing, such as it was, in a safe condition. It is said that the railing was a cause of danger because one of the uprights was wanting. I should have thought that, having stated the duty and then having explained the breach in those terms, that that constituted a relevant case—a relevant case when it is averred that, in consequence of one or other of those defects, the child met with an accident. I do not dwell upon the argument with which the respondents opened that, there being an alternative ground of action here, that would not do in the circumstances of the case. I understand your Lordship has no difficulty about that, nor have I. It appears to me that the pursuer is entitled to have the facts inquired into. If it appears in the course of the proof that the landlords used all reasonable care, or that there was no duty to this particular child in regard to this particular danger, then it may be that the pursuer will fail in his case. But I cannot, for my own part, see how, without knowing the facts, we can assume either the one thing or the other in regard to such a matter.

I do not think that the case of *Mechan*,[4] upon which your Lordship lays stress, really meets the difficulty in the present case. That was an action in which the tenant was pursuing. This is an action in which a member of the public is suing for injury to his child. Now, it may very well be that where you have got a tenant living on the stair, and seeing it day by day, then, in the absence of any averment that he complained, the result may be, as Lord Pearson put it in the case of *Mechan*,[4] that the fault is just as much on the part of the pursuer as on the part of the defender. But how can that apply to the case of a member of the public, who, for aught we know, knew nothing about the state of the stair herself, and whose father may have been equally ignorant? That a member of the public has a right lawfully to be upon the staircase does not admit of doubt. Whether we are, in the law of Scotland, to draw a distinction further than between those who are lawfully and those who are unlawfully upon the premises I am not at present disposed to say, because that is a matter which, I think, would require careful consideration, and I do not think it is suitable, on the present occasion, to go further into that matter. In *Mechan*[4] Lord Kinnear pointed out that, if the rail was insufficient, the defect was a defect in construction which was perfectly obvious to the tenant. It may turn out, if there is a proof in the present case, that the defect was obvious. It may turn out that it was not. Cases

[1] [1893] 2 Q. B. 177. [2] 10 Macph. 411. [3] 1913 S. C. 1143. [4] 1907 S. C. 25.

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in which the owner of property has been held not liable for accidents to children who fell into ponds or streams are not necessarily applicable to the case in hand. Where a person passing (with permission) over private property falls into a pond, you may start with a totally different obligation as regards the owner. You may start with no obligation to fence the pond or stream. But, in the present case, you necessarily start with an obligation on the owner of the property to provide a staircase which shall be safe so far as he, by reasonable care and inspection, can secure. The duty and the right thence emerging are different in the two cases, because, although there is no contractual right between a member of the public using the staircase and the landlord, yet the right which is vested in the member of the public does arise out of the contract which has been entered into between the tenant and the landlord, it being an implied condition of that contract that those visiting the tenant shall have access to the tenant by a staircase which is reasonably safe and secure.

There were several English cases cited to us. In these the facts were ascertained. As regards the position of a child and an adult, I venture to refer to what I have said in the case of *Stevenson*.[1] Unless fault on the part of a defender is the proximate cause of the accident, then, whether the person injured is an adult or a child he is not liable.

I regret having been obliged to go into the questions of law which I should rather have left over until the facts were ascertained. For the reasons stated I am of opinion that the order for proof made by the Sheriff-substitute should stand, and that the case should go back to him.

Lord Skerrington.—I agree with Lord Mackenzie in thinking that, as a matter of averment and pleading, the pursuer has said all that is necessary in order to entitle him to an inquiry into the facts.

I further agree with the observations which Lord Mackenzie has made in regard to the legal principles applicable to cases of this kind. But I desire to reserve my opinion upon one question, namely, whether it is strictly accurate to say, as a general proposition of law, that the duty of the person who has control of premises is precisely the same towards adults whom he permits to use his property as it is towards children. I may refer to the opinion of Lord Atkinson in the case of *Cooke* v. *Midland Great Western Railway of Ireland*,[2] where he states that "the duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

As regards the question whether this case should be tried by a jury or not, I agree with both your Lordships in thinking that it ought to be tried by a Judge, but I desire to say that I come to this conclusion merely upon the specialties of this particular case and in view of the fact that there is a difference of opinion among the Judges of this Court as to the legal principles which ought to be applied. I do not think that there is

[1] 1908 S. C. 1034.

[2] [1909] A. C. 229, at p. 238.

anything in this particular type of action which ought to deprive a pursuer of his statutory right to have his case tried by a jury. Jan. 9, 1914. Grant v. John Fleming & Co., Limited.

THE COURT pronounced an interlocutor in the following terms:—"Having considered the closed record and heard counsel for the parties on the defenders' motion to retransmit the cause and on their objections to the relevancy, repel said objections, sustain said motion, disallow the issue, No. 14 of process, recall the interlocutor of the Sheriff-substitute of 29th October 1913 in so far as it assigns a diet of proof: *Quoad ultra* affirm said interlocutor and remit the cause to him to proceed as accords."

HILL MURRAY & BRYDON, S.S.C.—BOYD, JAMESON, & YOUNG, W.S.—Agents.

JOHN CHISHOLM, Pursuer (Respondent).—*Lord Adv. Munro*—*A. M. Stuart.*
JAMES GRANT, Defender (Reclaimer).—*G. Watt, K.C.*—*Macquisten.*

No. 32.
Jan. 10, 1914.
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Reparation—Slander—Innuendo—Allegation of professional incapacity—"Quack."

In an action of damages for slander at the instance of C., the superintendent of a district lunatic asylum (who was admittedly not a qualified medical practitioner), complaining that the defender had said of him, "What does that mannie C. know about treating lunatics? He is just a quack. We will sack him yet," *held* that the pursuer was entitled to an issue with the innuendo that these words represented "that he was unfit for his duties as superintendent, that he did not know his work, was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post."

ON 4th September 1913 John Chisholm, Banff, brought an action of damages for slander against James Grant, solicitor and town-clerk, Banff. 2D DIVISION. Lord Dewar.

The pursuer averred that he was appointed superintendent of the Banff District Asylum on 21st September 1910. (Cond. 13) "On or about 16th December 1912 the defender, at Ladysbridge Railway Station, shouted in a loud voice, 'What does that mannie Chisholm know about treating lunatics? He is just a quack. We will sack him yet.' The said statement was made in the hearing of, among others, Mr F. G. Watt, station-master at the said station, and Dr Ledingham, Medical Officer of Health, Banff, and was addressed to Mr Alexander Murray, bank-agent, Banff, and a former member of the District Lunacy Board. These statements are false and calumnious, and the defender, when making them, deliberately and maliciously raised his voice in order to make himself heard by everyone about the station. The said statement was of and concerning the pursuer, and was false and calumnious. It represented, and was intended to represent, that the pursuer was unfit for his duties as superintendent of the asylum, that he did not know his work, and was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post. The said false and calumnious statements were so understood by the said persons who heard them."

The pursuer also averred other instances of alleged slander with which this report is not concerned.

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He proposed, *inter alia*, an issue based on the words quoted in cond. 13, which he innuendoed as meaning "that the pursuer was unfit for his duties as superintendent of the asylum, that he did not know his work, was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post."

On 21st November 1913 the Lord Ordinary (Dewar) pronounced an interlocutor, *inter alia*, approving of this issue.*

The defender reclaimed, and the case was heard before the Second Division (consisting of Lord Dundas, Lord Salvesen, and Lord Ormidale) on 9th and 10th January 1914.

Argued for the reclaimer;—The issue relating to the conversation on 16th December should be disallowed. The words complained of were not slanderous in themselves, and would not support the innuendo placed on them. They meant, and could only mean, looking to the context, that the pursuer was unable to give lunatics medical treatment, because he was not a qualified doctor. It was admittedly true that he was not a qualified doctor and, though it might be unkind to publish the fact, it was not a slander, and did not pass the limits of fair comment on a man in the pursuer's position. The word "quack" was invariably associated with the idea of a person practising a profession without the proper qualification—such as a quack doctor[1] or a quack lawyer.[2]

Counsel for the respondent were not called upon to reply on this point.

Lord Dundas.—[After dealing with other issues with which this report is not concerned]—As regards the fourth issue also I think the Lord Ordinary is right. That issue proposes to ask the jury whether the defender said about the pursuer:—"'What does that mannie Chisholm know about treating lunatics? He is just a quack. We will sack him yet,' or words of like import and effect, meaning thereby that the pursuer was unfit for his duties as superintendent of the asylum, that he did not know his work, was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post." The defender says that issue should not be allowed, because it is quite clear that these words can only mean, and did only mean, that the pursuer, not being a duly qualified medical man (which is admitted), was in that sense a quack and in that sense a person not duly qualified to treat insane people; and this, the

* "Opinion.— . . . The fourth issue is in a different position, and I am of opinion that it ought to be approved. I think the words, 'What does that mannie Chisholm know about treating lunatics? He is just a quack. We will sack him yet,' will reasonably bear the meaning which the pursuer seeks to attach to them, in view of the facts and circumstances averred on record. The defender argued that the meaning which he intended to convey, and did convey, was that the pursuer was not a duly qualified medical practitioner. That may be so. I express no opinion on that matter. All I decide is that they are reasonably susceptible of the meaning which the pursuer suggests. It will be for the jury to decide, after hearing evidence, which contention is correct. I accordingly allow this issue."

[1] Collins v. Carnegie, (1834) 1 A. & E. 695; Long v. Chubb, (1831) 5 C. & P. 55; Dakhyl v. Labouchere, [1908] 2 K. B. 325.

[2] Wakley v. Healey, (1849) 7 C. B. 591.

defender says, is no slander. I agree with the Lord Ordinary that this may have been the meaning, but (like him) I offer no opinion whether it was so or not. "Quack" seems to me to be rather a stupid and vulgar word. I am not sure that anybody knows exactly what he means when he uses it. But I cannot say what the defender asks me to say, viz.: that the meaning which he puts upon the word is the only one that can reasonably be put upon it. I think the case of *Dakhyl* v. *Labouchere*,[1] to which we were referred, is a sufficient authority for saying that the word may have more than one meaning. I am not prepared to hold that the meaning put upon it by the pursuer is not one which may be reasonably put upon it; and, if that meaning is put upon it, I think it would involve damages. The question is—are we entitled to withhold the case from a jury? I think we are not; and accordingly I move your lordships to adhere to the interlocutor of the Lord Ordinary.

Lord Salvesen and Lord Ormidale concurred.

The Court adhered.

J. Ferguson Reekie, S.S.C.—Alex. Morison & Co., W.S.—Agents.

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The Parish Council of the City Parish of Edinburgh, Pursuers (Respondents).—*D.-F. Dickson—J. R. Christie.*
The Local Government Board for Scotland, Defenders (Reclaimers).—*Sol.-Gen. Morison—Pitman.*

Poor—Lunatic pauper—Warrant for removal of pauper to England—Appeal to Local Government Board—Competency—"Residence" of lunatic—Poor Law (Scotland) Act, 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 5.

The Poor Law (Scotland) Act, 1898, section 5, enacts that, whenever any parish council has obtained a warrant for the removal from any parish in Scotland to England or Ireland of any English-born or Irish-born pauper who has not acquired a settlement by residence in Scotland, an appeal may be taken to the Local Government Board for Scotland if such pauper "shall have resided continuously in such parish for not less than one year before the date of the application for relief," and the Board shall determine whether it is reasonable and proper that such pauper shall be so removed.

Held (*rev.* judgment of Lord Skerrington) that the word "resided," as used in the section, referred merely to bodily presence, and not to intelligent residence, in a particular locality; and accordingly that an appeal was competent in the case of a lunatic pauper who had lived in a Scottish parish (being boarded out at the expense of a relative) for more than a year, although she was insane during the whole period.

Poor—Removal of pauper to England—Finding as to residence in Sheriff's warrant—Poor Removal Act, 1862 (25 *and* 26 *Vict. cap.* 113), *sec.* 2.

The Poor Removal Act, 1862, section 2, enacts that a warrant for the removal of a pauper from England to Scotland, or from Scotland to England or Ireland, shall contain "the name of the place in Scotland or England or Ireland (as the case may be) where" the justices or magistrate or Sheriff shall find such person "to have been born, or to have last resided for the space of five years in the case of a poor

[1] [1908] 2 K. B. 325.

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2D DIVISION. Lord Skerrington.

person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland."

Observed (*per* Lord Dundas) that the residence for three years specified in the section for the case of a removal from Scotland to England is a residence in England and not in Scotland.

ON 10th July 1912 the Parish Council of the City Parish of Edinburgh brought an action against the Local Government Board for Scotland and also, for any interest they might have in the premises, against Mrs Elizabeth Buckle or Scott, the Parish Council of the parish of Falkland, and the Guardians of the Poor of the Union of St Pancras in the city of London. The conclusions of the summons were for declarator "that a warrant or order granted by the Sheriff of the county of Fife, at Cupar-Fife, on the 16th day of May 1911, at the instance of Lawrence Reid, inspector of poor for the parish of Falkland, for the removal, under the provisions of the Poor Removal Act, 1862, of the said Elizabeth Buckle or Scott to the Union of St Pancras was properly obtained, and is a good and valid warrant for such removal, and that the defenders the Local Government Board for Scotland have no power to interfere with the operation of the said warrant by virtue of the provisions of the Poor Law (Scotland) Act, 1898 (61 and 62 Victoria, cap. 21), or otherwise, and that the said warrant may be put in force notwithstanding any minute or order of the said Board bearing to be made under the provisions of section 5 of the said Act," * and for reduction of "(first) a minute or

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* The Poor Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21), enacts:—

Sec. 4. "Where an English-born or Irish-born poor person has resided continuously in Scotland for not less than five years (of which not less than one year shall have been continuously in the parish in which he applies for parochial relief), and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received parochial relief, he shall, on thereafter becoming chargeable to any parish in Scotland, be irremovable from Scotland, and shall be maintained by the parish to which he has so become chargeable"—(subject to a proviso as to his ceasing to be chargeable if he shall have acquired a settlement by residence in any other parish in Scotland).

Sec. 5 (1). "Whenever any parish council shall have obtained in terms of the Poor Law Removal Act, 1862, a warrant for the removal from any parish in Scotland to England or Ireland of any English-born or Irish-born poor person who has not acquired a settlement by residence in Scotland, and to whom the immediately preceding section does not apply, such poor person, if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief (her deceased husband's residence, if necessary, being reckoned as part of her residence in the case of a widow), may, within fourteen days after intimation of the granting of such warrant and of the right to appeal in this subsection mentioned, appeal to the Local Government Board, which Board shall without delay investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person shall be so removed. The inspector of poor of the parish whence the poor person is proposed to be removed shall be bound to intimate to the poor person the granting of the warrant and the right of appeal; and no warrant in terms of the Poor Law Removal Act, 1862, shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it has been disposed of by the Board."

(2) "In the case of a poor person as in the preceding subsection men-

order of the said Local Government Board for Scotland, dated 4th August 1911, purporting to determine, in accordance with the provisions of section 5 of the said Poor Law (Scotland) Act, 1898, that it was not reasonable or proper that the said Elizabeth Buckle or Scott should be removed from the parish of Falkland to St Pancras Union, and to sustain accordingly an appeal at the instance of the Board of Guardians of the Union of St Pancras against her removal; and (second) a minute or order of the said Local Government Board for Scotland, dated 20th May 1912, by which the Board purported to further determine, in terms of powers alleged to be conferred on them by the proviso to section 5 of the Poor Law (Scotland) Amendment Act, 1898, that the expense of maintenance of the said Elizabeth Buckle or Scott should be borne as from the 4th August 1911 by the Parish Councils of Edinburgh and Falkland" in certain proportions.

The pursuers averred, *inter alia*;—(Cond 5) "Within the area forming the parish of Edinburgh, which is under the administration of the pursuers, there is situated the Royal Edinburgh Asylum, to which insane persons are admitted in considerable numbers from all parts of Great Britain and Ireland. It thus happens that persons who are not natives of, and who have not acquired any settlement in, the parish of Edinburgh live for prolonged periods within the bounds of the parish in said asylum. Questions have arisen between the Local Government Board and the pursuers as to how far, if at all, the provisions of sections 4 and 5 of the Poor Law (Scotland) Act, 1898, hereinbefore referred to, are applicable to persons of English or Irish birth who have not acquired any settlement in Scotland, but who, as certified lunatics following upon a warrant of the Sheriff, have been inmates of the said Royal Edinburgh Asylum. There are also cases in which insane persons are boarded out in parishes in Scotland, in virtue of the provisions of the Lunacy Acts applicable to Scotland, and questions have arisen between the Local Government Board and the pursuers as to whether the provisions of the sections before mentioned are applicable to such persons, under circumstances of which the case hereinafter dealt with is typical." (Cond. 6) "A case with which the pursuers question the power of the Board to deal as falling within the scope of the provisions referred to is that of Mrs Elizabeth Buckle or Scott, a pauper lunatic who recently became chargeable to the parish of Falkland. She was born in London, and became chargeable in Leith in June 1871. Being then a lunatic, she was removed to the Royal Edinburgh Asylum. The parish of St Cuthbert's admitted liability in respect of her husband's residential settlement. From 3rd February 1885 to 25th February 1885 she was boarded out by that parish as a pauper lunatic at Kennoway, Windygates, Fife-

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tioned, the inspector of poor shall also be bound to send by registered letter a notice to the clerk to the board of guardians of the union or parish in England or Ireland named in the warrant of removal, that if they desire they may, within fourteen days after receipt of such notice, appeal to the Local Government Board against the removal, and shall with such notice transmit a copy of the depositions taken before the Sheriff granting the warrant; and if the board of guardians shall so appeal, the Local Government Board shall, without delay, investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person shall be so removed. No warrant in terms of the Poor Law Removal Act, 1862, shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it is disposed of by the Board."

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shire. From 25th February 1885 to 11th August 1903 she was boarded out also as a pauper lunatic in the parish of Kettle, Fifeshire, and thereafter, from 11th August 1903 until 8th May 1907, at Freuchie, Falkland. Her husband died in Leith in October 1906. On 8th May 1907, her son having intimated that he would in future support her, her name was taken off the pauper roll, and on 30th May 1907 she was struck off the books of the General Board of Lunacy. From 1st May 1907 until 11th August 1910 she continued to be boarded at the expense of her son at Freuchie, in the parish of Falkland, she being, however, during all that period of unsound mind. Owing to the death of her son, and failure of other means of support, the person with whom she was boarded applied to Falkland parish for relief, which was afforded, and on 10th November 1910 the Poor Law Authority of Falkland made a claim on the pursuers, liability for which the pursuers denied. The Parish Council of Falkland thereupon applied for and obtained a warrant from the Sheriff of the county of Fife and Kinross, sitting at Cupar, Fife, dated 16th May 1911, authorising, in terms of the Poor Removal Act of 1862, the removal of the said pauper lunatic to the St Pancras Union, London. This is the warrant referred to in the summons, and a copy of it is produced.* Against the removal thereby authorised the Guardians of the Poor of St Pancras Union lodged an appeal." (Cond. 7) "Upon consideration of the appeal, the Local Government Board, claiming to act under the provisions of section 5 of the Poor Law (Scotland) Act, 1898, by minute dated 4th August 1911, professed to determine that the 'proposed removal of the said Elizabeth Buckle or Scott from the parish of Falkland to St Pancras Union was not reasonable and proper,' and accordingly sustained the appeal of the St Pancras Union Authorities; and by further minute, dated 20th May 1912, the Board further professed, in terms of the powers conferred on them by the proviso of section 5 of the Poor Law (Scotland) Act, 1898, to determine that 'the expense of maintenance of Elizabeth Buckle or Scott should be portioned, as from 4th August 1911, between the Parish Councils of Edinburgh and Falkland in the proportions of—(1) Edinburgh, $\frac{3}{4}\frac{9}{0}$ths (2) Falkland, $\frac{1}{4}\frac{1}{0}$ths.' These minutes are the minutes brought under reduction in this action." (Cond. 8) "The pursuers contend that the warrant or order granted for the removal of the said Mrs Elizabeth Buckle or Scott under the provisions of the Poor Removal (Scotland) Act, 1862, was properly obtained, and that section 4 of the Poor Law (Scotland) Act, 1898, was not applicable so as to render the obtaining of the warrant incompetent. They further maintain that the warrant so obtained is not liable to be set aside or otherwise interfered with by the defenders the Local Government Board for Scotland by virtue of any powers contained in section 5 of that Act or otherwise. The

* The warrant contained the following findings:—"Find that the said Elizabeth Buckle or Scott is of the reputed age of sixty-five years; find that the said Elizabeth Buckle or Scott last resided for three years in Freuchie, within the parish of Falkland; find that the said Elizabeth Buckle or Scott has become, and is now actually chargeable to the Parish Council of the parish of Falkland, and that the said Elizabeth Buckle or Scott has not acquired and retained a settlement in Scotland; find that the said Elizabeth Buckle or Scott would not suffer bodily or mental injury by being removed as herein ordered."

Sec. 2 of the Poor Removal Act, 1862, on which the warrant proceeded, is quoted in the rubric.

said pauper is not a person falling within the scope either of section 4 or section 5. From 1871 onwards the said pauper was a person of unsound mind, and was in that mental condition during the whole period she was boarded out under guardianship in the said parish of Falkland. The minutes of the Board professing to sustain the appeal of the Board of Guardians of St Pancras Union against the removal order, and the consequent minute professing to allocate the expense of maintenance between the parish of Edinburgh and the parish of Falkland respectively were *ultra vires* of the said Local Government Board, and are null and void. . . ."

Of the defenders the Local Government Board for Scotland alone lodged defences. They averred:—(Ans. 6) "Admitted, under reference to the warrant of the Sheriff dated 16th May 1911, and with the explanation that the pauper in question was married in Edinburgh in February 1867, and that for a month in 1885 she was boarded out in Kennoway Parish, Fife, before being moved to Kettle Parish. Explained that, since the raising of the action, the Guardians of the Poor of the Parish of St Pancras have ascertained that the pauper in question was born on 5th February 1845 at St Edward's Yard, Kinnerton Street, in the Parish of St George, Hanover Square, in the St George's Union." (Ans. 7) "Admitted, under reference to the minutes of 4th August 1911 and 20th May 1912, copies of which are produced." (Ans. 8) "Denied that the said pauper is not a person falling within the scope of sections 4 and 5 of the Act of 1898. Admitted that from 1871 onwards she was a lunatic. Denied that the action of the Board complained of was *ultra vires*. Explained that the Board, in the exercise of the discretion conferred upon them by section 5 of the 1898 Act referred to, sustained the appeal of the Guardians of the Poor of the Union of St Pancras, in the City of London, and apportioned the expense of maintenance of the pauper in question. Explained, further, that pauper lunatics are included in the expression 'poor person' in sections 4 and 5 of the Act of 1898, and that these defenders acted within the powers conferred upon them by said sections when they considered and disposed of the appeal made to them."

The pursuers pleaded, *inter alia*;—(1) Upon a sound construction of the Poor Law (Scotland) Act, 1898, the provisions of sections 4 and 5 thereof not being applicable to the case of English-born or Irish-born persons who are and continue to be lunatics while they live in Scotland, the Local Government Board for Scotland has no right or title to interfere under these sections with warrants, otherwise lawfully obtained, for the removal of such persons under the provision of the Poor Removal Act, 1862, and the pursuers are entitled to decree of declarator and to reduction as concluded for.

The defenders pleaded, *inter alia*;—(2) In respect that the expression "poor person" in sections 4 and 5 of the Act of 1898 includes pauper lunatics, these defenders were entitled to receive and sustain the appeal as condescended on, and are entitled to absolvitor.

On 6th December 1912 the Lord Ordinary (Skerrington), after hearing parties in the Procedure Roll, pronounced an interlocutor finding and declaring in terms of the declaratory conclusions of the summons, and reducing the minutes or orders in terms of the conclusions for reduction.*

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* "OPINION.—The pursuers are the Parish Council of the City Parish of Edinburgh, and the compearing defenders are the Local Government Board

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The defenders reclaimed, and the case was heard before the Second Division on 11th, 12th, and 16th December 1913.

Argued for the reclaimers;—The appeal to the Local Government Board was competent. The Poor Law (Scotland) Act, 1845,[1] sec. 77, the Poor Removal Act, 1862,[2] and secs. 3 to 6 of the Poor Law (Scotland) Act, 1898, formed a code regulating the removal of paupers; and this code was complete in itself. The code dealt with both sane paupers, who could reside in the technical sense of the term, and insane paupers, who could not so reside; and throughout the code the word "reside" was used, as was necessary for its purpose, in its natural sense, viz., as meaning presence in Scotland or in a parish.[3] This accordingly was the sense in which the word was used in sec. 5 of the 1898 Act. The decisions as to the liability of a parish to maintain a pauper which treated the word "reside" as having an established technical signification were not in point in a question as to the

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for Scotland. The action raises a question of some general interest as to the particular class of cases in which the Poor Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21) has conferred upon the Local Government Board a discretionary power to interfere with parish councils which have obtained a warrant for the removal of a pauper from Scotland to England or Ireland. Prior to 1898 the removal of paupers from one parish in Scotland to another was regulated by section 72 of the Poor Law (Scotland) Act, 1845 (8 and 9 Vict. cap. 83). The removal of English and Irish paupers to their native land was regulated by section 77 of the same statute, as amended by the Poor Removal Act, 1862 (25 and 26 Vict. cap. 113). It seems to have been considered a hardship both on paupers and on boards of guardians that English and Irish paupers, who had resided for a considerable time in Scotland without acquiring a settlement, were liable to removal if a Sheriff or two justices could be persuaded to grant the necessary warrant. It seems also to have been thought that the law as it stood under the Act of 1845 made it too difficult to acquire a settlement by residence, and further, that in certain cases paupers who had a settlement in Scotland ought not to be removed from the parish where they became chargeable to their parish of settlement. The Act of 1898 was passed in order to remedy these evils. The question in the present case is whether the Local Government Board, acting in the assumed exercise of the powers conferred upon them by the Act of 1898, were entitled to determine that the removal of a pauper lunatic from the parish of Falkland to the Union of St Pancras, London, was unreasonable and improper. The question turns primarily upon the meaning of the word 'reside,' as used in sections 3, 4, and 5 of the Act of 1898.

"It has long been settled that 'residence' for the purpose of acquiring a settlement under section 76 of the Act of 1845 is residence by a person who has a certain amount of intelligence. A lunatic, as distinguished from a person of weak mind, cannot acquire a residential settlement. The conditions upon which a residential settlement may be acquired were altered by section 1 of the Act of 1898, which repealed section 76 of the principal Act. It is, however, clear that section 1 of the 1898 Act assumes that its readers are familiar with the Poor Law of Scotland as settled by numerous decisions. Its phraseology is nearly identical with that of section 76, and besides using the word 'resided' once in connection with the acquisition and once in connection with the retention of a settlement, it uses two expressions to which technical meanings have been attached by decisions, viz., 'continuously' and 'maintained himself.' There is no doubt that it is still the law

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[1] 8 and 9 Vict. cap. 83. [2] 25 and 26 Vict. cap. 113.

[3] Crawford and Petrie v. Beattie, (1862) 24 D. 357, *per* Lord Justice-Clerk Inglis, at p. 367.

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removal of a pauper. It was to be observed that throughout the Poor Law statutes the word, when it was used in this technical sense, was commonly accompanied by the words "without having recourse to common begging" or a similar phrase. There was no such phrase in the section bearing on the present case, and no ground for refusing to the word "reside" its natural sense Further, under the 1898 Act, a right of appeal to the Local Government Board was given to all the parties affected by an order for the removal of a pauper. The pauper could appeal; and quite independently of that appeal, the English union or parish to which the pauper was to be removed had a right of appeal. Whether the lunatic pauper had or had not a right of appeal under subsec. (1) of sec. 5, and whatever the meaning of the word "reside" as used in that subsection, the Board of Guardians interested in the matter had a right of appeal under subsec. (2) of sec. 5; and when an appeal was taken, the Local Government Board

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that residence in a parish by a person of unsound mind will not avail for the acquisition of a settlement in that parish. On the other hand, I do not agree with the argument of the pursuers' counsel to the effect that in every case where the word 'reside' is used in the Poor Law Acts with reference to a pauper, the word necessarily refers to residence by a person who possesses some degree of intelligence. Section 1 of the Act of 1898 and section 76 of the earlier Act show that the word 'reside' may be used in the same section in a popular as well as in a technical sense. So far as I know, it has never been contended in the Court of Session that a pauper lunatic who possessed a residential settlement in a particular parish was incapable of retaining that settlement by continuing to reside in the same parish. The contrary has been assumed in a number of cases, of which I need only refer to a single example—*Keith Parish Council* v. *Kirkmichael Parish Council*, (1901) 4 F. 76. It seems to me, therefore, that the pursuers' counsel argued his case too high. On the other hand, I agree with him that in any question as to the acquisition of a privilege by virtue of residence, this word, as used in the Poor Law Acts, *prima facie* means residence by a person who is possessed of some intelligence. When one reads the Act of 1898 as a whole, it seems to me clear that this *prima facie* view is actually the sound one. It has been said that the law of settlements is a matter of merely pecuniary interest to parishes, and that it is of no importance to paupers. The opposite is the truth. It may be of vital importance to a pauper whether he is removed from a town where he has lived most of his life and has friends, and is sent to a place where he is a stranger. Equally he has an interest in the question whether, after spending the best part of his life in Scotland, he is to be sent to England or Ireland. Accordingly, the law as to the acquisition of a parochial settlement is, in my view, substantially a part of the law of status. As already explained, section 1 of the Act of 1898 makes it easier for a person to acquire a settlement in Scotland; but it still carries forward the long-established rule that a lunatic's residence in a parish will not help him to acquire a settlement. Sections 3, 4, and 5 of the same statute create new and minor privileges, which a person may acquire by residence in Scotland even although such residence may not have been sufficient for the acquisition of a settlement. Thus by section 3 a pauper who has resided for a year in one parish may appeal to the Local Government Board against his removal to another parish in Scotland. This clause is conceived in the interest of paupers, because the Board has no power to alter the legal incidence of the burden of maintenance. Again, by section 4 an English-born or Irish-born pauper, who has resided for a certain time in Scotland without having recourse to common begging or receiving parochial relief, is declared to be irremovable from Scotland. Lastly, by section 5 English-born or Irish-born persons

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were bound to decide whether the proposed removal was reasonable and proper.

Argued for the respondents;—The appeal to the Local Government Board was incompetent. In the poor-law code prior to the Act of 1898, the words "reside" and "residence" were employed, as was decided in numerous cases, with a certain special meaning; and, according to this meaning, a lunatic could not acquire a settlement by living in a parish.[1] This being the recognised meaning of the terms, the Legislature must be held, when it employed them in the Act of 1898, to have attributed to them that meaning.[2] Secs. 1 to 5 of that Act dealt with cognate matters. Sec. 1 was identical with sec. 76 of the 1845 Act[3]; and in sec. 1 residence was clearly used in its technical sense. That being so, the word must receive the same meaning in the other sections of the Act, as there was nothing in them to exclude that meaning. The Act of 1862 mainly regulated the administration of the law, and did not affect the qualifications as

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who have not acquired a settlement by residence in Scotland, and who have not acquired what is now popularly called a 'status of irremovability' under section 4, are entitled to appeal to the Local Government Board against a warrant for their removal from Scotland to England or Ireland, provided they have resided continuously in one parish for not less than one year. It will be seen, therefore, that sections 3 to 5 are really part and parcel of the legal reform initiated by section 1 of the same Act, and I have no doubt that the word 'residence' as used in all these sections, means residence of a kind which would avail to acquire a settlement—in other words, residence by a person who is not of unsound mind. It is none the less true that every one of these sections applies to persons who are lunatics as well as to persons who are sane. It is of no importance whether a pauper is or is not of unsound mind at the time when the question arises whether he has a settlement by residence, or may appeal against an order for his removal to another parish, or against a warrant for his removal to England or Ireland, or whether he is irremovable from Scotland. Whether he is sane or insane, the only question is whether his residence in Scotland was of the kind contemplated by the particular section under which he claims to benefit. I recognise the force of the argument that the equitable restrictions upon the right of removal introduced by the Act of 1898 are a separate chapter in the Poor Law Code, and that in this chapter the word 'reside' should be construed in its ordinary as distinguished from its technical sense. I find it impossible, however, to dissociate sections 3 to 5 from section 1. Further, section 4 is expressed in the same technical language as section 1, and its phraseology supports the view that the scheme of legal reform contained in the statute must be regarded as forming one integral whole. The language of sections 3 and 5 is much less technical and significant than that of section 4, but they each contain a provision which suggests that the word 'residence' is used in something different from the merely popular sense. I refer to the parenthesis which allows a widow to tack on the period of her residence as

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[1] Melville v. Flockhart, (1857) 20 D. 342; Crawford and Petrie v. Beattie, 24 D. 357; Kirkwood v. Lennox, (1869) 7 Macph. 1027; Thomson v. Kidd and Beattie, (1881) 9 R. 37. Roger v. Maconochie, (1854) 16 D. 1005; and Beattie v. Leighton and Mitchell, (1863) 1 Macph. 434, were also cited.

[2] Parish Council of Kilmalcolm v. Parish Council of Glasgow, (1906) 8 F. (H. L.) 12, *per* Lord Robertson, at p. 14; Stirling Parish Council v. Dunblane Parish Council, 1912 S. C. 316, *per* Lord Dundas, at p. 328.

[3] Keith Parish Council v. Kirkmichael Parish Council, (1901) 4 F. 76, *per* Lord Adam, at p. 79.

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to settlement under the Act of 1845; and the Act of 1898 must be read with reference to the Act of 1845. A prisoner did not acquire a settlement in the parish in which the prison was situated, however long his period of imprisonment might be[1]; and, similarly, the presence of a lunatic in a parish would not give him a settlement in that parish. No aid was to be derived from reference to the law of England, for the principle of the acquisition of a settlement by residence was not introduced into England until 1876.[2]

At advising on 10th January 1914,—

Lord Dundas.—The question for decision in this case is as to the competency, or the reverse, of an appeal to the Local Government Board by the guardians of an English poor-law union against a warrant pronounced by the Sheriff of Fife ordering the removal of a pauper lunatic

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a wife. This clause seems intended to exclude a technical rule of the Poor Law which might otherwise have been thought applicable.

"The pauper was born in London in 1845. She was married in Edinburgh in 1867 to a man who had a residential settlement in the parish of St Cuthbert's. She became chargeable in Leith in 1871 as a pauper lunatic, and she was maintained as such by the parish of St Cuthbert's from 1871 till May 1907. From that time until August 1910 she was boarded at the expense of a son at Freuchie, in the parish of Falkland, her name having been taken off the pauper roll. Owing to the death of her son, she recently became chargeable to the parish of Falkland, which thereupon applied for and obtained a warrant from the Sheriff of Fife and Kinross authorising her removal to the Union of St Pancras, London. The Guardians of this Union lodged an appeal, and the Local Government Board determined that the proposed removal of the pauper was 'not reasonable and proper.' Although the pauper had resided in the parish of Falkland for many years before she became chargeable to that parish, her residence there must, in my opinion, be disregarded upon the ground of her mental incapacity, which has continued without a break from 1871 to the present time. There is nothing, however, in the pleadings to show that she may not have resided continuously in the parish of Falkland for a year sometime between her marriage in 1867 and the date when she became a lunatic. While I agree with the pursuers' construction of the statute, I do not propose to give facilities for the removal to England of a woman whose husband had a settlement in Scotland, and who has lived in this country for more than forty years, more particularly in view of the fact that the Local Government Board has determined that such removal would not be reasonable and proper. Accordingly, I shall continue the case in order that the pursuers may take one or other of two courses. They may, if they choose, submit evidence to the Local Government Board to the effect that the pauper did not reside in Falkland parish for a year between 1867 and 1871, and thereafter, if the Board is against them, the pursuers may amend their pleadings and ask for a proof. Alternatively, the pursuers may move for a re-hearing of the case in order to argue that when section 5 of the Act of 1898 speaks of residence in a parish 'for not less than one year before the date of the application for relief,' it means 'immediately before' such application, and that accordingly it is irrelevant to inquire into the earlier history of the pauper. It must, however, be understood that decree will

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[1] The Inebriates Act, 1898 (61 and 62 Vict. cap. 60), sec. 25 (f), was referred to.

[2] Vulliamy's Law of Settlement, (2nd ed.) p. 2; Clerks of Peace of Somersetshire v. Overseers of Shipham, (1862) 3 B. & S. 507.

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from the parish of Falkland to the workhouse of the said union. If the appeal was competent, we have no concern with the manner in which the Board dealt with it. If it was not competent, we must reduce the minutes of the Board. Though the question at issue is thus capable of brief and succinct statement, it is not easy to set forth with brevity one's grounds of decision; and I do not at all complain of the length of the arguments which were presented in order to enable us to arrive at a conclusion.

The statutory provision upon which, primarily at least, the question turns is section 5 of the Poor Law (Scotland) Act, 1898. The facts of the case are sufficiently set forth on the record and in the opinion of the Lord Ordinary, and I need not summarise them. It seems to me clear that, upon these facts, the requisites prescribed by section 5 (1) of the Act, as preliminary to an appeal to the Board, are all here present, if one reads the subsection according to the natural and ordinary meaning of its language. It would appear (*a*) that Falkland Parish Council has obtained, in terms of the Poor Removal Act, 1862, a warrant by the Sheriff for the removal of the pauper to England; (*b*) that the pauper was born in England; (*c*) that she has not acquired (or, at all events, has not retained) by residence a settlement in Scotland; (*d*) that she has not become "irremovable" from Scotland within the meaning of section 4; and (*e*) that she has "resided" continuously, in the ordinary sense of the word, for not less (in fact for much more) than one year in Falkland parish before becoming chargeable there. The arguments from both sides of the bar were presented upon the assumption that the Act of 1898, and in particular section 5 (1), deal with insane, as well as sane, paupers; and I think this assumption is well founded, looking to the wide words used, "any English-born or Irish-born poor person," and to section 6, where a specialty is dealt with as affecting "the case of a lunatic poor person proposed to be removed to Ireland." And the pursuers are confronted with what seems *prima facie* a strange anomaly, in that, though the Sheriff's warrant finds in fact that the pauper "last resided" for three years in Falkland parish, she did not, upon their reading of section 5 (1), "reside" there during the last of these very same years, or indeed at all, because, being a lunatic, she was incapable of "residence," in the sense in which they say that word has been interpreted by decisions of this Court.

I agree with the Lord Ordinary that the Act of 1898 presupposes an acquaintance not only with prior poor-law legislation, but also with prior decisions of the Court; and I think that when the Act adopts words or phrases which (under the Act of 1845) have been interpreted by decision as bearing a special meaning, it must be held to use them according to that meaning when they occur in a context identical with or similar to

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not be pronounced as concluded for unless I am satisfied that it is justified either by the facts or by the law of the case. If the Local Government Board state that after considering the evidence they are satisfied that the pauper did not reside in Falkland parish between 1867 and 1871 for the requisite term, I shall, of course, accept their statement."

[The parties subsequently lodged a joint minute stating that the pauper did not reside in the parish of Falkland for one year between 1867 and 1871.]

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that in which they were judicially considered and construed. Now the words "reside" and "residence" as they occur in section 76 of the older Act, with direct relation to the acquisition and retention by a pauper of a residential settlement, have been construed by this Court as connoting, in that context, a certain amount of mental capacity. I think the result of the cases, which are binding upon us, is (1) that a lunatic cannot acquire a settlement by residence; and (2) that a lunatic fails to retain such a settlement, acquired prior to his lunacy, if he is *de facto* absent for the statutory period from the parish where he so acquired it. Whether or not the lunatic, though he is in fact resident during the statutory period in that parish, can retain the settlement is still, I apprehend, an open question. It is not necessary to decide it in this case; but I cannot agree with the Lord Ordinary's observation that "it has never been contended in the Court of Session that a pauper lunatic who possessed a residential settlement in a particular parish was incapable of retaining that settlement by continuing to reside in the same parish." Not only has the contention been maintained, but it has received high judicial sanction and approval, *e.g.*, in *Crawford and Petrie* v. *Beattie*,[1] and in *Kirkwood* v. *Lennox*.[2] Nor do I agree with the Lord Ordinary when he says that "the contrary has been assumed in a number of cases," of which his Lordship instances (erroneously, as I think) as an example that of *Keith Parish Council*.[3]

One must consider, then, whether the construction put upon "reside" and "residence," as the words occur in their context in section 76 of the Act of 1845, has any close or real bearing upon the present question, which relates, not to the acquisition or retention of a settlement by a pauper lunatic, but to his removal from Scotland to England, and the competency of an appeal to the Local Government Board against a Sheriff's warrant obtained to that end. The pursuers' counsel did not argue at our bar,—and they stated that they had not argued in the Outer House (though the Lord Ordinary seems to have so understood their argument),—that "in every case where the word 'reside' is used in the Poor Law Acts with reference to a pauper, the word necessarily refers to residence by a person who possesses some degree of intelligence." What I understood to be argued at our bar was that "reside" and "residence" in the Act of 1898, and particularly in section 5 thereof, must be read and interpreted according to the judicial construction put upon those words as they occurred in section 76 of the Act of 1845. Even so put, this contention seems to me rather a violent one. It may well be that that construction would be appropriately applied to the words in question as they occur in section 1 of the Act of 1898, which is *in pari materia* with section 76 of the Act of 1845; but it does not, to my mind, follow that its application is appropriate to the words as they occur in section 5 of the later Act, which deals with a quite different and separable category of poor-law administration. The statutory provisions in regard to the removal of

[1] 24 D. 357, *per* Lord Justice-Clerk Inglis, at p. 368, and Lord Cowan, at p. 369.

[2] 7 Macph. 1027, *per* Lord President Inglis, at p. 1029.

[3] 4 F. 76.

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paupers from Scotland to England or Ireland, and *vice versa*, seem to me to be quite distinct from the enactments about the acquisition and retention of residential settlements. The legislative code (old and new) in regard to the removal of paupers from Scotland is, I think, contained in section 77 of the Act of 1845, the Poor Removal Act, 1862, and sections 3 to 6 of the Act of 1898. As to section 77, one may observe that the words "reside" and "residence" do not occur in it at all; that it was repealed by section 8 of the Act of 1862, "so far as inconsistent with" that Act; and that certain portions of it were specially repealed—I suppose to make things quite clear—by the Statute Law Revision Act, 1892. The Act of 1862 was a machinery Act; it was passed to provide "better means . . . for the safe conveyance to the place of their destination in England, Ireland, or Scotland," of paupers who were to be removed. One comes really then to the Act of 1898. The words "any poor person" in section 3 are obviously wide enough to include poor persons who are insane. I do not think any material aid is to be derived from section 4. It creates, under certain circumstances, a status of irremovability from Scotland of an English-born or Irish-born pauper; the proviso certainly seems to refer to paupers who are not lunatics; but it does not follow that the word "reside" is used in two different senses in the same section, though it may apply with different effect to paupers sane and insane respectively. It is, I think, upon section 5 that this matter truly turns; and its whole language, as I read it, concludes the question in favour of the competency of this appeal to the Local Government Board. I see no reason to apply a technical, or any other than the ordinary, meaning to the words "reside" and "residence," as they occur in it. Indeed, if (as I think, and as the Lord Ordinary expressly says that he thinks) the section applies to insane as well as to sane paupers, these words must, I take it, be used in their ordinary sense, for they could not, in the case of a lunatic, be used in any other.

I respectfully think that the Lord Ordinary's conclusion is wrong. He seems to me to have started and proceeded upon a misleading trail. He starts from section 1 of the Act of 1898, as substantially re-enacting (though with variations in the statutory periods) section 76 of the Act of 1845; and he says (rightly, as I think), that "it is still law that residence in a parish by a person of unsound mind will not avail for the acquisition of a settlement in that parish." Thence his lordship proceeds to deduce that "in any question as to the acquisition of a privilege by virtue of residence, this word, as used in the Poor Law Acts, *prima facie* means residence by a person who is possessed of some intelligence"; and, after commenting upon the sections of the Act of 1898, down to and including section 5, the Lord Ordinary comes to the conclusion that "sections 3 to 5 are really part and parcel of the legal reform initiated by section 1 of the same Act, and I have no doubt that the word 'residence' as used in all these sections, means residence of a kind which would avail to acquire a settlement—in other words, residence by a person who is not of unsound mind." His lordship adds,—"It is none the less true that every one of these sections applies to persons who are lunatics as well as to persons who are sane." The Lord Ordinary thus bases his judgment upon a construction of the first

five sections of the Act of 1898, as a massed whole, into which he imports, as an essential element, the judicial interpretation of the words "reside" and "residence," as they are used in section 76 of the Act of 1845. His lordship says he finds it impossible to dissociate sections 3 to 5 from section 1. As already observed, I consider that the judicial construction of the words "reside" and "residence," while fairly applicable to section 1, has no necessary nor (I think) justifiable application to other sections of the 1898 Act, such as that with which we are here specially concerned, which deal with quite a different aspect of poor-law administration; I consider that the "legal reform initiated by section 1" involved two separate and distinct elements, relating respectively to (*a*) acquisition and retention of residential settlements, and (*b*) removal of paupers; and I hold that sections 3 to 5 must, for these reasons, and in the above sense, be dissociated from section 1. I am therefore of opinion that we ought to recall the interlocutor reclaimed against, and that the compearing defenders are entitled to absolvitor.

I think it right to add a few words upon a matter which came into prominence during the debate, though it does not actually arise for decision. In the petition to the Sheriff for removal of this pauper to England it is set out that she was born in London, "(or) last resided for three years in the parish of Falkland in Fife"; and the Sheriff's order finds, *inter alia*, that she so resided. It seems to me that a misapplication of the provisions of the Act of 1862, section 2, is here involved. That section enacts that the Sheriff's warrant shall contain, *inter alia*, the name of the place in Scotland, England, or Ireland (as the case may be) where he shall find the pauper to have been born "or to have last resided for the space of five years in the case of a poor person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland." The residence for three years specified for the case of a removal from Scotland to England is, I apprehend, plainly a residence in England, not in Scotland. I think the theory of the Legislature was that inquiry should be made in such case as to the pauper's English place of birth, or the last English residence where he has (or may have) acquired a settlement. The Sheriff's finding in the present case of a three years' residence in Falkland seems to me to be irrelevant, and to lack compliance with the requirements of the statute. This view is borne out by the printed forms which were exhibited to us during the debate, and which I understood to be officially issued for use, as matter of practice, as well as by text writers upon the subject—Guthrie Smith's Poor Law, (3rd ed.) p. 274; Graham's Poor Law, p. 312, note. But I need say no more, as it is unnecessary to decide this point, which arose only incidentally during the discussion.

Lord Salvesen.—The sole question in this case is, whether the word "resided" in section 5 of the Poor Law (Scotland) Act, 1898, falls to be read in its ordinary sense as being equivalent to "lived," or, as the Lord Ordinary has held, as qualified by the word "intelligently." In my opinion the answer to this question depends on whether the section is applicable to poor lunatics as well as to other poor persons who have sufficient intelligence to acquire a settlement by residence. Had this question

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depended entirely upon the terms of section 5 there is much to support the view that it did not have in contemplation persons who were insane, for it is difficult to understand why provision should be made for granting a lunatic a right of appeal against the warrant for his removal to England or Ireland. There is no other instance, so far as I know, in which a lunatic is permitted to embark upon legal proceedings in his own person, and it is difficult to understand what guidance is to be derived by the Local Government Board in determining the matters submitted to them from the views or wishes of an insane person. It would have been more reasonable if the two appeals which are allowed by the section had been alternative, so that while a sane pauper should be given a right of appeal against a warrant for his removal, the interests of a lunatic should be entrusted to the guardians of the union to which it was proposed to remove him. As the section is framed, however, the appeals appear to be cumulative, and we were told that in practice the Local Government Board have received and considered appeals by persons who had been certified insane. It is, however, unnecessary to dwell on this and similar anomalies of what appears to be an ill-considered statute, for section 6 makes it quite plain by implication that the previous section is applicable to lunatic poor persons since it provides that "in the case of a lunatic poor person proposed to be removed to Ireland the warrant shall order his delivery at the district asylum of the place to which he is to be removed." Unless then the application of section 5 is to be limited to the case of a lunatic who has had a continuous residence for a year while sane in a particular parish, for which limitation there appears to be no good reason, it seems to me that the word "resided" must connote such a residence as both sane and insane persons are capable of having, and which, in the case of the latter, involves only their bodily presence in a particular locality. *Prima facie*, however, such residence must not be compulsory, as by detention in prison or confinement in an asylum, otherwise undue burdens would be placed on the particular parishes in which prisons and asylums happen to be situated. Here, however, no question of that kind arises, as the lunatic pauper to whom this action relates was supported by relatives in a Scotch parish for a period of three years. Her bodily presence in that parish, in my opinion, satisfied the condition as to residence expressed in section 5, and gave the Local Government Board jurisdiction to entertain the appeal which was presented against the warrant for her removal. I accordingly agree with your Lordships that the judgment of the Lord Ordinary cannot stand, and that the defenders are entitled to be assoilzied.

Lord Dundas intimated that the LORD JUSTICE-CLERK and LORD GUTHRIE, who were absent at advising, concurred in his opinion.

LORD ORMIDALE was present when the case was advised.

THE COURT recalled the interlocutor reclaimed against and assoilzied the compearing defenders from the conclusions of the summons.

R. ADDISON SMITH & Co., W.S.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

MRS MARSHALL COLVILLE AND OTHERS (John Colville's Trustees), First Parties.—*Clyde, K.C.—C. H. Brown.*
CHRISTINA HENDRIE COLVILLE, Second Party.—*Chree, K.C.—Christie, K.C.—Hedderwick.*
DAVID JOHN COLVILLE, Third Party.—*Clyde, K.C.—C. H. Brown.*

No. 34.
Jan. 13, 1914.
Colville's Trustees v. Colville.

Trust—Administration—Appropriation of investments to particular legacies—Competency—Depreciation in value of investments—Succession—Legacy.

A body of testamentary trustees, who were directed to pay a legacy of £5000 at a postponed date, invested that sum in trust investments and appropriated them to the legacy. The trust-deed contained no express or implied direction to appropriate investments to particular legacies, nor was such appropriation necessary to facilitate the administration of the trust. When the term of payment of the legacy arrived the investments appropriated thereto had materially depreciated in value, and the legatee refused to accept the depreciated investments and claimed payment of the legacy in full.

Held that the trustees were not entitled to appropriate investments to the legacy, and accordingly that the legatee was entitled to payment in full.

ON 25th October 1913 a special case was presented for the opinion and judgment of the Court upon certain questions which had arisen under the trust-disposition and settlement of John Colville, who died on 22nd August 1901. The trustees acting under that deed were the *first parties* to the case; Christina Hendrie Colville, the truster's daughter, was the *second party;* and David John Colville, his son, was the *third party.* 1ST DIVISION.

By his settlement, the truster bequeathed to his daughter, the second party, (besides a liferent) a legacy of £5000, and to his son, the third party, the residue of his estate, and provided "that these provisions in favour of my children (including the foresaid legacy of five thousand pounds to my daughter) shall be payable in the case of my son when he attains the age of twenty-five years, and in the case of my daughter when she attains that age or is married, whichever of these events shall first happen, and shall vest as at the term of payment."

The truster further provided, *inter alia*, as follows:—"Without in any way limiting or restricting the powers which my trustees have at common law or by statute or otherwise, but in addition thereto I confer upon them the following special powers in carrying out the purposes of this trust, and such powers shall be exercisable at any time as the trustees may in their discretion think proper, and that although the beneficiaries or any of them may have obtained vested interests,—that is to say, in the first place, to continue and carry on in case they in their absolute discretion shall think fit to do so, for such period as they shall deem advisable, any business in which I may be engaged at the time of my death, either alone or in partnership . . . In the fifth place, to continue all or any part of the trust-estate in the state or investment in or upon which the same shall be at the time of my death (however doubtful or hazardous or limited the description or nature of the property or investment may be). . . ."

Various questions arising out of the provisions contained in the testator's trust-disposition were set forth in the special case, but this

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report deals only with the legacy of £5000 bequeathed to the truster's daughter, who attained the age of twenty-five in 1912. With reference to this legacy the case stated as follows:—

"7. The trustees entered upon the administration of the trust-estate, and on 12th November 1902 resolved to apply £5000 in making investments to meet the legacy of £5000 to the second party. The resolution they came to is in the following terms:—'It was arranged to invest the legacy of £5000 bequeathed to Miss Christina, and payable to her on her attaining twenty-five years of age, or marrying, in such investments as are authorised by the Will. . . .'

"8. Accordingly, the trustees made the following investments at the following expenditure:—

"(1) £1200 3 per cent Debenture Stock of the London and North-Western Railway Company,	£1216	14	4
"(2) £1500 2½ per cent Debenture Stock of the Midland Railway Company,	1260	18	3
"(3) £950 4 per cent Debenture Stock of the Caledonian Railway Company,	1269	0	2
"(4) £1250 3 per cent Debenture Stock of the North British Railway Company,	1239	9	2
	£4986	1	11

"At the date when the trustees came to said resolution, the second party was under fifteen years of age, and the legacy of £5000 had not vested in her. In arriving at the said resolution, the trustees were not constrained thereto by any necessity for immediate distribution of the trust-estate, or any part thereof, and they came to it merely because they considered it expedient so to set aside and secure in such investments a sum to meet the legacy. The trustees have since treated said investments as applicable to the said legacy of £5000, and the interest on said investments as the interest payable on the said legacy. There has been considerable depreciation in the capital value of these investments, and the first question that arises in this case is whether said depreciation falls to be borne by the second party, or by the residuary legatee of the truster."

With reference to that question, the following were the contentions of parties:—"The first parties maintain that they were bound or at anyrate entitled to set apart and appropriate the investments in question to the second party's legacy of £5000, and that the depreciation on said investments falls to be borne exclusively by said legacy. The third party concurs in these contentions. The second party maintains that, in the absence of any direction to the trustees to set aside investments and appropriate them to the said legacy, and of any necessity requiring them so to do, the first parties were not entitled to appropriate the investments in question to her legacy. She therefore further maintains that she is entitled to payment of her legacy of £5000 in full, and that any depreciation which may have arisen on said investments does not fall to be borne by her."

The first and second questions of law in the case were:—"(1) Were the trustees entitled to set aside and appropriate said investments to the second party's legacy of £5000? (2) Does the depreciation in the investments appropriated by the trustees to the second party's legacy of £5000 fall to be borne by the second party?"

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The case was heard before the First Division (without Lord Johnston) on 7th and 8th January 1914.

Argued for the first and third parties;—The question whether trustees were entitled to appropriate specific investments to any bequest depended upon whether such appropriation was consistent with proper administration of their trust.[1] In the present case, looking to the "doubtful or hazardous" character of investments which the trustees were authorised to hold, it was clearly consistent with proper administration, and also to the advantage of the second party, to appropriate investments to her legacy. She could take no benefit from any increase in the capital value of the trust-estate, and after appropriation of investments to her legacy, she was protected against depreciation in that capital value. As she had this advantage resulting from the appropriation of investments, any depreciation on these investments themselves fell to be borne by her.

Argued for the second party;—The truster had left no directions requiring his trustees to appropriate specific investments to meet the legacy of £5000, and there was nothing arising out of the administration of this trust-estate—which included a most prosperous business, and in which there was no call for immediate distribution—requiring such appropriation to be made. In the absence of directions to do so, or necessity arising in the course of administration of a trust, it was *ultra vires* of trustees to appropriate investments to any legacy.[2] The second party, being entitled to a legacy of a sum of £5000, was not bound to accept investments of a capital value below that figure. Accordingly, the depreciation in the investments appropriated by the first parties did not fall to be borne by her.

At advising on 13th January 1914,—

Lord President.—The questions submitted for our judgment in this case relate to the succession of the late Mr John Colville. He died in August 1901, survived by Mrs Colville, by one son, and by one daughter. The scheme of his settlement in so far as relates to the son and daughter, with whose interests alone we are concerned in this case, is simple. To the daughter he bequeathed a legacy of £5000 and the liferent of £20,000. This is her testamentary provision. To the son he bequeathed the residue of his estate and, of course, the income. That is his testamentary provision. These provisions, "including" (to use the words of the settlement) "the legacy of £5000," he declared to vest not at the date of the testator's death but on his children respectively attaining twenty-five years of age, or, in the case of the daughter, being married. The daughter is unmarried and has attained twenty-five years of age. Her testamentary provisions have vested and are now payable. Accordingly, she claims payment of her £5000 legacy. The trustees reply that they are ready to give her not the £5000 which was bequeathed to her by her father but certain railway debenture stock in which they say they invested the £5000 legacy in November 1902. That railway debenture stock, it is agreed, has now considerably depreciated in capital value.

[1] Robinson v. Fraser's Trustees, (1884) 8 R. (H. L.) 127.

[2] Scott's Trustees v. Scott, (1895) 23 R. 52, Lord Trayner, at pp. 57-8; Vans Dunlop's Trustees v. Pollok, 1912 S. C. 10, Lord President Dunedin, at p. 14.

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It is certain that the trustees were not expressly authorised to sever the legacy of £5000 and place the money upon separate investments. It is equally certain that they were not impliedly authorised to do so, because it is agreed that they were "not constrained thereto by any necessity for immediate distribution of the trust-estate, or any part thereof. They came to [the resolution to make an appropriation] merely because they considered it expedient so to set aside and secure in such investments a sum to meet the legacy."

In these circumstances, I am very clearly of opinion that, there being no expressed or implied power to set aside specific investments to meet this legacy, the daughter is entitled to have her £5000, and her claim cannot be legally met by an offer to give her something different and something less.—(His Lordship then dealt with questions with which this report is not concerned.)

LORD MACKENZIE.—I agree in the result at which your Lordship has arrived.

As regards the first and second questions, I think that the trustees were not warranted in making an appropriation to meet the legacy of £5000. The direction to pay that legacy to the daughter, on her attaining the age of twenty-five or earlier in the event of her marriage, I do not think can be satisfied by tendering to her depreciated investments. It is clear that there is no express direction to appropriate. It is also clear that there may be, in certain cases, an implied direction to make an appropriation, and the case of *Robinson*[1] was said to be similar to the present. But I think that case is plainly not applicable because the direction there was to make provision, first, for the payment of two specific legacies which were to be held in liferent and in fee, and then for a division of the residue. The terms of that settlement indicated that, in order that there might be no delay in dividing the residue, it was necessary to appropriate. In the present case there is no ground for any such implication, and the statement set out in article 8 of the special case makes that point perfectly clear.

LORD SKERRINGTON.—I concur.

THE COURT answered the first and second questions in the negative.

J. & J. Ross, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

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[1] 8 R (H. L.) 127.

THE ROYAL BANK OF SCOTLAND, Pursuers (Reclaimers).—*Blackburn, K.C.—Hon. W. Watson.*
JAMES JOHN GREENSHIELDS, Defender (Respondent).—*M'Lennan, K.C.—Keith.*

No. 35.
Jan. 14, 1914.
Royal Bank of Scotland v. Greenshields.

Cautioner—Bank—Bank's duty to cautioner—Disclosure of principal's indebtedness.

H., whose bank account was overdrawn to the extent of about £300, and who was also indebted to the bank to the amount of about £1100 in respect of certain accommodation bills, requested G., an acquaintance who had no knowledge of his financial position and in particular of his indebtedness to the bank, to guarantee his account to the extent of £300. The latter expressed to the bank-agent his willingness to undertake a guarantee to that amount, and was informed by the agent that a guarantee of £300 might not assist the principal debtor, as that sum would be taken up by the bank. The agent, however, did not make any disclosure of the principal's further indebtedness of £1100 under the bills, and G., believing an overdraft of £300 to be the sole debt, granted a guarantee for £500.

The principal having failed to discharge his debt to the bank, G. resisted an action for payment under the guarantee, on the ground that he had been persuaded to undertake it under essential error induced by the failure of the bank-agent to discharge his duty of disclosing the existence of the principal's indebtedness under the bills.

Circumstances in which held (*rev.* judgment of Lord Cullen) that there was no such duty of disclosure, and decree for payment granted.

Observations, per the Lord President and Lord Mackenzie, on the circumstances in which a bank-agent might have a duty to disclose to an intending guarantor the state of the principal's indebtedness to the bank.

Cautioner—Bank—Verbal representations by bank-agent as to customer's credit—Mercantile Law Amendment Act, 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

Opinion reserved, per the Lord President, as to whether section 6 of the Mercantile Law Amendment Act, 1856—which provides that representations as to a person's credit made for the purpose of enabling that person to obtain credit or money shall be of no effect unless in writing—applied to representations made by a bank-agent to an intending guarantor of the account of one of the bank's customers.

1ST DIVISION. Lord Cullen.

On 3rd August 1911 the Royal Bank of Scotland brought an action against James John Greenshields, of Kerse, Lesmahagow, in which the pursuers claimed payment of the sum of £500, being the amount alleged to be due by the defender in terms of a letter of guarantee, dated 5th November 1905, granted by him in favour of the bank. In the letter founded on the defender undertook a general guarantee of the indebtedness to the bank of John Hutchison to the amount of £500.

The estates of John Hutchison were sequestrated on 13th December 1909, and yielded a first and final dividend of 4d. in the pound, and thereafter the pursuers raised the present action.

The defender lodged a statement of facts, in which he averred:—(Stat. 1) "About the beginning of November 1908 John Hutchison applied to defender to become cautioner for him to pursuers to the extent of £300, in order that he might in future obtain greater

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facilities than he then possessed with pursuers for the profitable working of his business. Defender had met Hutchison as a boy on the occasion of defender's visits to his uncle at Kerse many years before, but at this date Hutchison was known to defender only through odd jobs which he had as a joiner done for defender, and from casual contact with him as a residenter in defender's locality. Defender told Hutchison that he would require to see Mr Allan, pursuers' agent at their branch bank at Lesmahagow, with regard to Hutchison's financial condition generally and his position with the bank, before undertaking any such guarantee. Defender was a customer of pursuers, and expected to receive full and correct information as to Hutchison's financial position, and to get every consideration and perfect fairness in the inquiries he was about to make. . . ." (Stat. 2) "An interview followed between Mr Allan and defender on 3rd November 1908 in Mr Allan's private room at pursuers' branch bank at Lesmahagow. At said interview, in answer to defender's questions as to Hutchison's financial position and as to the extent of the risk he would run in guaranteeing Hutchison, Mr Allan represented to and assured defender that the risk was a fair one for the defender to undertake, and would involve no loss to him, that Hutchison required temporary accommodation with the bank merely in order to enable him to carry on his business on more profitable lines, that Hutchison was doing very well and was making money out of a contract in connection with the Abbey Green United Free Church at Lesmahagow, and that his family were now a help to him in his business instead of a burden on him. Allan represented and led defender to believe that there was nothing in Hutchison's transactions with pursuers which required to be disclosed to defender as material to the risk he was asked to undertake in guaranteeing Hutchison, that Hutchison's total indebtedness to the pursuers was less than £300, and that his affairs were in a prosperous condition. In view of the favourable report he had just received, defender assented to the latter's suggestion then made to increase the guarantee to £500, so that it would be of material assistance to Hutchison. Shortly thereafter the defender, in presence of Mr Allan, stated to Hutchison that Mr Allan had given him such a good account of his (Hutchison's) affairs that he would undertake the guarantee. To this statement Allan tacitly assented. Following upon this interview defender, on 5th November 1908, signed the guarantee for £500 now founded on by pursuers. In making said representations in course of said interview with defender Mr Allan was acting for and on behalf of pursuers, and within the scope of his ordinary duties as pursuers' agent. . . ." (Stat. 3) "Defender has ascertained and now avers that at the date of said interview and of the signing of said guarantee Hutchison had, apart from current acceptances for ordinary trade debts, been accommodated by and was indebted to the pursuers to the extent of at least £1200, that he had been indebted in large sums to the pursuers for some considerable time prior to said interview, and that when said interview took place pursuers already held guarantees for £900 in the form of two promissory-notes, one for £500 granted by Hutchison and Mr A. L. Scott, boot manufacturer, Glasgow, and another for £400 granted by Hutchison and Dr Neil M'Coll Hutchison, Mount Florida, there. Said promissory-note for £400 was replaced by one for £500 shortly after defender signed said guarantee. The existence of this indebtedness of Hutchison to pursuers was well known to the agent Allan at

the date of said interview but was not disclosed by Allan to defender. Defender further avers that pursuers had for some years prior to 5th November 1908 been aware of Hutchison's financial instability, and had called for statements of his affairs, and that it was after procuring said statements that they first insisted on Hutchison procuring personal security as a condition of their continuing to accommodate him, and obtained the guarantees of Mr Scott and Dr Hutchison. Further, the pursuers had shortly before said interview insisted on John Hutchison's finding further security for his increased indebtedness, and it was in consequence of the pursuers' pressure that Hutchison applied to the defender, although he concealed this fact from the defender. All the facts above stated were well known to Mr Allan as the pursuers' bank-agent. . . ." (Stat. 4) "In these circumstances, the foresaid representations made by Mr Allan were false and unfounded. They were made by him fraudulently, and the true position of John Hutchison's financial affairs was fraudulently concealed by him from defender for the purpose of inducing defender to sign said guarantee, and so enabling the pursuers to obtain security for Hutchison's total indebtedness to them. Had defender been made aware of the true financial position of Hutchison, or of the extent of his indebtedness to the pursuers on 3rd November 1908, or of prior obligations having been undertaken by other third parties to pursuers on Hutchison's behalf, he would have declined to sign said guarantee. He signed the same under essential error as to Hutchison's solvency, and his indebtedness to pursuers, induced by the misrepresentations and concealment of Allan as above set forth."

The defender pleaded, *inter alia*;—(1) The defender is entitled to absolvitor, with expenses, in respect that (*a*) the defender having requested from pursuers' agent Allan information respecting John Hutchison's financial position, said agent failed in his duty to make full and fair disclosure to defender of the facts within his knowledge; (*b*) defender undertook the guarantee founded on by pursuers under essential error induced by material misrepresentations on the part of pursuers' said agent; (*c*) defender undertook said guarantee under essential error induced by the fraudulent misrepresentation and concealment of pursuers' said agent.

A proof was allowed and led. The Lord President summarised the effect of the evidence on the main questions of fact considered in the case in the following passage taken from his opinion:—

"On that vital issue—as I take it, the only issue in fact in the case—the evidence of the defender, Mr Greenshields, is as follows:—He is speaking of the first interview that took place on the 3rd November between him and the bank-agent, and says, 'I then went on to the Bank and saw Mr Allan. I was shown into his private room. I told Mr Allan that Hutchison had applied to me for a guarantee for £300, and I asked him Hutchison's position. I am perfectly clear that I put that question. Mr Allan's reply was that Hutchison's position was a good one; that he had a contract for reseating the church; and that he was making money. He said that Hutchison wanted the guarantee to carry on his business to better advantage.' Then, further on in his evidence, he says: 'All that was disclosed to me was an overdraft which Mr Allan said was under £300. From what I now know there was concealment. (Q.) Was this statement which was made to you such as induced you to believe that there was no indebtedness to the Bank over £300? (A.) From the statement made to me

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I thought the risk was a perfectly good one; I knew nothing else. From the bank-agent's statement I considered that Hutchison was perfectly solvent at the time, and would be able to repay anything that was advanced on my guarantee. From the statement made by Mr Allan at the time I inferred that Hutchison's indebtedness to the Bank was under £300. (Q.) In view of what you now know as regards his actual indebtedness at the time, would you say there was misrepresentation on the part of Mr Allan? (A.) Well, it looks on the face of it misrepresentation; it is concealment; I would not quite call it misrepresentation.' And then, a little further on, he is asked this question—'Did you ask Mr Allan anything about Mr Hutchison's business? (A.) I said to Mr Allan, "What is Hutchison's position?" and I thought that that question would cover everything. By his position, I meant whether he owed the bank, or whether he was a man that I could give a guarantee to.' And then, finally, he says in answer to this question—'Are you sure that you asked any questions of Mr Allan beyond the state of Mr Hutchison's account at the bank? (A.) I asked him his position. (Q.) Did you say the position of his account? (A.) I did not; I said, "What is Mr Hutchison's position?" (Q.) You are quite sure you did not ask, as you came in, "What is the position of Mr Hutchison's account at the bank?" (A.) I did not. (Q.) Did you ask any question of Mr Allan which plainly applied to Hutchison's total indebtedness, and not merely to the state of his current account at the bank? (A.) I think asking his position covered that; it covered the whole case; I expected to be told in what position John Hutchison was, and from what Mr Allan said I believed him to be solvent.' Now, that is the whole evidence given by the defender, Mr Greenshields, upon this the vital issue in the case. It is contradicted by Mr Allan, who says in his evidence-in-chief regarding the interview to which I have just referred, 'He [Mr Greenshields] was not more than two minutes there. He asked me no questions whatever as regards Mr Hutchison's financial position. In particular, he did not use the expression, "What is John Hutchison's position?"' And further on, in cross-examination, he says, 'When Mr Greenshields came in he told me that Mr Hutchison had been down at Kerse and had asked him if he would become cautioner for him for £300. Mr Greenshields did not put the question to me, "What is Hutchison's position," nor "What is Hutchison's position at the bank"; he did not put any such question to me. He did not ask me anything at all about Hutchison's affairs. He did not ask anything about the extent of the risk involved. He never asked me such questions.'"

A subsequent passage in the Lord President's opinion contained this further summary of the evidence:—"He [the bank agent] says that 'after the call of Hutchison that I have referred to,' that was the call made earlier on the morning of the 3rd November, 'Mr Greenshields called at the Bank. He was shown into my private office. I asked him to be seated, and he said no, he had not time because he had a friend waiting outside for him, and then he said that John Hutchison had called that morning and had asked him to become security for him, but after that he said that John had been down there that morning and he wanted about £300 to pay some tradesmen's accounts. At that time I told him that I did not think that £300 would assist John to pay tradesmen's accounts, because it would be taken up by the Bank, but I said, "Mr Greenshields,

that is purely a matter between you and Mr Hutchison." Mr Greenshields replied that seeing that was the case he had better see John before doing anything else, and he left the office thereafter.' He is asked, 'Was it only because he said that Hutchison wanted the money to pay tradesmen's accounts that you thought it necessary to inform him of the overdraft at the Bank? (A.) Yes, of course I did not mention the overdraft at the Bank, I told him it would be taken up by the Bank. He did not ask what I meant by being taken up by the Bank. I am quite sure that I made that statement at the first visit that Mr Greenshields paid, and I told him distinctly that it was purely a matter between him and John Hutchison at the time. I said that because I make it a point never to advise my customers to become security for anybody.' And he substantially repeats the same statement in cross-examination."

The import of the evidence is also discussed in the opinions of the Lord Ordinary and Lord Johnston.

On 7th September 1912 the Lord Ordinary (Cullen) assoilzied the defender.*

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* "OPINION.—[After narrating the circumstances of the action]—The ground of defence to this action on the guarantee is that the defender was misled into granting it by misrepresentation as to the state of Hutchison's indebtedness to the Bank, in respect he was told only of the debit balance of £300 on the current account, and was told nothing about Hutchison's bills for £900 [subsequently admitted to be £1100] held by the Bank, and that he would not have granted the guarantee had he known that Hutchison was so heavily indebted. The defender maintains that Mr Allan should have informed him of the existence of the bills as well as of the overdraft, and that his omission to do so amounted to a material misrepresentation which disables the Bank from holding him to his guarantee.

"That the defender had no knowledge of the existence of the bills; that he signed the guarantee in the belief that Hutchison's indebtedness to the Bank consisted only of the £300 of overdraft; and that he would not have signed the guarantee had he known about the bills, are facts as to which I have no doubt. The question remains whether the Bank is responsible for the defender having been imperfectly informed as to Hutchison's liabilities and for the error he was under when he signed the guarantee.

"The defender on record alleges that, for some time prior to the guarantee, Mr Allan had been aware that Hutchison was financially unsound, and he imputes to Mr Allan a deliberate scheme to obtain Hutchison's debt to the Bank fortified by outside security, and an intention to deceive the defender in the matter of his guarantee. A good deal of evidence was directed towards substantiating these allegations. I am of opinion that the defender has not succeeded in making good his case on this aspect of it. It is true that the statements of Hutchison's affairs put forward by him were inflated and would not have stood a proper scrutiny. And Mr Allan seems to have passed them without such attention and scrutiny as might have been expected of him, and as he could have given. That he should have done so is not quite easy to understand. But the evidence does not contain anything sufficient to explain why he should have been willing to be a party to misrepresenting the position of Hutchison's affairs to the head office. I take the case therefore on the footing that in these matters Mr Allan acted in good faith.

"There remains, however, for consideration the alleged specific misrepresentation of which the defender complains, that is to say, the failure of Mr Allan to inform him about Hutchison's bill debts to the Bank. If Mr Allan represented, or was a party to representing, to the defender that Hutchi-

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The pursuers reclaimed, and the case was heard before the First Division on 16th and 17th December 1913.

Argued for the reclaimers;—A bank-agent had no general duty to disclose to a would-be guarantor the state of the principal's indebtedness. The cautioner was presumed to have made himself acquainted with all the matters material to the obligation he was about to undertake. The agent's only duty was that, if any question was asked regarding the principal's financial relations with the Bank, he was bound to answer truthfully.[1] The defender had failed to prove that any question had been put to the agent which laid upon him the duty of disclosing Hutchison's whole indebtedness. It was not proved that the question "What is Hutchison's position?" had been put to the agent; but even if that question had been put it had been answered truthfully, for it was a question as to Hutchison's general financial position, not as to his position with the Bank. From the

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son's debt to the Bank consisted only of the balance of £300 on the overdrawn account current, while in fact it included also £900 due on the bills, it appears to me that the defender would be entitled to complain of this as a misrepresentation material to the transaction; and, as there is no doubt that he signed the guarantee in the belief that the £300 was the whole indebtedness, that he would be entitled to disclaim his obligation under it. It is no doubt true that Mr Allan was, originally, not under obligation to inform the defender as to the state of Hutchison's liabilities to the Bank. But if he chose to give information he was bound to see that it was accurate and not misleading.

"There is considerable variation in the accounts given by the defender and by Allan as to what passed when the defender first called at the bank on the morning of 3rd November, and between the defender, Allan, and Hutchison, as to what passed at their subsequent meeting at the bank on the same morning. I place most reliance on the evidence of the defender, who impressed me as a very frank and straightforward witness. It is a salient fact in the history of the transaction that whereas Hutchison had originally asked the defender to grant a guarantee for £300, the defender in the end granted one for £500. What occasioned this increase in the amount of the guarantee is not doubtful. It was a statement made to the defender that a guarantee for £300 might not be of much benefit to Hutchison as the sum in it might be taken by the bank to pay off his overdraft of that amount. On hearing this the defender agreed to give a guarantee for £500, so as to provide a substantial margin over said debt. Now, as Hutchison's indebtedness to the Bank was not merely the £300, but totalled £1200, it is clear that the defender gave his guarantee under an error as to how Hutchison stood with the Bank. He believed that the indebtedness was only £300 and that his guarantee would provide a free margin of £200, whereas the indebtedness far exceeded the sum guaranteed. The defender says that, had he known of the additional indebtedness on the bills, he would not have signed the guarantee, and I believe him. His error, therefore, was material, because but for it he would not have contracted as he did.

"Now, while the defender, Mr Allan, and Mr Hutchison vary in their accounts of the meetings at the bank, I think it is proved that the statement as to the overdraft debt swallowing up a guarantee for £300, which misled the defender, was either originally made by Mr Allan or was endorsed by him, and it must have been evident to him that the defender, when he agreed to £500, was proceeding on the footing that by guaranteeing that

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[1] Young v. Clydesdale Bank, (1889) 17 R. 231, *per* Lord Adam, at p. 240, and Lord Shand, at p. 244.

answer which he had received it must have been clear to the defender that his question, if it had been intended to elicit an answer as to Hutchison's indebtedness to the Bank, had been misunderstood, and he should then have put the question categorically. The only case that was left was one of concealment, and the defender could not succeed on this ground in face of the law laid down in *Young* v. *Clydesdale Bank*.[1] It was contended for the defender that he had been induced to give the guarantee in question by representations made to him by the bank-agent as to Mr Hutchison's financial position. The provisions of section 6 of the Mercantile Law Amendment Act, 1856,[2] applied to such representations, and denied effect to them unless they were made in writing. Parole proof only had been led with regard to these representations, and it was therefore not competent for the defender to found upon them.[3]

Argued for the respondent;—The respondent accepted the law laid down in *Young* v. *Clydesdale Bank*.[1] But in the present case the presumption that the intending guarantor had informed himself of the principal's position was displaced, seeing that he came to the bank-agent seeking such information. It was sufficiently proved that he had asked the agent "What is Hutchison's position?" This question was just such a question as had been figured as putting a duty of disclosure on the bank-agent. In any case the agent had concealed the condition of Hutchison's indebtedness from the defender, in the knowledge that he was not informed, and wished to be informed, thereof. This concealment was material, for it was not denied that the defender would not have undertaken the obligation had he known the extent of Hutchison's debt to the Bank. Such material concealment was enough to release the defender from his guarantee.[4] The case of

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increased amount he was providing Hutchison with a free margin above the Bank's claim against him. The defender's action in the matter was susceptible of no other meaning. And this being so, I think it was the duty of Mr Allan to dispel the error under which the defender was proceeding by informing him that the overdraft did not represent the whole of Hutchison's indebtedness, but that there were the bill debts as well. Mr Allan may have thought that the bill debts were sufficiently secured to the Bank by the other names on the bills. But Hutchison was the true debtor in them, as Mr Allan knew, and had he disclosed their existence to the defender there is, in my opinion, no doubt that the defender would not have undertaken the guarantee. I am accordingly of opinion that the defender signed the guarantee under a material error, and that this error was induced by the failure of Mr Allan to disclose the existence of the bill debts under circumstances which laid on him a duty of disclosure; and that the pursuers accordingly are not entitled to enforce against the defender the guarantee so obtained from him. . . ."

[1] 17 R. 231.

[2] The Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), enacts:—Sec. 6. "All . . . representations and assurances as to the character, conduct, credit, ability, trade or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt . . . shall be in writing and shall be subscribed by the person . . . making such representations, . . . otherwise the same shall be of no effect."

[3] Clydesdale Bank, Limited v. Paton, (1896) 23 R. (H. L.) 22.

[4] Hamilton v. Watson, (1842) 5 D. 280, *per* Lord Medwyn, at p. 290, *aff.* (1845) 4 Bell's App. 67; Railton v. Matthews, (1844) 3 Bell's App. 56; Royal Bank of Scotland v. Ranken, (1844) 6 D. 1418; Falconer v. North

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Clydesdale Bank v. *Paton*[1] was no authority for the proposition which the reclaimers sought to found upon it. The representations which were contemplated by the 6th section of the Act of 1856, and to which alone it applied, must be made to the person who was going to give credit or to supply goods, and with the primary object of enabling the person with regard to whom they were made to obtain credit or goods. The representations in question here were made, not to the person who was to give credit, but to the intending guarantor, and their immediate object was to induce him to undertake the guarantee. In any event the effect of section 6 was merely to limit the mode of proof of such representations,[2] and the pursuers were barred from pleading the section after they had allowed parole proof to be taken. Further, there was no plea in law founded on this section.

At advising on 14th January 1914,—

LORD PRESIDENT.—Along with your Lordships I have found it unnecessary to consider and decide whether or no the 6th section of the Mercantile Law Amendment Act of 1856 applies to this case. On that question I desire expressly to reserve my opinion, for, having in view the condition of the pleadings and the course and conduct of this action in the Outer House, it appears to me to be preferable to follow the path which has been taken by the Lord Ordinary.

In substance, although not in form, this is an action for the reduction of a letter of guarantee, dated 5th November 1908, addressed to the Royal Bank of Scotland by a Mr Greenshields, the original defender in the action, who died since the proof was taken and whose representatives have been sisted in his stead. The ground on which Mr Greenshields sought release from the obligation contained in the letter of guarantee is very succinctly stated in his first plea in law to the effect that the "defender undertook the guarantee founded on by pursuers under essential error induced by material misrepresentations on the part of the pursuers' said agent." That plea, which at once puts the defender in the position of pursuer of the issue, rests upon the following statement set out in his defence: an interview took place between Mr Allan, agent for the Bank, and the defender, Mr Greenshields, "on 3rd November 1908, in Mr Allan's private room at pursuers' branch bank at Lesmahagow. At said interview, in answer to defender's questions as to Hutchison's financial position, Mr Allan represented to and assured defender . . . that Hutchison's total indebtedness to the pursuers was less than £300." That was the vital question which was remitted to probation.

The law applicable to this case is well settled. A bank-agent is entitled to assume that an intending guarantor has made himself fully

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of Scotland Banking Co., (1863) 1 Macph. 704, *per* Lord Justice-Clerk Inglis, at p. 712; Young v. Clydesdale Bank, 17 R. 231, at p. 244; Brownlie v. Miller, (1880) 7 R. (H. L.) 66.

[1] 23 R. (H. L.) 22.

[2] Bell's Com., (7th ed.) Lord M'Laren's note, p. 403; Simpson v. Stewart, (1875) 2 R. 673; Kerr's Trustees v. Ker, (1883) 11 R. 108; Wallace v. Gibson, (1895) 22 R. (H. L.) 56; Walker's Trustees v. M'Kinlay, (1880) 7 R. (H. L.) 85; Maddison v. Alderson, (1883) 8 App. Cas. 467; Lyde v. Barnard, (1836) 1 M. & W. 101.

acquainted with the financial position of the customer whose debt he is about to guarantee. And the bank-agent is not bound to make any disclosure whatever regarding the customer's indebtedness to the bank. But if he does, either voluntarily or in answer to a question put, make any representation which turns out to be erroneous or untrue, then the guarantor who has relied upon that statement is entitled to liberation from his obligation. That is the law as laid down in the case of *Young* v. *Clydesdale Bank*[1] and some prior authorities to which we were referred, and is accepted by both parties as applicable to this case.

Now it is certain that, at the date when the letter of guarantee was signed, the customer was indebted to the Bank, not only in respect of an overdraft amounting to close on £300 sterling, but also in respect of certain promissory-notes amounting to, in round figures, £1100. It is equally certain that the existence of that indebtedness on the promissory-notes was well known to the bank-agent and was not known to Mr Greenshields, and that the latter would not have signed the letter of guarantee had he been aware of the indebtedness on the promissory-notes. The question, therefore, which at once emerges is this: Did the bank-agent at the interview prior to the date when the letter of guarantee was signed represent to the intending guarantor that Hutchison's (the customer's) total indebtedness to the pursuers was less than £300?—[Here followed the first passage from the Lord President's opinion quoted *supra*.]

I think it must be obvious that this, which is the whole evidence in the case upon the vital issue, is quite insufficient to sustain the defence and to cut down this formal letter of guarantee. Even on the assumption that Mr Greenshields's evidence was to the effect that the misrepresentation charged had actually been made, the evidence would have been insufficient because unsupported, not only unsupported but contradicted by Mr Allan. No doubt the Lord Ordinary says that he prefers Mr Greenshields's evidence to Mr Allan's, not, I gather, on the ground of its greater candour, but of clearer recollection. Be it so, nevertheless the unsupported although uncontradicted evidence of one reliable witness, deeply interested in the case, is not sufficient, in my opinion, to prove the whole case and to destroy this formal deed. But on the assumption that Mr Greenshields's evidence is to be accepted as it was given and to be considered as supported, it falls very far short of establishing his case, because the expression of a personal opinion that a man's financial position is good is not equivalent to a statement that his total indebtedness does not exceed a certain sum. An honest opinion may be entertained that a man's financial position is sound although his indebtedness at the time may be considerable. The Lord Ordinary, I observe, has fully acquitted Mr Allan of any intention to deceive. I think his Lordship was quite right, and that the general opinion which Mr Allan expressed regarding Hutchison's position was quite honestly given and honestly entertained.

I reach, therefore, without any hesitation, the conclusion that the evidence given is inadequate to sustain the defence. The Lord Ordinary

[1] 17 R. 231.

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has reached a different conclusion, not because he finds that a misrepresentation was made—he finds no misrepresentation—not because he finds that a question was asked which elicited the answer that the total indebtedness of Hutchison to the Bank was less than £300—for no such question was put and no such answer was given—but the Lord Ordinary's judgment in favour of the defender is rested on this ground that the defender signed the guarantee under a material error, and this error was induced by the failure of Mr Allan to disclose the existence of the bill debts under circumstances which laid on him a duty of disclosure. So that the Lord Ordinary's judgment does not proceed upon the assumption that the defender has proved that misrepresentation was made regarding the amount of the customer's indebtedness. His judgment rests upon a failure to disclose on the part of the bank-agent. Now it is well-settled law, as I have already pointed out, that the bank-agent was entitled to assume that the intending guarantor was fully conversant with the financial position of the customer, and was not bound to make any disclosure whatever to the intending guarantor. The only circumstances in which I can conceive that a duty of disclosure would emerge, and a failure to disclose would be fatal to the Bank's case, would be where a customer put a question or made an observation in the presence and hearing of the bank-agent which necessarily and inevitably would lead anyone to the conclusion that the intending guarantor was labouring under a misapprehension with regard to the state of the customer's indebtedness. Nothing short of that, in my opinion, would do.

Now when I turn to the Lord Ordinary's reasoning in the note appended to his interlocutor, I find that the particular circumstance which, in his judgment, caused a duty of disclosure to emerge was that a statement was made to the defender that a guarantee for £300 might not be of much benefit to Hutchison, as the sum in it might be taken by the Bank to pay off his overdraft to that amount. On hearing this the defender agreed to give a guarantee for £500 so as to provide a substantial margin over said debt. In my opinion, if that statement was made—we shall see in a moment in what form it was made—it would fall very far short of an expression of view on the part of the intending guarantor which ought to have elicited a full disclosure of the amount of the customer's indebtedness by the bank-agent. The Lord Ordinary himself expresses some doubt as to the circumstances under which and the person by whom that statement was made, and that of itself would be sufficient, I think, to displace the ground of judgment, because the circumstances must be, as I think, plainly and unequivocally proved. But turning to the evidence, I think it will be found that the evidence of the bank-agent upon this topic, which has bulked so largely in the Lord Ordinary's view, is perfectly clear and distinct.—[Here followed the second passage from the Lord President's opinion quoted *supra*.]

That is to say, the bank-agent himself, without any question put or without any observation made by others, volunteers the statement that a guarantee for £300 might not be of much use to enable the customer to carry on his business, in respect that it might be taken by the Bank. That Mr Allan's account of what took place is correct is, I think, clear

when one turns to the evidence of the customer himself, Hutchison, who says, "then we," that is to say, he and Mr Greenshields, the intending guarantor, "talked about the overdraft, and Mr Greenshields said that there was just a danger of the Bank seizing that, and it was then that I asked him kindly to make it £500 instead of the £300. It was either Mr Greenshields or I who mentioned the overdraft." "It was I," he says further on—alluding to what occurred at the subsequent meeting in the Bank—"who led off; I said, addressing Mr Allan, that I thought Mr Greenshields would kindly consent to make it £500 instead of £300, and then Mr Greenshields said that a hundred or two was neither here nor there seeing that everything was satisfactory, or words to that effect."

Now Mr Greenshields denies that anything of the kind took place at the first interview, and he says that the overdraft was mentioned at the second interview, but under circumstances by no means so favourable to himself as the circumstances stated by Mr Allan in the evidence I have just read.

It appears to me that to say that £300 might not go very far, and that it might be taken by the Bank, or would be taken by the Bank in respect of an overdraft, falls very far short of a distinct representation to the effect that the total indebtedness of the customer was less than £300, and is quite compatible with the view that the customer's indebtedness upon other obligations might amount to a very much larger sum. But that is the sole circumstance on which the Lord Ordinary founds when he says that there was a duty of disclosure laid upon the Bank which they failed to discharge. I think there was no duty of disclosure laid upon the Bank by anything that was said in the presence and hearing of the bank-agent either by Mr Greenshields himself or by the customer, and, accordingly, that his Lordship's judgment cannot be supported.

I move your Lordships, therefore, to recall the interlocutor of the Lord Ordinary, and to give the pursuers decree in terms of the conclusions of the summons.

Lord Johnston.—Although I have had considerably more difficulty in the case than I think your Lordship has, I am now quite satisfied that the judgment which your Lordship proposes is the right one. One cannot of course avoid sympathising with anyone in the position of the late Mr Greenshields, who is ultimately responsible under a guarantee of this sort, because one sees clearly that, in this case, Mr Greenshields was misled. But he was misled, I think, partly by want of caution and full inquiry on his own part, and partly by unquestionable suppression of facts on the part of Hutchison, who is now bankrupt. But one's sympathy with the guarantor cannot affect the question of liability, and that, I think, is clear, unless one can follow the line of judgment which was taken by the Lord Ordinary. I thought that there was very great strength in what the Lord Ordinary says on this subject, and it was only on the explanations which your Lordship has given, and which I know are concurred in by my colleagues, that I see that the Lord Ordinary—though perfectly right in his reasoning, and therefore in his conclusion, if he is justified by the facts—is not so justified. I think that what he says in his judgment really amounts to this: Mr Allan was not bound to give any information whatever, but,

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Royal Bank of Scotland v. Greenshields.

Lord Mackenzie.

disclosing the whole truth," or—and this would be a case of ordinary fraud—if the intending cautioner makes a statement to the bank-agent, or in his presence, which plainly shows that he is entering into a transaction in an entire misapprehension of the facts of the case, then the bank-agent equally would be under an obligation, arising out of the circumstances of the case, to prevent the cautioner from being misled.

Now, in the present case, no specific question was put which imposed a duty on the bank-agent to disclose the financial position of his customer. That is the only possible view upon the facts, and, if I recollect aright, it was not even attempted to be argued that there was a specific question imposing that duty. But then, the view which the Lord Ordinary has taken is that, in consequence of statements made during the interview, there was an obligation on the bank-agent to disclose that there was a possible indebtedness of £1100 upon outstanding bills.

I keep in view that in his cross-examination Mr Allan goes a little further than he did in the passage which has been already read from his examination-in-chief. His evidence amounts to this: he said he did not think £300 would benefit Hutchison by paying tradesmen's accounts, because it was very likely to be swallowed up by the bank overdraft. That was not a statement made in the course of an inquiry by the cautioner as to what the position of Hutchison was. It was a comment by the bank-agent on what the parties wished him to carry out. I am unable to find it proved that Mr Greenshields, in the presence and hearing of Mr Allan, the bank-agent, made any statement to the effect that he believed that the bank overdraft was the whole amount of the possible liabilities of Hutchison who asked for the guarantee. Accordingly, I am of opinion, with your Lordship, that the Lord Ordinary's interlocutor should be recalled.

LORD SKERRINGTON concurred.

THE COURT recalled the interlocutor reclaimed against and decerned against the defender for the sum sued for.

DUNDAS & WILSON, C.S.—J. MILLER THOMSON & Co., W.S.—Agents.

No. 36.

Jan. 16, 1914.

Menzies v. M'Kenna.

DAVID PRENTICE MENZIES, Pursuer (Reclaimer).—*A. J. P. Menzies—Maclaren.*

THE RIGHT HON. REGINALD M'KENNA, HIS MAJESTY'S SECRETARY OF STATE FOR THE HOME DEPARTMENT, AND OTHERS, Defenders (Respondents).—*W. L. Mackenzie, K.C.—Gillon.*

Jurisdiction—Court of Session—Declarator of Heirship.

An action was brought in the Court of Session for declarator that the pursuer was heir of a certain deceased person, the only purpose of the action being admittedly to obtain a decree which might be used as evidence before the Privy Council in support of a claim by the pursuer to be placed on the Roll of Baronets.

The Court *dismissed* the action as incompetent, in respect that a question of propinquity alone was a matter for the Sheriff of Chancery, and that the Court would not pronounce a decree, which would be inoperative except for the purpose of aiding the pursuer to maintain a claim elsewhere.

Officers of State v. *Alexander*, (1866) 4 Macph. 741, *followed.*

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2D DIVISION. Ld. Ormidale.

ON 27th November 1912 David Prentice Menzies, Plean Castle, Mengieston, brought an action against the Right Honourable Reginald M'Kenna, His Majesty's Secretary of State for the Home Department, Home Office, London; the Right Honourable Alexander Ure, Lord Advocate for Scotland, Parliament Square, Edinburgh; Sir James Balfour Paul, Lyon King of Arms, Lyon Office, Edinburgh; and Sir William Patrick Byrne, Registrar of the Baronetage, Home Office, Whitehall, London. The only conclusion of the summons, other than the conclusion for expenses, was for declarator that "the pursuer is the nearest lawful heir male of line of Captain James Menzies of Comrie, Perthshire, who was born at Castle Menzies, in the parish of Weem and county of Perth, in or about the year 1663, and died at Comrie Castle, formerly in the parish of Weem and now in the parish of Dull and county of Perth, in or about the year 1748."

The pursuer averred that he was the nearest lawful heir male of line of Captain James Menzies of Comrie by a chain of descent which he set forth in detail.

He further averred that, by Royal Warrant dated 8th February 1910 and published in both the *London Gazette* and *Edinburgh Gazette* of 15th February 1910, it was declared and ordained, *inter alia*, that an official Roll of Baronets should be prepared and kept in the office of the Secretary of State for the Home Department, that the Roll should be prepared in consultation with one of the Kings of Arms, that any person, considering himself entitled to be placed on the Roll, should be at liberty to petition the King through the Home Secretary, and "(4) That if in such case, or in any circumstances whatever, Our said Secretary of State finds difficulty in advising Us as to the validity of the claims of any person to be placed or to be retained on the Roll he shall refer the matter either to Our Attorney-General for England, to the Lord Advocate for Scotland or to Our Attorney-General for Ireland for his opinion thereon, and may on consideration of that opinion direct that the said matter be referred to Our Privy Council to submit the same to examination and to advise Us thereon."

He also averred that on 24th December 1910 he had formally applied to the Home Secretary to be entered on the Roll of Baronets as successor (in respect of his relationship to Captain James Menzies, as above described) to the baronetcy of Menzies of Menzies upon the death of Sir Neill Menzies, Baronet, of Menzies, on 21st December 1910; and that the Home Secretary, after consultation with the Lyon King of Arms and the Lord Advocate, had declined to place the pursuer's name on the Roll.

Answers were lodged on behalf of the defenders, in which they averred, *inter alia*:—(Ans. 2) "Denied that the pursuer is the nearest lawful heir male of line of the said Captain James Menzies of Comrie."

The defenders pleaded;—(1) The action is incompetent, and ought to be dismissed. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action ought therefore to be dismissed. (3) The defenders, not being the proper parties to be called upon to defend the action, are entitled to decree of absolvitor. (4) The pursuer's averments, so far as relevant, being unfounded in fact, the defenders are entitled to absolvitor.

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On 23rd January 1913 the Lord Ordinary (Ormidale) sustained the first plea in law for the defenders, and dismissed the action.*

The pursuer reclaimed, and the case was heard before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Dewar) on 16th January 1914.

Argued for the reclaimer;—The royal warrant of 8th February 1910 had altered the law as it stood at the date when *Bosville* v. *Lord Macdonald*[1] was decided. It entrusted the Privy Council with the duty of investigating claims to be put on the roll of baronets, and of satisfying itself by competent evidence. A decree of the Sheriff of Chancery was not enough for this purpose,[2] but no exception could be taken to a decree of the Court of Session, at least where, as here, there was a contradictor; and it was for the purpose of laying it before the Privy Council as evidence of his claim that the pursuer sought a decree in the present action. An action containing merely a declaratory conclusion was not necessarily incompetent.[3] In *Earl of Lauderdale* v. *Wedderburn*[4] the Court of Session ordered a proof on a question of propinquity, and no doubt was suggested as to the competency of the procedure.

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* "OPINION.—This is an interesting point and one which is of importance to the pursuer, and if I had any doubt on the matter I would have taken time to consider my judgment. But dealing only with the point of competency, and leaving out of view entirely the second question argued whether, there being but a bare declarator, the action is incompetent on that ground, I think the question is already decided by the case that was cited by the defenders, namely, the case of *Bosville* v. *Lord Macdonald*, 1910 S. C. 597. In the observations made by Lord Skerrington in that case I entirely concur, and it seems to me therefore that this case is ruled by the judgment which he pronounced. Besides, while it is said in the rubric to have been acquiesced in, an argument is reported to have been submitted for and against it, although there is an observation by the Lord President which seems to show that the reclaimers did not press their contention, but agreed finally that the question was one for the Sheriff of Chancery.

"The only ground which Mr Menzies suggests distinguishes the present case from the case of *Bosville* is that a royal warrant, dealing with the preparation and keeping of a roll of baronets, and providing for the procedure to be followed by any person desiring to be enrolled, was issued subsequently to the decision in *Bosville's* case; but it seems to me that, while that is historically quite correct, the warrant has not made any real difference in the course that a person in the position of the present pursuer ought to follow in the initial stages of his endeavour to prove his propinquity. I do not adjudicate upon the matter at all, but it seems to me that the point stated in the letter of the Lyon King of Arms of 24th January 1911, and the question he raises there, might be answered—I do not say that it would, but as at present advised, I am inclined to think that it might be answered—by the pursuer presenting to the Secretary of State through the Lyon King a service obtained in the Court of Chancery, showing that he was what he wants this Court in the present action to declare him to be, namely, the nearest lawful heir male of line of Captain James Menzies.

"Accordingly, following the decision of *Bosville* v. *Lord Macdonald*, so far as it deals with the question here raised, I must hold the present action incompetent, and dismiss it."

[1] 1910 S. C. 597.

[2] Sir Hugh Mitchell's claim, *The Times*, March 12, 1912.

[3] Stewart & Co. v. Sillars, (1906) 13 S. L. T. 800.

[4] 1908 S. C. 1237, *per* Lord M'Laren, at p. 1251.

Argued for the respondents;—The law of Scotland was not, and could not be, altered by the royal warrant, and *Bosville* v. *Lord Macdonald*[1] was still authoritative. The Court of Session had no original jurisdiction in this matter,[2] and the proper course for the pursuer was to obtain service from the Sheriff of Chancery. Such a service, though not perhaps conclusive, at least raised a presumption in favour of the person served.[3] At anyrate it was clearly incompetent to bring a declarator in the Court of Session that one person was, or was not, the heir of another.[4] Moreover, the Court would not pronounce a declarator of right in the absence of the proper contradictors,[5] and the respondents, though they were entitled to object to the procedure, had no real interest in the merits of the case.

Lord Salvesen.—This case raises an interesting question as to whether an action concluding only for declarator that the pursuer is the nearest lawful heir male of line of Captain James Menzies of Comrie, Perthshire, who was born in the year 1663, is competent in the Court of Session. The action is admittedly brought for the purpose of furthering the pursuer's claim to a baronetcy which is said to have lapsed in 1910 on the death of Sir Neill Menzies, the last holder of the title. I think it has been settled that this Court is not entitled in an action such as the present to declare the propinquity of one person to another, and that the proper Court for a person who wishes to serve as heir male of line or on any other footing to a deceased person is the Court of Chancery. The first proposition was, I think, conclusively established by the decision of the Court in *Officers of State* v. *Alexander*,[6] where it was held incompetent for one to bring a declarator that another is not the heir of a person deceased. No doubt it was a negative declarator which was there held to be incompetent, but if a negative declarator is incompetent, it appears to me that a positive declarator must be equally incompetent. That was a decision of the Second Division over which, at that time, Lord Justice-Clerk Inglis presided, and, so far as I am aware, there has never been any challenge of that decision which in any sense is binding upon us. We were referred by Mr Menzies to some observations made by Lord M'Laren in the case of the *Earl of Lauderdale* v. *Wedderburn*,[6] but all that was decided there was that the Court of Session had jurisdiction to determine a claim to the office of Hereditary Standard Bearer of Scotland, that office being a hereditary office and not a mere title of honour. Now, a baronetcy is a mere title of honour. It confers no privileges, except those that are social, and the pursuer here does not allege that there is any question of heritable right depending upon the success of his declaratory conclusion.

Mr Menzies has practically conceded that such is the law, but he says

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[1] 1910 S. C. 597.

[2] Stair, iv. 1, 43; Mackay's Manual of Practice, p. 118; Sir A. Moncreiff v. Lord Moncreiff, (1904) 6 F. 1021.

[3] Norris v. Gilchrist, (1847) 9 D. 466, *per* Jord Justice-Clerk Hope, at p. 474.

[4] Officers of State v. Alexander, (1866) 4 Macph. 741.

[5] Allgemeine Deutsche Credit Anstalt v. Scottish Amicable Life Assurance Society, 1908 S. C. 33.

[6] 1908 S. C. 1237, at p. 1251.

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that a change has been effected by the Royal Warrant which was published in the *London Gazette* of 15th February 1910, the object of which is to institute a roll of baronets. Whatever be the effect of the warrant, it seems to me that, so far from assisting the pursuer, it supplies an additional reason for holding that this Court cannot entertain the present action, because it provides machinery for carrying out its purpose in which the Court of Session has no place. It provides that the claimant may apply by petition to the Secretary of State, and the Secretary of State has the power of remitting the matter, where a Scottish baronetcy is concerned, to the Lord Advocate, and upon his advice, if he thinks fit, of directing the matter to be referred to the Privy Council for examination. The pursuer does not maintain that a decree of the Court of Session would place him on that roll but, so far as I understand his position, he is anxious to get a decree in this Court in order that he may present it to the Secretary of State as *prima facie* evidence in support of his claim to be put on the roll. Now, we are not in the habit of granting decrees in order simply that they may be evidence in some other Court or tribunal. We decide matters of fact finally between parties who are interested in the settlement of these particular matters. But I do not think there is any instance, and none has been cited to us, in which the Court of Session investigated a disputed question of fact, not with the view of their decree being operative, but with the view of aiding the person in whose favour the decree was sought to maintain a claim elsewhere.

I do not think we need say how the position of this pursuer may be improved. It may be that if he obtained a service from the Sheriff of Chancery, after an inquiry made by the Sheriff into his claim, that that might assist him in establishing his claim in the proper quarter. Certainly, as he has pointed out, it would not be conclusive, because jurisdiction is not vested in the Sheriff of Chancery, but at all events it would be competent for him to serve before the Sheriff of Chancery whatever the value of such a service might be. All that we have to decide is whether this action is competent, and on that point I have no difficulty in reaching the same conclusion as the Lord Ordinary.

Lord Guthrie.—I am of the same opinion. Evidently this is a test case, and the defenders were right in appearing, but I doubt whether they should have gone beyond tabling their position in regard to the preliminary pleas, and whether it was their duty to raise any question on the merits of the case. The pursuer does not ask us to serve him heir to the individual to whom your Lordship has referred, who was born in 1663 and died in 1748, but the result would be practically the same.

I agree with your Lordship that the case is ruled by the case of *Alexander*.[1] It further appears to me that what the pursuer asks here we cannot grant, because it would be useless. If the defenders opposed the application on the merits, the Privy Council could say that they were not the proper contradictors. If the defenders did not appear, the pursuer would only get a decree in absence, to which the Privy Council would attach little

[1] 4 Macph. 741.

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importance; especially in view of the fact that, if he had obtained service from the Sheriff of Chancery, the pursuer would at least have required to produce sufficient evidence to satisfy the Sheriff that he had a *prima facie* case.

I agree with your Lordship on the further ground that it would be against the practice of this Court to grant a decree which is not going to settle anything finally so far as the pursuer is concerned, but is merely to aid him to maintain a claim elsewhere. We are not bound to advise the pursuer here; and it appears from the correspondence that he is not in the position which has been represented—namely, helpless and unable to take any further step. It is quite clear from the documents referred to on record that if he served he would, at all events, be in a position to make renewed application, and that his service, if tendered, would certainly be considered by the Secretary of State in the first instance, who might refer it to the Privy Council. If the pursuer wants to take any further step he has this course clearly open to him; whether it would advantage him or not in the end, it is not for us to say.

Lord Dewar concurred.

The Court adhered.

Bruce & Black, W.S.—Sir William S. Haldane, W.S.—Agents.

No. 37.

Jan. 17, 1914.

Edgar v. Lamont.

Mrs Jessie M'Intosh or Edgar, Pursuer (Respondent).—*D.-F. Dickson—Maclaren.*

Alexander Lamont, Defender (Reclaimer).—*Horne, K.C.—D. M. Wilson.*

Reparation—Negligence—Unskilful treatment by doctor—Ground of action—Delict or breach of contract—Title to sue—Patient or employer of doctor.

Held that the ground of action in a claim of damages against a medical man for unskilful treatment is breach of his duty to his patient and not breach of his contract with his employer; and, accordingly, that a married woman had a title to sue such an action, although the medical man had been employed to attend to her by her husband and not by herself.

2d Division. Ld. Anderson.

On 16th October 1913 Mrs Jessie M'Intosh or Edgar, with the consent and concurrence of her husband, brought an action against Alexander Lamont, M.B., C.M., concluding for payment of £500.

The pursuer averred that on 5th June 1913 she cut her finger, and on the following day sent for the defender, that she was under his care for the next fortnight, and that in consequence of his improper treatment of the wound she suffered great pain, and finally had to have the finger amputated.

The pursuer pleaded;—(1) The pursuer having suffered loss, injury, and damage in the manner condescended on, through the gross fault of the defender, is entitled to reparation therefor from the defender. (2) The loss of the pursuer's finger having been caused by the gross fault, incompetence, and negligence of the defender, in consequence of his failure to afford proper and sufficient professional treatment and attention, the defender is liable in reparation therefor to the pursuer. (3) The sum sued for being a reasonable estimate of the loss,

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injury, and damage which the pursuer has suffered, and will continue to suffer, through the gross fault, incompetence, and carelessness of the defender as condescended on, the pursuer is entitled to decree as concluded for.

The defender pleaded, *inter alia*;—(1) No title to sue. (2) The averments of the pursuer being irrelevant, and insufficient to support the conclusions of the summons, the action ought to be dismissed.

On 17th December 1913 the Lord Ordinary (Anderson) repelled the first and second pleas in law for the defender, and allowed an issue.*

The defender reclaimed, and the case was heard before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Ormidale) on 17th January 1914.

Argued for the reclaimer;—The ground of action was breach of contract and not delict, and the pursuer had no title to sue an action for breach of contract when she was not one of the contracting

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* "OPINION.—[After narrating the facts]—At the outset, I deal with the first point that was argued, namely, whether or not the lady has a title to sue the action. It was maintained by Mr Wilson for the defender that she had no title to sue the action, inasmuch as it was not she who made the contract with the defender; and it was contended that, as the contract was the husband's, he alone had the title to sue under it for any remissness on the part of the defender in executing that contract. I was referred to a number of cases in different branches of the law, such as the case of *Cameron* v. *Young*, 1907 S. C. 475, and in the House of Lords, 1908 S. C. (H. L.) 7, and the case of *Kennedy* v. *Bruce*, 1907 S. C. 845, which were cases of landlord and tenant. I was also referred to the cases of *Raes* v. *Meek*, 16 R. (H. L.) 31, and *Tully* v. *Ingram*, 19 R. 65, which are cases where the conduct of a law-agent was involved, and I was asked on these authorities to hold that the pursuer had no title to sue the action. On the other hand, Mr Maclaren for the pursuer referred me to a number of English Cases, such as the case of *Pippin* v. *Sheppard*, (1822) 11 Price, Exch. 400, where it was decided that the wife alone, who had been injured by the negligence of the medical man, was entitled to sue him for damages; and the case of *Gladwell* v. *Steggall*, (1839) 5 Bing. (N. C.) 733, where the injured individual was a young girl of the age of ten years, and where the doctor had been instructed to attend her by the mother, but where, nevertheless, the Court held that the injured girl was the proper person to sue the action, and Chief-Justice Tindal laid it down as the law of England that in a case like that the claim of the injured person was not *ex contractu*, but *ex delicto*; also to *Longmeid* v. *Holliday*, (1851) 6 Exch. (W. H. & G.) 761, and in our own Courts, *Farquhar* v. *Murray*, (1901) 3 F. 859, in which the opinions of the Judges indicate that the foundation of the action was really delict and not contract. I think that this is according to the right reason of the thing because, if the injured woman here is not entitled to sue this action and recover damages for personal injuries, it seems to me that there are no legal means whereby compensation may be recovered in respect of those injuries. The husband certainly could not sue and make the ground of damages claimed the fact that his wife had sustained those personal injuries. I do not know that he could sue in respect of loss of her services of which he was deprived for a certain time. That is the law in England, but I am not aware that there is any case in this country in which a husband has maintained his right to obtain reparation in respect of loss of service on the part of his wife. Accordingly, I decide that the pursuer here has a title to sue the action, and I repel the first plea in law for the defender.—[His Lordship then dealt with the question of relevancy, with which this report is not concerned]."

parties.[1] Medical attendance was one of the necessaries of family life, for which the husband as head of the family was liable, and though it happened to be the wife who called in the doctor here, the contract was truly with the husband. A good analogy was to be found in the cases where a law-agent was sued in respect of failure to give proper services, and where it was held that he was professionally liable only to his employer.[2] The cases of *Pippin* v. *Sheppard*,[3] *Gladwell* v. *Steggall*,[4] and *Kennedy* v. *Bruce*,[5] referred to by the Lord Ordinary, were no longer sound law after the decisions in *Cavalier* v. *Pope*,[6] and *Cameron* v. *Young*.[7] *Longmeid* v. *Holliday*[8] dealt with a wholly different set of circumstances, and in *Farquhar* v. *Murray*,[9] the action—in distinction to the present case—was at the instance of the doctor's employer. [Counsel for the reclaimer then dealt with questions of relevancy and of the mode of procedure, with which this report is not concerned.]

Counsel for the respondent were not called on.

Lord Salvesen.—I think the Lord Ordinary has come to a right conclusion.

The first question is as to the pursuer's title to sue. The argument maintained by the defender is to the effect that this is a claim for breach of contract, that the only person with a title to sue is the person with whom the contract was made, and that the contract was made, not with the pursuer, who is a married women, but with her husband, because although it was the pursuer who sent for the doctor, she did so as agent for her husband and on the footing that he must pay for the doctor's services.

No doubt it is sometimes difficult to distinguish between liability arising from breach of contract and liability arising from breach of duty. We were referred to a landlord and tenant case, *Cameron* v. *Young*,[1] where it was held that the wife of a tenant could not maintain an action against the landlord for his failure to perform the contractual duty of making the house habitable. But that case is clearly distinguishable from the present, and there is a series of decisions in England to establish the proposition that a patient is entitled to a direct action *ex delicto* against a doctor for professional incompetence or negligence, and that no action lies in respect of the injuries so sustained at the instance of the person (other than the patient) who contracted for the doctor's services. I think that view is consistent with our own law and with common sense. To hold otherwise would lead to an entire denial of any remedy to a person who did not happen to be the person who had contracted with the doctor, and I should be very slow indeed to arrive at that result. It seems to me that the clear ground of action is that a doctor owes a duty to the patient, whoever has called him in and whoever is liable for his bill, and it is for breach of that duty that he is liable, in other words, that it is for negligence arising in the course of the

[1] Cameron v. Young, 1907 S. C. 475, *aff.* 1908 S. C. (H. L.) 7.
[2] Begg on Law-Agents, (2nd ed.) p. 259; Robertson v. Fleming, (1861) 4 Macq. 167; Tully v. Ingram, (1891) 19 R. 65.
[3] (1822) 11 Price, 400. [4] (1839) 5 Bing. (New Cases) 733.
[5] 1907 S. C. 845. [6] [1906] A. C. 428. [7] 1908 S. C. (H. L.) 7.
[8] (1851) 6 Exch. (W. H. & G.) 761. [9] (1901) 3 F. 859.

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Edgar v. Lamont.

Lord Salvesen.

employment, and not in respect of breach of contract with the employer. That being so, I have no difficulty in reaching the same result as has been arrived at in England, and in sustaining the Lord Ordinary's view that the plea of no title should be repelled.—[His Lordship then dealt with questions with which this report is not concerned.]

LORD GUTHRIE and LORD ORMIDALE concurred.

THE COURT adhered.

STURROCK & STURROCK, S.S.C.—FRASER & DAVIDSON, W.S.—Agents.

No. 38.

Jan. 23, 1914.

John Walker & Sons, Limited.

JOHN WALKER & SONS, LIMITED, Petitioners.—*Watson, K.C.*—*Wilton.*

Company—Alteration of memorandum—Power to sell or amalgamate—Power to acquire similar businesses—Companies (Consolidation) Act, 1908 (8 *Edw. VII. cap.* 69), *sec.* 9 (1).

A limited company presented a petition for confirmation of a special resolution, by which it was proposed to alter its memorandum of association by adding powers to acquire similar businesses; to sell the undertaking of the company; or to amalgamate with any other firm, person, or company.

The Court, while confirming the power to acquire similar businesses, *refused* to confirm the other alterations, on the ground that they were not within the alterations which a company was authorised to make by sec. 9 (1) of the Companies (Consolidation) Act, 1908.

1ST DIVISION. ON 28th August 1913 John Walker & Sons, Limited, presented a petition under the Companies (Consolidation) Act, 1908,* for confirmation of alteration of the Company's memorandum of association.

The petition set forth:—

"1. That the petitioners, John Walker & Sons, Limited, were incorporated under the Companies Acts, 1862 to 1886, on 11th November 1886, and have since carried on business. . . .

"3. The objects for which the Company was established, as set forth in clause 3 of its memorandum of association, as altered by special resolution of the Company passed on 21st December 1893, and confirmed on 8th January 1894, and confirmed by your Lordships by interlocutor dated 20th March 1894, are as follows, viz.:—'(1) To carry through and complete a transaction for the purchase and payment of the price of "Walker's Bonded Stores and Offices," Strand Street and Croft Street,

* The Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), enacts:—Sec. 9. "(1) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—

"(*a*) To carry on its business more economically or more efficiently; or

"(*b*) To attain its main purpose by new or improved means; or

"(*c*) To enlarge or change the local area of its operations; or

"(*d*) To carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

"(*e*) To restrict or abandon any of the objects specified in the memorandum.

(2) The alteration shall not take effect until and except in so far as it is confirmed on petition by the Court."

Jan. 28, 1914.

John Walker & Sons, Limited.

Kilmarnock, in the parish of Kilmarnock and county of Ayr, belonging to Alexander Walker, wine merchant, Kilmarnock, or the firm of John Walker & Sons, wine merchants there, of which the said Alexander Walker is the only individual partner; together with the goodwill of the business of said firm of John Walker & Sons, and their registered trade-mark, and whole machinery, fittings, and other apparatus in the said premises, and the whole stock in trade and other effects belonging to the said Alexander Walker or to his said firm; and of the lease of the shop and premises in Portland Street and Strand Street, Kilmarnock, held by the said firm of John Walker & Sons or the said Alexander Walker as an individual, and likewise the lease of the offices, vaults, and premises at 3 Crosby Square, Bishopgate Street, London, occupied by the said firm of John Walker & Sons, with the whole machinery, fittings, and other apparatus and whole stock in trade and other effects belonging to the said firm. (2) To work the business hitherto carried on by the said firm of John Walker & Sons as bonded store keepers, wine and spirit merchants, Italian warehousemen, and commission agents, and to make the purchases and sales required in the said business, and to purchase and sell all such materials and goods as may be in any way used in connection with the said business, and also to carry on such other business operations as are connected with or incident to the said business. (3) To acquire the distillery known as Cardow Distillery, in the parish of Knockando, Morayshire, with the goodwill of the business now or lately carried on at said distillery, and the whole pertinents of the said distillery and business. (4) To carry on in the United Kingdom or elsewhere the business of distillers, maltsters, and merchants. (5) To purchase [and sell heritable property]. (6) To acquire [&c., patent rights]. (7) To register [&c., trade-marks]. (8) To let or hire all or any part of the property or effects of the Company. (9) To draw [&c., bills and promissory-notes], to discount and sell promissory-notes, bills of exchange, and other negotiable instruments. (10) To borrow any sum or sums of money by way of discount, cash credit, or overdraft, or upon bond, debenture, mortgage, promissory-note, or receipt, or in any other manner, and to grant security for all or any of the sums so borrowed, or for which the Company may be, or may become, liable, and by way of such security to dispone, mortgage, pledge, or charge the whole or any part of the property, assets, or revenue of the Company (including uncalled capital), or to dispone, transfer, or convey the same absolutely or in trust, and to give to lenders or creditors powers of sale and other usual and necessary powers, and also to raise money by the issue of debenture stock. (11) To advance money by way of loan. . . . (12) To enter into and subscribe all writings necessary for carrying through the said transactions and conducting the business and otherwise carrying out the objects and transacting the business of the Company.' . . . .'"

"5. At an extraordinary general meeting of the Company duly convened, held on 30th June 1913, the following resolution was duly passed, and at a subsequent extraordinary general meeting also duly convened, held on 18th July 1913, the same was duly confirmed, so as to become a special resolution of the Company, viz.:—'That clause 3 of the memorandum of association of the Company be altered so as to include the following additional objects, namely—(13) To subscribe for, take, purchase, or otherwise acquire and hold shares or other interests in or securities of any other company having objects altogether or in part similar to those of this Company or carrying on any

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business capable of being conducted so as directly or indirectly to benefit this Company. (14) To enter into arrangements with local, municipal, and other authorities or companies, corporations, or persons, and to obtain any rights, guarantees, or privileges, and to carry out such arrangements. (15) To acquire, carry on, or undertake the whole of the business and assets, and to undertake the liabilities of any person, firm, or company possessing any property suitable for any of the purposes of this Company, or carrying on any business which this Company is authorised to carry on or which can conveniently be carried on in connection with the same, and as consideration or part of the consideration for such acquisition to pay cash or to issue shares, stock, or obligations, or to acquire any interest, or to amalgamate with or enter into any arrangment for sharing profits or co-operation with any firm, person, or company. (16) To establish and support associations and institutions to benefit the employees of this Company, to subscribe money for charitable or benevolent objects, and to give pensions to the servants and employees of this Company. (17) To sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with the undertaking of this Company, and all or any part of the property and rights of this Company, either for cash, shares, debentures, or debenture stock, or any other consideration. (18) To do all or any of the above mentioned things as principals or agents or otherwise, or by trustees, agents, or otherwise, and either alone or in partnership. (19) To do all such other things as may be incidental to or connected with any of the above mentioned objects.' . . .

"8. The said alteration is required to enable the Company to carry out the first four purposes specified in section 9, subsection 1, of the said statute. It is now customary for incorporated companies engaged in similar business to have, by their memoranda of association, the powers specified in the said alteration, and they are necessary for the proper and efficient carrying on of the Company's business."

No answers were lodged to the petition.

On 15th October 1913 the Court remitted to Sir George M. Paul, D.K.S., to inquire into the procedure and the reason for the proposed alteration of the memorandum of association, and to report.

On 17th December 1913 Sir George Paul reported in favour of confirming the alterations included in the special resolution, with the exception of those giving the company power to sell or dispose of the undertaking or to amalgamate.*

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* Sir George Paul's report contained the following passages:—"It is stated in the petition that the proposed alteration of the Company's memorandum of association 'is required to enable it to carry out the first four purposes specified in section 9, subsection 1, of the Companies (Consolidation) Act, 1908; that it is now customary for incorporated companies engaged in similar business to have by their memoranda of association the powers specified in the said alteration, and that they are necessary for the proper and efficient carrying on of the Company's business.

"'But,' as was observed by Lord Kinnear in *Glasgow Tramway Company* v. *Magistrates of Glasgow*, 18 R. 675, at p. 683, 'the Court is not entitled to sanction such resolutions merely because they appear reasonable and proper in the interests of the Company itself. We must be satisfied that the conditions under which the statute allows the memorandum of association to be altered are complied with.'

"The alterations authorised by the statute must have for their objects:

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Argued for the petitioners;—In the passage quoted by the Reporter from the opinion of Lord Kinnear in the case of *Glasgow Tramway and Omnibus Company, Limited* v. *Magistrates of Glasgow*[1] his Lordship was dealing with a proposal to introduce a purpose "entirely foreign to the original purposes of the memorandum of association,"[2] which could not be said of the proposals of the petitioners here. The ground of the decision in the case of *Young's Paraffin Light and Mineral Oil Company, Limited*[3] (referred to by the Reporter as that which had been followed in the case of the present Company in 1894, when the Court refused to confirm general powers to sell the business of the Company or to amalgamate), had been departed from in Scotland,[4] except in the unreported case of the *Biggar Auction Mart*, decided on 14th May 1912, which should be reconsidered. In the

(1) the more economical or more efficient conduct of the business; or (2) the attainment of the Company's main purpose by new and improved means; or (3) the enlargement or change of the local area of its operations; or (4) the carrying on of some business which, under existing circumstances, might conveniently or advantageously be combined with the Company's business.

"'The alteration which is contemplated in that clause' (of the statute) 'seems to me to be an alteration which will leave the business of the Company substantially what it was before, with only such changes in the mode of conducting it as will enable it to be carried on more economically and more efficiently,'—Mr Justice Warrington in the *Cyclists' Touring Club*, [1907] 1 Ch., at p. 274.

"In the reference which has been made to the Company's special resolution of 1894 and interlocutor of the Second Division following thereon, it was stated that certain powers included in the special resolution had been refused. These were: (1) to acquire the business or undertaking of any other company carrying on any business which the Company might legally carry on; (2) to sell or transfer the business and undertaking of the Company; and (3) to amalgamate with any other company in the United Kingdom established for objects similar to any of those for which the Company was established. The case is not reported, but the interlocutor of 20th March 1894 will be found on page 14 of the printed memorandum and articles of association, No. 11 of process. The grounds of the refusal were no doubt those given about the same time by the same Division on a similar application by *Young's Paraffin Company* (21 R. 384), viz., that 'the Act did not contemplate that such general powers should be conferred before the necessity of using them arose.' But the Court stated that they 'would consider any special transaction which the Company might wish to carry out under such articles.' And, in point of fact, they had, as already mentioned, allowed to the petitioning Company (John Walker & Sons) in 1894 the specific application for power to acquire the Cardow distillery.

"In view of the statement in Palmer's Company Precedents (10th, edition) i. 1208, that 'on the whole the Courts have shown themselves inclined to place a liberal and reasonable construction on the Act,' and of decisions in the English Courts (*In re New Westminster Brewery Co., Limited*, [1911] 105 L. T. R. 946, and the unreported case of *In re Provident*

[1] (1891) 18 R. 675, at p. 683. [2] *Ibid*, at p. 684.

[3] (1894) 21 R. 384.

[4] King Line, Limited, (1902) 4 F. 504; London and Edinburgh Shipping Co., Limited, 1909 S. C. 1, at p. 3, footnote, art. 11; Innerleithen Gas Co. (1902) (not reported).

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last mentioned case power to acquire other businesses had been granted, while powers to sell or amalgamate were refused. In England these powers had been granted[1] after citation of the case of *Young's Paraffin Light and Mineral Oil Company*,[2] and they had been refused in the case of *Cyclists' Touring Club*,[3] only because the alterations there sought were not within the class described by Mr Justice Warrington in that case in the passage quoted by the Reporter. In the present case the proposed alterations were within that class, as was explained by Mr Gore-Browne in his opinion quoted by the Reporter. The jurisdiction of the Court to sanction an alteration of the objects of a company was intended to be exercised on broad principles,[4] and the alterations here proposed in terms of resolutions unanimously passed and confirmed by the Company should be confirmed by the Court, without any such change as was proposed by the Reporter.

Clerks' and General Guarantee Association therein referred to) in which the general powers refused in the cases of this Company and the Paraffin Company before referred to were granted, the petitioning Company has again included in its special resolution the general powers previously refused to it, viz. (1) to acquire other businesses of the same nature as that which the Company is authorised to carry on, or which can conveniently be carried on, in connection with the Company's main business; (2) to sell or dispose of the Company's undertaking; and (3) to amalgamate with any company, firm, or person.

"The Company has requested the Reporter to bring under the notice of your Lordships information with which it has been furnished by Mr Gore-Browne, K.C., an eminent English counsel, respecting the practice in the English Courts on applications for power to sell a company's undertaking or to amalgamate with other companies. Upon several occasions Mr Gore-Browne observes such applications have been before the English courts, and 'in all such cases the new powers have been allowed, upon each occasion the attention of the Court being called to the provisions in question.' He has never 'known such a clause as either of those in question rejected.' He further says, 'the ground justifying such extensions is that amalgamation (which often is merely the absorption of a smaller company) enables the Company to carry on its business more economically and efficiently, and to carry on some business which may be conveniently and advantageously combined with that of the Company; and that a sale of the undertaking for shares or other interests in another company is only an amalgamation justified on the before-mentioned grounds, while a sale for cash often enables a company to get rid of a business which by reason of competition or otherwise cannot be advantageously carried on, and to employ the funds obtained by the sale in a more economical or efficient carrying on of the general business which the Company is authorised to carry on or to attain its main purpose by new or improved means, or to change the area of its operations (*e.g.* by removing the business to some place not affected by the competition).' Mr Gore-Browne, however, says that, so far as he is aware, the matters in question have not been before the Court of Appeal in England.

"Palmer (Precedents, 9th edition, i. 1153), observed that there is no

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[1] New Westminster Brewery Co., Limited, (1911) 105 L. T. R. 946; Anglo-American Telegraph Co., Limited, (1911) 105 L. T. R. 947.

[2] (1891) 21 R. 384.

[3] [1907] 1 Ch. 269, Warrington, J., at p. 274.

[4] Palmer's Company Law, (9th ed.) 416; Palmer's Company Precedents, (11th ed.) i. 1311-1313.

At advising on 23rd January 1914,— Jan. 23, 1914.

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LORD JOHNSTON.—John Walker & Sons, Limited, were incorporated in 1886. The main, indeed the sole, object of the constitution of the Company as set forth in the original memorandum of association was the acquisition of the business of an existing firm of spirit merchants, embracing (*a*) goodwill; (*b*) premises in Kilmarnock and London; and (*c*) plant and stock in trade in or connected with these premises: and having acquired the business of bonded storekeepers, wine and spirit merchants, Italian warehousemen, and commission-agents (to give it its full description), to carry it on, and to carry on also such other business operations as should be connected with or incident to said business.

Proceeding under the Companies (Memorandum of Association) Act, 1890,[1] section 1, the Company in 1894, with the sanction of the Court, altered the existing memorandum of association. But in so doing it did nothing which affected the object of its existing constitution. The purpose of this alteration was to enable the Company to acquire a particular distillery in Morayshire, and to carry on the business of distillers in the United Kingdom or elsewhere. Such addition to the business of the Company, though hardly warranted by the terms of the original

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power 'to confirm a resolution empowering the company to dispose of its undertaking.' This observation is, however, omitted in the 10th edition.

"In the unreported case of the *Biggar Auction Mart Company*, your Lordships of the First Division, by your interlocutor of 14th May 1912, after hearing counsel, confirmed a general power to acquire other businesses of a similar nature to the company's main business, but refused confirmation of a power to sell the company's main undertaking or to amalgamate, on the ground that the powers of alteration under the 9th section of the Companies Act are limited in a way which excludes the conferring of a power to dispose of the undertaking or to amalgamate. It appears to be assumed in the Act that the Company is not to lose its identity; the authorised alteration must be for its advantage as a going and continuing concern.

"In view of that decision of your Lordships, and the powers allowed in that and in other previous cases, the Reporter is of opinion that the present application might be confirmed as regards all the objects included in the special resolution other than those to sell or dispose of the undertaking or to amalgamate. Considering that nearly twenty years have elapsed since the refusal of 1894, and that the Courts seem now inclined to take a more liberal view of the statute, the Reporter ventures to suggest that the general power to acquire other businesses, which is now being granted in other cases, might be allowed.

"As regards the other powers, viz., to sell the undertaking, or to amalgamate, if your Lordships, following your decision in the *Biggar Auction Mart* case, should see fit to refuse them, the words 'amalgamate with or' in the fifteenth subclause should be deleted; and, if the general power to acquire other businesses be confirmed, the seventeenth subclause should be altered, as in the *Biggar* case, so as to be applicable only to after acquired businesses. It might read thus:—'To improve, manage, or develop the undertaking of this Company and all or any part of its property and rights; also to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with any branch or part of the Company's undertaking which may have been acquired by it as an adjunct to its main business.'"

[1] 53 and 54 Vict. cap. 62.

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memorandum, viz., to carry on such other business operations as should be connected with or incident to its original business, was one which might be made under the express terms of the Act 1890, section 1 (5) (*d*), because it would enable the Company "to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the Company."

Now, the Company, taking advantage of the Companies (Consolidation) Act, 1908, section 9, proposes still further to alter the memorandum of association by the addition of seven new articles. Of these, six, if they are not practically already included in the original memorandum, are alterations which are completely covered by the terms of the above section, and to these the Reporter has taken no exception. But there is a seventh, of very doubtful propriety in itself, which the Reporter holds to be outwith the purview of the above section. In this I agree with him.

By this latter article the Company proposes to take power "to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account or otherwise deal with the undertaking of this Company, and all or any part of the property and rights of this Company, either for cash, shares, debentures, or debenture stock, or any other consideration." The undertaking of the Company can mean nothing but its main object and that which effects it. I cannot find a better descriptive word, though such undoubtedly exists, than the materialisation of its main object, that is, in the present case, the business which it was incorporated to acquire and conduct with its necessary adjuncts. If that is to be improved, managed, or developed, the Company will continue to exist and presumably to prosper. But it cannot be sold, exchanged, leased, disposed of, turned to account, or otherwise dealt with, without the *raison d'être* of the Company ceasing to exist, and consequently the Company itself coming to a standstill or becoming dead to the business world.

We are told that a power of this sort has become general in all recent companies. That may be or may not be, though I doubt its legality, for I think it inconsistent with the whole conception of the Companies Acts. But we are told further that it has become the practice in England to confer such powers in confirming alterations of the memorandums of association of existing companies under the powers conferred by the Companies Acts with which we are at present concerned. I confess I am somewhat astonished to learn that this is the case, and though we have been supplied with authority for the statement, I am quite at a loss to know how the practice has arisen or how it can be justified. The English Courts and we are sitting under the same statute and exercising a statutory power and a statutory discretion. By the statute we are bound. Company promoters and managers may think that it is expedient that our powers and discretion should be extended, though I cannot say that I think there is any sound ground for such extension. But we are not drafting *de novo* the memorandum of a company. Nor are we legislating. We are merely performing a statutory duty and exercising a statutory discretion. Our powers are strictly limited, and they do not entitle us to sanction such an alteration as is here proposed.

The ninth section of the 1908 Act is no real variation of the first section

of the 1890 Act. All that it does is to put its contents into more logical order, but in the same words. It provides in its first subsection :—"(1) Subject to the provisions of this section a Company may, by Special Resolution, alter the provisions of its Memorandum with respect to the objects of the Company, so far as may be required to enable it—(*a*) To carry on its business more economically or more efficiently; or (*b*) To attain its main purpose by new or improved means; or (*c*) To enlarge or change the local area of its operations; or (*d*) To carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the Company; or (*e*) To restrict or abandon any of the objects specified in the Memorandum." I cannot conceive how the disposal of the undertaking of the Company can either enable it to carry on its business more economically; or to attain its main purpose by more approved means; or to enlarge the area of its operations; or to carry on a business, which may conveniently be combined with its business; or to restrict or abandon any of the objects specified in its memorandum. If anything, it would be to abandon the whole objects specified in its memorandum. If, then, we confirmed the alteration, we should be acting *ultra vires*.

The defence of the proposal and of the alleged English practice is that a desirable reconstruction of the company can be often conveniently effected by disposing of its undertaking to a new company for payment in shares to be distributed among the shareholders of the old company; that in such case the vendee company is not really, but only nominally, a new company, and that the operation enables the original company in the words of the statute, section 9 (1) (*b*) to attain its main purpose by new or improved means. But I venture to point out that all that the statute says the company may do is to alter the provisions of its memorandum "so far as may be required to enable it . . . (*b*) to attain its main purpose by new or improved means"—to enable it, the existing company, not to enable some new and different company, to do so. The one thing which the statute unquestionably predicates is the continued identity of the company whose memorandum is to be altered. But the specious suggestion in support of the proposal fails for another and equally sound reason. If the alteration were confirmed the Company would be enabled not merely to reconstruct itself in the assumed innocent form of an *alter ego*, but to sink its identity by amalgamation in another company, or to dispose of its undertaking for cash, while remaining, not in a state even of suspended animation, but beyond resuscitation, yet retaining the form without the substance of a company. Neither of these things does the statute contemplate or authorise.

I have dealt with this matter, probably at unnecessary length, because of the respectful consideration which I feel I am bound to give to what we are informed has become the English practice. But so far as our own practice is concerned, the matter stands, I think, on authority. I refer in the first place with respectful acceptance to what Lord Kinnear says in the *Glasgow Tramway Company's* case,[1] and to his analysis of the

[1] 18 R., at p. 683.

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statute, and I think that from the way in which he expresses himself *In re The Cyclists Touring Club*,[1] Warrington, J., would subscribe to the same view of the statute. In the case of *Young's Paraffin Light Company*[2] the present question was raised, though the practical refusal of sanction to the alteration here proposed is merely included in a general refusal. But the precise question which is now raised came nakedly before the Court quite recently in the case of the *Biggar Auction Mart Company* on 14th March 1912. Of this case there is no report as it was not considered necessary to give a reasoned judgment, but having been one of the Court before which that case came, I am able to say that confirmation of the alteration proposed was refused on precisely the grounds which I have stated above for its refusal here. And I am unable to see any reason for departing from the practice then established.

Turning to English authority, I find that Mr Buckley (now Lord Justice Buckley), in the 8th edition of his work on the Companies Acts, in commenting on the Act of 1890, says, at page 707: "The Act does not confer upon either the company or the Court a general power of alteration. The operative words in subsection (1) are limited by 'so far as may be required for any of the purposes hereinafter specified,' and the specification is found in subsection (5). The proposed alteration must be brought within some one or more of subsections (5) (*a*) to (*e*). The authority is confined to the definite matters there mentioned. The Court will not confirm alterations which merely amplify the language of the existing object clause." That does not appear to give any countenance to the alleged practice. In Palmer's Precedents again, 9th edition, vol. i. p. 1153, published in the year 1906, we find the statement that there is no power "to confirm a resolution empowering the company to dispose of its undertaking." But the statement is omitted in the 10th edition published in the year 1911. I have looked in vain for any authority to justify the change in the more recent edition of Mr Palmer's work. None is given by him, and we were referred by counsel to none, with the exception of two cases decided in the same week by a single Judge, Joyce, J., viz., the *New Westminster Brewery Company* and the *Anglo-American Telegraph Company*, only reported in 105 L. T. R. 946 and 947 respectively. I gather from these brief reports that Joyce, J., was following what he conceived to be accepted practice and was not applying his mind to the question. So far as these cases go, they do not seem to me to require us to consider the English practice as based on any proper consideration of the intent of the statute or the powers of the Court.

I therefore propose to your Lordships that, before confirming these alterations of memorandum, we require the new 17th article to be restricted as suggested by the Reporter in his very discriminating report.

Lord Skerrington.—The petitioners ask for confirmation by the Court, in terms of section 9 of the Companies (Consolidation) Act, 1908, of the alteration of their memorandum of association with respect to the objects of the Company set forth in the special resolution of 30th June and 18th

[1] [1907] 1 Ch. 269. [2] 21 R. 384.

July 1913. On referring to the so-called "objects" which the petitioners desire to add to their memorandum, it will be found that these are not objects in the proper sense of the word, but are merely powers which the petitioners consider might be useful to them in the course of their business. This abuse of the word "objects" in connection with registered companies has often been judicially referred to, but I think that it has received judicial approval in a series of applications under the Companies (Memorandum of Association) Act, 1890. Further, I think that it has received statutory recognition in the Act of 1908, the provisions of which must have been framed in view of the well-known practice under the Act of 1862.[1] Section 3 (iii.) of the later Act speaks simply of "the objects of the Company" in contrast to the more elaborate language of section 8 (3) of the earlier Act. Accordingly I agree with the Reporter that most of the suggested alterations of the objects of the petitioning Company may competently be sanctioned, and I also agree that there is no reason why such sanction should not now be given.

The only difficulty raised by the Reporter is in regard to the power proposed to be conferred upon the Company to sell its undertaking "either for cash, shares, debentures, or debenture stock, or any other consideration." The Reporter recommends that the petitioners should be empowered to sell any subsidiary part of their undertaking, and accordingly the only question is whether they should be empowered to sell their undertaking as a whole in return either for cash or for shares or debentures of the purchasing company. It has for long been customary to insert such a power in the memorandum of newly formed companies, the purpose being to enable the sale of the undertaking to be carried through free from the restrictions of section 161 of the Act of 1862 (section 192 of the 1908 Act). In the case of *Bisgood* v. *Henderson's Transvaal Estates, Limited*,[2] the Court of Appeal in England decided, contrary to a long-continued practice, that this purpose could not be legally effected and was *ultra vires*. It is not necessary to consider whether that judgment would be followed in Scotland. I respectfully agree, however, with Buckley, L.J., that the sale by a company of its undertaking means a great deal more than a sale of its whole existing assets, and that a company which has made such a sale has retired once and for all from carrying on its business. In these circumstances I do not see how, on any reasonable construction of section 9 of the Act of 1908, such a power can be held to be requisite in order to enable a company "(*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means." The section assumes, in my opinion, the continued existence of the company which seeks to have its powers enlarged. It is too metaphysical to say that a company can carry on its business, or attain its main purpose by ceasing to exist and transferring its business to a successor.

At first sight it may seem unreasonable to confer upon the petitioners power to buy the undertaking of a company carrying on a similar business, but at the same time to refuse them power to sell their undertaking to some other company. Why should the petitioners be authorised to

[1] 25 and 26 Vict. cap. 89.

[2] [1908] 1 Ch. 743.

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amalgamate by buying and absorbing another company while they are not permitted to amalgamate by selling their business to another company and being themselves absorbed? There is, however, a substantial distinction between the two cases. If the petitioners contented themselves with buying and absorbing other businesses, their company would remain subject to its original memorandum of association, with such alterations and additions as have legally and competently been made thereto. On the other hand, if the petitioners sell their undertaking to and become absorbed in another company, their shareholders might, on a distribution of the assets of the petitioning company, be forced to become shareholders in a company governed by a memorandum of association which need have no limits similar to those contained in the petitioners' memorandum in regard to the kind of business which may be carried on. Such a result would be contrary to the principles of partnership and cannot be easily implied. I am therefore of opinion that the power to sell the whole undertaking ought to be refused. It follows that the express power to amalgamate ought also to be refused as being one which it is either unnecessary or incompetent for us to sanction.

We were informed that, according to English practice under the Act of 1890, it was usual to confirm resolutions by companies empowering themselves to sell their undertakings either for cash or for shares, and we were referred to several cases in which such resolutions were sanctioned by the Court. We were also referred to a recent Scottish case in which the First Division refused to sanction such a resolution. So far as appears from the reports, no judicial opinions were delivered in any of these cases, and accordingly I have treated the present question as one which is entirely open.

LORD PRESIDENT.—I agree in the opinions which have just been delivered. While I regret that the practice of this Court should differ from what we are informed is the practice in the Court of Chancery in the administration of the same statute, in common with your Lordships I can find no good ground whatever for departing from the practice which has hitherto prevailed here, sanctioned by the precedents to which your Lordships have called attention. We shall therefore pronounce an interlocutor in the terms suggested by the Reporter.

THE COURT pronounced an interlocutor in the following terms:—"Confirm the alteration of the memorandum of association with respect to the objects of the Company set forth in the special resolution of the Company passed on 30th June and confirmed on 18th July 1913, subject to the following modifications, viz.: In subclause 15 delete the words 'amalgamate with or,' and alter subclause 17 so that it shall read as follows: 'To improve, manage, or develop the undertaking of the Company, and all or any part of its property and rights; also to sell, improve, manage, develop, exchange, lease, mortgage, dispose of, turn to account, or otherwise deal with, any branch or part of the Company's undertaking which may have been acquired by it as an adjunct to its main business.'"

DAVIDSON & SYME, W.S.; Agents.

MRS MARY MAY OR TOUGH, Pursuer.—*G. Watt, K.C.—Macquisten.* THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Cooper, K.C.—E. O. Inglis.*

No. 39.
Jan. 30, 1914.

Tough v. North British Railway Co.

Reparation—Negligence—Liability to licensee—Persons other than passengers permitted to be in railway station—Railway—Master and servant—Negligence of servant.

A person who goes upon premises as a mere licensee is not there at his own risk if he suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licensee has entered the premises.

So where a person, who had been permitted to go upon a railway platform to see friends off by a train, was injured through the fault of the station employees in starting a train without closing the doors, the railway company were *held* liable in damages.

2D DIVISION. Ld. Ormidale and a Jury.

ON 9th May 1913 Mrs Mary May or Tough, as an individual and as tutrix of her pupil son, brought an action against the North British Railway Company concluding for damages in respect of the death of her husband.

On 30th October 1913 the case was tried before Lord Ormidale and a jury. The evidence led by the pursuer was to the following effect:—On 22nd March 1913 the deceased went with two friends to the defenders' Waverley Station in order to see them off by a train leaving at 9.5 P.M. At the gate at the end of the platform the tickets of the deceased's friends were checked by one of the defenders' servants who allowed the deceased to accompany them to the train. The deceased stood talking to his friends at the door of their compartment, and as the train moved off he walked along the platform waving his hand to them. While so walking he had to step to the side and towards the train in order to avoid a lady standing on the platform, and was immediately struck on the back by the door of a compartment which was swinging open. This blow knocked the deceased on to the railway line; and, the wheels of the train passing over him, he received injuries of which he died next morning.

In the course of his charge to the jury the presiding Judge was requested by counsel for the defenders to direct the jury "that the deceased William Hall Tough was a licensee at the Waverley Station on the night in question and the defenders are not responsible to him or his representatives for the consequences of the alleged negligence on the part of the defenders." His Lordship refused to give this direction, and counsel for the defenders thereupon excepted.

The jury having returned a verdict for the pursuer, the defenders presented a bill of exceptions and obtained a rule to show cause why the verdict should not be set aside and a new trial granted. On 28th and 29th January 1914 the parties were heard on the rule and on the bill of exceptions before the Second Division (Lord Dundas being absent) with Lord Ormidale.

Argued for the pursuer;—The exception should not be allowed. The pursuer's husband while lawfully on the defenders' premises was injured by the fault of their servants in not shutting the doors of the compartments of the train; and for this fault the defenders were responsible in law. The defenders were under the duty of taking reasonable care for the safety of those whom they admitted to their station; and if, as here, a person, while within the station for a

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lawful purpose, was injured through their fault or the fault of their servants, they were liable. The law was so settled in the cases of *Thatcher* v. *The Great Western Railway Company*,[1] *Watkins* v. *Great Western Railway Company*,[2] and *Tebbutt* v. *Bristol and Exeter Railway Company*.[3] These cases were directly in point, and they had never been challenged. It could not be maintained that *Thatcher's* case[1] was inconsistent with the earlier case of *Batchelor* v. *Fortescue*,[4] for Lord Esher and Lopes, J., concurred in the decision in both cases. The direction craved by the defenders was that the deceased was a licensee; but, assuming that he was, the defenders would not thereby be relieved of liability. A licensee took the risk only of dangers which were not concealed. He could hold the owner of the premises liable if he were injured through a concealed danger or trap, or if he were injured through a cause which did not exist when he entered the premises, but which was thereafter brought into existence by the negligence of the owner of the premises or his servants. The last class of cases was described by Mr Beven in his book on Negligence[5] as injuries due to dangers added through negligence, and the present case fell within this category. *Devlin* v. *Jeffray's Trustees*[6] and *Cummings* v. *Darngavil Coal Company, Limited*,[7] were not in point. These cases were discussed in *Mackenzie* v. *Fairfield Shipbuilding and Engineering Company, Limited*,[8] and were not consistent with the decisions in *Cooke* v. *Midland Great Western Railway of Ireland*[9] and *Messer* v. *Cranston & Company*.[10]

Argued for the defenders;—*Thatcher's* case,[1] if it were sound, admittedly was an authority directly against the defenders. But that case must be regarded as overruled, for the grounds on which the decision proceeded were destroyed by the judgment in *Perth General Station Committee* v. *Ross*,[11] which for the first time defined the rights of persons, other than passengers, entering a railway station; and the actual decision in *Thatcher's* case[1] was inconsistent with the earlier decision in *Batchelor* v. *Fortescue*.[4] The direction which the learned Judge had refused to give correctly stated the relation and responsibilities of the defenders to the pursuer. The deceased was a mere licensee, and to such a person the owner of the premises, under both Scots[12] and English[13] law, was under no liability except for injuries caused either through some concealed peril or by the malicious acts of himself or possibly of his servants done in the course of their employment. For injury through other negligence on the part of his servants, as for injury caused by a patent danger, the owner of the premises was not responsible.[14] In the present case all that the pursuer had attempted to prove was non-malicious negligence on the

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[1] (1893) 10 T. L. R. 13.
[2] (1877) 46 L. J., Q. B. 817.
[3] (1870) 40 L. J., Q. B. 78.
[4] (1883) 11 Q. B. D. 474.
[5] Beven on Negligence, (3rd ed.) vol. i., p. 443, and vol. ii., p. 952.
[6] (1902) 5 F. 130.
[7] (1903) 5 F. 513.
[8] 1913 S. C. 213.
[9] [1909] A. C. 229.
[10] (1897) 25 R. 7.
[11] (1897) 24 R. (H. L.) 44.
[12] Stevenson v. Corporation of Glasgow, 1908 S. C. 1034, *per* Lord Kinnear, at p. 1042 *et seq.*
[13] Latham v. R. Johnson & Nephew, Limited, [1913] 1 K. B. 398.
[14] Batchelor v. Fortescue, 11 Q. B. D. 474; Bolch v. Smith, (1862) 7 H. & N. 736; Holmes v. North-Eastern Railway Co., (1869) L. R., 4 Exch. 254, *affd.* (1871) L. R., 6 Exch. 123.

part of the station officials, and consequently no case for damages against the defenders had been established.[1]

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At advising on 30th January 1914,—

LORD SALVESEN.—[After dealing with the rule for a new trial]—There remains the bill of exceptions which was taken to the refusal of the presiding Judge to direct the jury in the following terms:—"That the deceased William Hall Tough was a licensee at the Waverley Station on the night in question, and the defenders are not responsible to him or his representatives for the consequences of the alleged negligence on the part of the defenders." That direction was perhaps not expressed as it ought to have been; but, as there was no question of the character in which the pursuer's husband was upon the platform, I think we are entitled to consider the question of law which the defenders undoubtedly sought to raise in this way. Their case, as I understand it, is that a person who neither is a passenger by train, nor has a legal invitation from the Railway Company, expressed or implied, to be upon the platform next to a train that is going to start, is a mere licensee, and must take all the risks that may arise from his being on the private premises on which he is permitted to be, except those that arise from malicious or deliberate wrongdoing on the part of the owner of the premises or those for whom the owner is responsible. It will be observed that, in this broad statement of what the defenders maintain, they include casual acts of negligence committed by the owner of the premises, or his servants for whom he is responsible, to the injury of the licensee.

We had a very forcible argument from Mr Cooper upon this point, which he regards—and I think rightly regards—as one of great general importance to railway companies; and I am disposed to accept at least one of the propositions which he laid down. I think the licensee does take the risk of the condition in which the premises are, subject again to the qualification that the peril from which he suffers was not a concealed peril of which the owner was aware, but of which the licensee was ignorant. There are many illustrations of this proposition. I need not refer to any of the special cases, because they are all examined in two very learned judgments by English Judges in the case of *Latham* v. *R. Johnson & Nephew, Limited*,[2] which was decided only last year. The doctrine laid down in that case seems to me to be exactly that which has been recognised in various Scottish cases, some of which were referred to by Lord Justice Hamilton in the elaborate opinion which he delivered. But the case of *Latham*[2] was not a case which raised any question of negligence on the part of the servants of the owner of the premises. It was a case where a child had been injured by playing among a heap of stones on a piece of waste ground, which the owners permitted members of the general public to use for their own purposes. It did not therefore raise the ques-

[1] With regard to the alleged fault of the defenders' servants, the following cases were referred to:—Toal v. North British Railway Co., 1908 S. C. (H. L.) 29; Metropolitan Railway Co. v. Jackson, (1877) 3 App. Cas. 193; Adams v. Lancashire and Yorkshire Railway Co., (1869) L. R., 4 C. P. 739.

[2] [1913] 1 K. B. 398.

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tion with which we are here concerned, that question being—Does the licensee take the risk of negligence, whether of omission or commission, by the servants of the owners of the premises on which he is permitted to go?

I pause here to say that there is no doubt that the pursuer's husband was a licensee in the sense in which that word is used in the English authorities. On this particular occasion there was a barrier erected at the entrance of the platform where the tickets of passengers were checked, and no one could go upon the platform at all without the consent of the clerk who was checking the tickets. The object of that checking was to avoid the necessity in a crowded train on a Saturday night of the third class passengers' tickets being checked inside the carriages. What happened was that when Tough went down with his two friends their tickets were checked, and he then asked the clerk if he might be allowed to pass on to the platform along with them to see them off; the clerk nodded, and he thereupon went on to the platform. That is a typical case of a man being expressly permitted to go on to premises from which he could have been excluded if the owner had desired so to exclude him; so that there is no doubt that the law in regard to licensees, whatever it may be, applies to the case of this man Tough; because in no sense can it be said that he was on the platform by invitation, nor had he any contract with the railway company which entitled him to special consideration at their hands.

The point of real interest and importance in the case is then—Does such a licensee take the risk of the negligence of the servants of the owner of the premises? In my opinion he does not do so, and I think there is no authority in which the contrary proposition has been laid down. I take, by way of illustration, the case of a man who is permitted to go upon the avenue to a gentleman's country house. Undoubtedly he takes the risk of there being defects in the road—whether they are at the side of the road or in the condition of the roadway. What is good enough for the owner is good enough for the licensee, and, if the owner is content to take those risks for himself, the licensee cannot exact any special care or protection on the part of the owner. I make these observations, of course, subject to what I have already said, that there must be nothing of the nature of a trap or concealed risk known to the owner but unknown to the licensee, and of which it was the duty of the owner to warn the licensee. But, then, does the licensee take the risk, for instance, of the coachman of the owner of the avenue negligently driving him down? I think the state of the law would be very extraordinary if that were so. Take a case which is more analogous to the present. Suppose one of the porters in a railway station in driving his barrow of luggage along the platform negligently ran it against a person standing on the platform: it was admitted, as I understand, by Mr Cooper, that if he were a person who was about to travel by train he would have a good action against the railway company for such negligence on the part of their servant; but his contention was that the licensee had no claim at all, but must take, as a condition of the permission that is granted to him of being on the premises at all, all the risks that may arise from the negligence, however crass, on the part of those whom the owner has put in charge of the premises. I am quite unable so to hold.

I do not think that there are any of the cases cited which really create any difficulty except perhaps the case of *Batchelor* v. *Fortescue*,[1] and the case of *Ivay* v. *Hedges*[2] there referred to. In *Ivay* v. *Hedges*[2] the plaintiff was permitted to use the roof of a house for drying linen. There was a defect in a rail on this roof, of which the owner of the roof was aware but the plaintiff was ignorant. The plaintiff slipped upon the roof when he was on the point of carrying linen to hang over the rail, and owing to the defect in the rail he slipped through it and fell to the ground and was severely injured. It was held that the owner of the roof was not liable to the plaintiff in damages. Now I quite understand that decision, and I think it was a perfectly sound decision if the defect in the rail was a patent defect. If, for instance, one of the posts of the rail was missing then undoubtedly the licensee had the same knowledge as the owner and could not complain of his meeting with an accident which resulted from a patent defect, of which he took the risk when he went upon the roof to hang up the clothes. But if, on the other hand, it was a concealed risk, then I rather think that the other class of case might possibly apply, of which *Indermaur* v. *Dames*[3] is a good example. But the case does not disclose, so far as I can see, whether the risk was open or concealed; if it were an open risk arising from a patent defect the decision is in accordance with the other authorities. The other case which I think raises some difficulty is the case of *Batchelor*,[1] to which Mr Cooper attached great importance. I am free to confess that some of the observations of the learned Judges who decided that case seem to me to go beyond anything that had been previously laid down, and to run counter to subsequent decisions; and I notice that Mr Beven in his book on Negligence takes the same view and comments adversely upon certain observations of the Judges in that case. I am bound to say here again that one does not get sufficiently detailed facts to know whether the decision itself was not precisely in accordance with the law as it has been laid down in other cases, although some of the observations in the opinions undoubtedly went beyond anything that had been previously laid down. If the watchman, who was injured in that case by what the Court of Appeal thought might be negligence of the defenders' servants, was unseen by them in the position from which he was watching their operations, then the case is quite in accordance with precedents. But if, on the other hand, he was observed by them and they negligently caused him injury in the course of their operations, then I should respectfully doubt whether that decision is in accordance with the law which has been administered in this Court and also I think in England.

But we are relieved entirely from considering the observations in *Batchelor's* case,[1] because of the case of *Thatcher* v. *Great Western Railway Company*,[4] in the decision of which Lord Justice Lopes, who was the Judge who directed the jury in *Batchelor's* case,[1] took part. That case was precisely on all fours with the present, because not merely was the

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[1] 11 Q. B. D. 474.
[2] (1882) 9 Q. B. D. 80.
[3] (1866) L. R., 1 C. P. 274, *aff.* (1867) L. R., 2 C. P. 311.
[4] 10 T. L. R. 13.

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cause of the accident the same, but the man who was injured was a licensee of the same character as the pursuer's husband in this case. He was a person who had accompanied some friends to the station, was not intending to travel by the train, had no express invitation, but had gone on to the platform just to see his friends off, and was injured in precisely the same way as that in which the pursuer's husband met his death. In those circumstances I think the case of *Thatcher*[1] is conclusive. It has never been commented upon, far less overruled. I notice it was not even cited in the case of *Toal* v. *North British Railway Company*,[2] and one may conjecture that if *Thatcher's* case[1] had been cited to the First Division their judgment might not have been the same; they might have been disposed to have allowed inquiry, as the House of Lords eventually did. For my own part I think *Thatcher's* case[1] was well decided. It is, of course, not binding upon us; but I think it is in accordance with law and with the common sense of the matter. We do not recognise that a licensee takes every risk to which he may be exposed on the premises through overt acts of negligence or through negligent omissions which may result in injury to him, such negligence being the negligence of persons for whom the owner of the premises assumes responsibility.

I have therefore no difficulty in coming to the conclusion that we must refuse the bill of exceptions; and that on the other part of the case we must discharge the rule.

Lord Guthrie.—[After dealing with the rule for a new trial]—The question of the defenders' liability for fault of their servants resulting in injury to licensees on their property, would, if decided in the defenders' favour, have far-reaching consequences for the travelling public. According to the defenders, railway companies are liable for such injury at stations where persons seeing friends off at a platform are bound to take a penny ticket, but at stations where there are no such regulations railway companies, if liable at all beyond the obligation not to treat the licensee as a trespasser, are liable only for injuries maliciously inflicted by their servants in so far as these are inflicted by the servants in the course of their duty. The only direct authority where the circumstances were fairly comparable with those in the present case is *Thatcher* v. *Great Western Railway Company*,[1] and it is admitted that if that case, which has not been adversely criticised, was well decided, the defenders must fail. I am of opinion that the case was well decided, and I do not think that any of the opinions quoted by Mr Cooper from other cases prior and subsequent are inconsistent with the result arrived at in *Thatcher's* case.[1] I assume four elements in this case—and I give no opinion as to the result if any of these were absent—first, that there was a failure in duty on the part of the defenders' servants, namely, their failure fully to shut the compartment door, or to see that it was fully shut, which resulted, through the subsequent opening of the door, in injury to the deceased; second, that neither this original failure in duty nor the consequent opening of the door was patent to the deceased; third, that this act was

[1] 10 T. L. R. 13. [2] 1908 S. C. (H. L.) 29.

not an ordinary incident in the conduct of the defenders' business of which the deceased took the risk; and fourth, that the original act, or at least the consequent opening of the door, occurred after the deceased obtained his licence from the collector to go on the platform.

Lord Guthrie.

Mr Cooper relied on the opinions expressed in the case of *Latham*,[1] where Lord Justice Farwell and Lord Justice Hamilton deal with the case of a licensee as distinguished, on the one hand from a trespasser, and on the other hand from a person who has been invited to the premises and a person under contract. The circumstances of that case were entirely different from those with which we are here concerned, and I do not think that the general principles of law enunciated by these learned Judges support Mr Cooper's contention when applied to the facts of the present case. I refer particularly to the following passage in Lord Justice Farwell's opinion at page 405:—"There are, however, the following exceptions to the freedom from liability, namely . . . (2) 'concealed trap,' that is something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee. 'A person coming on lands by licence has a right to suppose that the person who gives the licence . . . will not do anything which will cause him an injury'—per Willes, J., *Corby* v. *Hill*."[2] It appears to me that this case does not come under the general rule as to the liability of licensees by contrast with persons under contract, but under the exception noted by Lord Justice Farwell, namely, "something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous, and without giving notice to the licensee." On the whole matter I think the verdict must stand.

Lord Ormidale.—[After dealing with the rule for a new trial]—In regard to the question of law raised by the bill of exceptions, Mr Cooper admitted that the case of *Thatcher* v. *The Great Western Railway Company*[3] was an authority absolutely against the proposition for which he contended. It seems to me that he has furnished us with no reason for supposing that the law laid down in 1893 in *Thatcher*[3] is not good law, or that it conflicts with any decision of more recent date. The law laid down by the House of Lords in the *Perth Station* case[4] in 1897 was, Lord Macnaghten said, not new law but had been the law of England for forty years. It is said that *Thatcher*[3] cannot stand along with cases like *Batchelor* v. *Fortescue*,[5] which has been approved in more recent cases. It seems to me that—so far as I could gather them—the circumstances in *Batchelor*[5] were somewhat special, and at any rate that the accident occurred in the ordinary and normal course of the operations which were being conducted by the defenders' servants, and further that the accident was not due to any negligence on the part of these workmen. No doubt the expressions used by the Master of the Rolls are very general, but as the Master of the Rolls as well as Mr Justice Lopes, before whom

[1] [1913] 1 K. B. 398.
[2] (1858) 27 L. J., C. P. 318.
[3] 10 T. L. R. 13.
[4] Perth General Station Committee v. Ross, 24 R. (H. L.) 44.
[5] 11 Q. B. D. 474.

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with a jury the case had been tried, were both members of the Court of Appeal which decided *Thatcher's*[1] case only ten years later, it must be assumed that in the opinion of these eminent Judges the law laid down in *Thatcher*[1] did not in the least conflict with the decision in *Batchelor*.[2]

In *Latham's* case,[3] *Batchelor*[2] is cited along with other cases as establishing this proposition, that the rule as to licensees is that they must take the premises as they find them apart from concealed sources of danger—where dangers are obvious they run the risk of them. Lord Justice Farwell in the same case defines concealed trap, which is one of the exceptions to freedom from liability in the case of a licensee, as follows:—"something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee," and he quotes with approval the following dictum of Mr Justice Willes in *Corby* v. *Hill*,[4]—"A person coming on lands by licence has a right to suppose that the person who gives the licence . . . will not do anything which will cause him an injury."

Now it seems to me that the present case and *Thatcher's*[1] case fall within the principle underlying the exceptions to the freedom from liability to which the dicta I have quoted refer. The pursuer met with his injuries not from any seen or existing danger or risk on the premises which he was bound to take as he found them, but because of something which the defenders did of an extraordinary or abnormal nature. Mr Cooper would not admit that the starting of a passenger train with an open door was a normal occurrence at the Waverley Station, and there is no proof that it is. Assuming, therefore, that the pursuer on getting permission to enter the section of the defenders' premises from which the 9.5 train to Stirling was to start was bound to take the risk of all obvious dangers, that he had to face all the accustomed perils of seeing friends off by a train, that he had to take care of himself, and that he had no right to look to the defenders for protection from the risks attendant on the normal execution of such an operation, still he was also entitled to rely on the defenders and their servants refraining from negligently doing anything novel or unusual which was calculated to injure him, as the starting of a train with an open door was. To that extent they were bound to take reasonable care of him. I think, therefore, that the bill of exceptions should be refused.

Lord Justice-Clerk.—It has not been reasonably possible for me in the circumstances to prepare a separate opinion in this case. The view I take of the case is the same as that of your Lordships, and I so expressed myself to your Lordships yesterday. I have listened with great attention to the opinion which Lord Salvesen has delivered, and I desire to express my entire concurrence in it. The rule will be discharged, and the bill of exceptions refused.

The Court disallowed the exception.

J. D. Rutherford, W.S.—James Watson, S.S.C.—Agents.

[1] 10 T. L. R. 13.
[2] 11 Q. B. D. 474.
[3] [1913] 1 K. B. 398.
[4] 27 L. J., C. P. 318.

SAMUEL SUZOR, Pursuer (Respondent).—*Cooper, K.C.—Paton.*
SYDNEY BUCKINGHAM, Defender (Reclaimer).—*Sol.-Gen. Morison—D. P. Fleming.*

No. 40.
Feb. 3, 1914.

Suzor v. Buckingham.

Reparation—Slander—Accusation of dishonesty—Privilege—Malice—Sufficiency of averments of malice.

A cashier, who had been dismissed from his employment, brought an action of damages for slander against the manager of the business. The pursuer averred that, having discovered shortages in the cash, he reported these to his employer; that the same afternoon, in the presence of his employer, the defender charged him with having taken the money, and the same evening dismissed him from the employment. Two days later the defender called on him at his house and, in the presence of his wife, said to him, "I have come to ask for explanations; you must have taken the money." He further averred that the defender, who had formerly been very friendly, had for some months entirely changed in his demeanour; that he had become jealous of the pursuer and desired to undermine his influence with his employer and to find an excuse for getting him dismissed; that he made these accusations, which inquiry would have shown to be baseless, without making any investigation and with the object of gratifying the *animus* he had conceived against the pursuer.

Held that, on the pursuer's averments, the occasion when the slander was uttered in the pursuer's house was not privileged; and issue without malice *allowed*.

Held further that, if it should appear at the trial that the occasion was privileged and consequently that malice must be established, the pursuer's record contained relevant averments of malice.

1ST DIVISION. Lord Dewar.

On 26th August 1913 Samuel Suzor, formerly in the employment of Messrs M'Lachlan & Brown, milliners, Stirling, brought an action concluding for £500 as damages for slander against Sydney Buckingham, manager of that firm.

The pursuer averred:—(Cond. 1) "The pursuer was for several years cashier and bookkeeper to Messrs M'Lachlan, Pepper, & Company, Limited, Glasgow, until that company was wound up in 1909. He also acted as private secretary to the late Andrew M'Lachlan until his death in 1910, and assisted in the winding-up of his affairs after his death. On the invitation of Mr John M'Lachlan, a brother of the said deceased Andrew M'Lachlan, the pursuer in February 1911 entered the employment of Messrs M'Lachlan & Brown, milliners, &c., at 8-12 Murray Place, Stirling, as bookkeeper. The said John M'Lachlan also carries on a tailor and clothier's business in Stirling, at 59-63 Murray Place there. Said last-mentioned business is under the management of the defender. The pursuer and defender were on friendly and intimate terms till about the beginning of 1913. They visited regularly and frequently at each other's houses, and when the defender called at the millinery department, he made a point of chatting with the pursuer. In or about January 1913 the defender's demeanour towards pursuer entirely changed. He discontinued visiting at the pursuer's house, avoided pursuer, and only spoke to him when he had occasion in connection with business matters. The pursuer believes and avers that the defender became jealous of the confidence that the said John M'Lachlan reposed in the pursuer, and conceived a scheme in his own interest to undermine such confidence." (Cond. 2) "The pursuer's duties consisted at the first of writing up

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the books of the business at 8-12 Murray Place, Stirling, including the said John M'Lachlan's private cash-book. About six months later the pursuer was transferred to the counting-house, to take in addition a general supervision of the counting-house department of the business. In connection therewith the pursuer had to meet travellers and check cash with the return slips and record sheets. The pursuer did not handle the cash. The cash was in charge of Miss Grace M'Donald." (Cond. 3) "At the close of business each day the said Grace M'Donald emptied the till into bags. These bags were securely fastened by her, and were handed by her to the pursuer who lodged them in the safe overnight. The bags were taken from the safe the following morning and returned unopened to the said Grace M'Donald, whose duty it was to count the money and check same with the record sheets, and the disbursement books, and receipts. There were frequently discrepancies between the cash and the returns in the record sheet. This was inevitable in a business of the kind. These discrepancies which might be shortages or surpluses were reported by the said Grace M'Donald to pursuer, and, when they could not be accounted for, the pursuer noted them on the record sheets, and in the exercise of the discretion conferred upon him by the said John M'Lachlan, placed shortages in cash against returns from the tea-room department of the business, and credited said department with surpluses when these occurred. These deductions and additions were apparent. When unexplained shortages occurred at close intervals, the pursuer reported same to the said John M'Lachlan. Said discrepancies all occurred and were all ascertained before the returns were made to pursuer." (Cond. 4) "On the morning of Thursday, 3rd July 1913, the pursuer reported a shortage to the said John M'Lachlan and advised him to instruct the said Grace M'Donald to exercise more care. In the afternoon of said 3rd July 1913, the said John M'Lachlan requested pursuer to attend upon him in his private room. This the pursuer did. The defender was in the room with Mr M'Lachlan. Mr M'Lachlan then stated that he had spoken to the said Grace M'Donald, who had said that she could not help 'shorts' and 'overs.' Addressing pursuer, Mr M'Lachlan said, 'It is most irregular. Where has the money gone to? You have taken the money and it is only your pride that keeps you from owning it.' The defender there and then without any investigation, without occasion, and without being asked by the said John M'Lachlan for his opinion, and in the presence and hearing of the said John M'Lachlan, addressing the pursuer, interposed and stated that 'You are responsible for the shortages, and have taken the money and defrauded Mr M'Lachlan,' or used words of a similar import and effect. On the evening of the same day the defender, professing to act on the instructions of the said John M'Lachlan, dismissed pursuer and took possession of the keys in his charge. . . . The pursuer admits that he made alterations on the tea-room column of the record sheets when 'shorts' or 'overs' were of small amount, so as to square the slips with the actual cash in the till. These alterations were apparent, and were made, as the defender knew, or ought to have known, to make up for unexplained shortages or surpluses of cash." (Cond. 5) "On Saturday, 5th July 1913, defender called at pursuer's house and showed him three cash balance cards for April, May, and June 1913, which disclosed shortages. The defender there and then in the hearing of pursuer's wife, addressing pursuer, stated to the pursuer, 'I

have come to ask you for explanations; you must have taken the money,' meaning the money represented by said shortages. The defender further asked the pursuer to admit having done so, and said that 'if you don't do so the matter will be put into lawyers' hands.' Defender persisted in said accusation, notwithstanding pursuer's denials and protests and offer to give full explanations to Mr M'Lachlan. Shortages and surpluses occurred frequently, both before and after the pursuer entered the employment of the said John M'Lachlan. This was well known, and the defender knew it to be inevitable in a business of the kind. In the daily cash balance cards there was a special column for 'shorts' and another special column for 'overs,' and this card was open on the cash girl's desk, and was daily posted by her." (Cond. 6) "The said statements made by the defender of and concerning the pursuer were false and calumnious, and were made by him recklessly, maliciously, and without probable or any cause. The defender knew that pursuer did not handle the cash. Had the defender made the slightest inquiry he would have found, as was the fact, that the pursuer did not handle the cash and that the shortages occurred and were ascertained before the returns were reported to pursuer by the said Grace M'Donald, and that there was no ground whatever for said accusations. For several months before July 1913, the defender's attitude towards the pursuer had changed and was distinctly hostile. The defender had been a frequent visitor at the pursuer's house, but he ceased to call and took every opportunity of showing ill-will to the pursuer. The defender urged on Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting the pursuer dismissed. Said accusations were made by the defender maliciously, to gratify the *animus* he had conceived towards the pursuer."

The defender pleaded, *inter alia*;—(1) The pursuer's statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The occasions in question having being privileged, and there being no relevant averment of malice, the action should be dismissed.

The pursuer proposed two issues, one referring to the first and the other to the second occasion of alleged slander. The issue referring to the second occasion was as follows:—"Whether on or about the 5th day of July 1913, and within the pursuer's dwelling-house at 28 Union Street, Stirling, the defender in the presence and hearing of the pursuer and of Mrs Suzor his wife, falsely and calumniously stated of and concerning the pursuer that pursuer had dishonestly taken his employer's money, or used words of the like import and effect, meaning thereby that pursuer was dishonest and had been guilty of theft, to the loss, injury, and damage of the pursuer?"

On 16th December 1913 the Lord Ordinary (Dewar) disallowed the first, but allowed the second issue.*

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* "OPINION.—The averments on which this action is founded are very similar to those in the action brought by the present pursuer against John M'Lachlan, with which I have already dealt (*vide* footnote, *infra*, p. 309). The defender is manager to Messrs M'Lachlan & Brown, and was present at the interview which the pursuer had with Mr M'Lachlan on 3rd July 1913. The pursuer complains that on that occasion the defender said:—'You are responsible for the shortages, and have taken the money and defrauded Mr M'Lachlan,' or used some such words. And two days afterwards he called

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The defender reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Skerrington, and Lord Hunter) on 17th January 1914. At the hearing the pursuer acquiesced in the disallowance of the first issue.

Argued for the reclaimer;—The Lord Ordinary was right in holding that the first occasion on which the alleged slander was uttered was privileged, but was wrong in holding that the second occasion was not. The second occasion was merely a continuation of the same course of investigation, and was just as much privileged as the first. Even if the pursuer was in fact no longer in the employment of M'Lachlan & Brown that circumstance did not deprive the occasion of privilege, because the defender still owed a duty to his master and to the other employees to investigate the matter of suspected crime, and all communications made in the prosecution of such an inquiry were privileged.[1] Nor did the presence on that occasion of a third party, viz., the pursuer's wife, destroy the privilege.[2] The pursuer knew what the defender had called about, and could have asked his wife to leave them if he desired her to do so, but as he allowed her to remain in the room her presence was his own contrivance, and the defender could not be prejudiced thereby.[3] The occasion, then, being privi-

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at the pursuer's house and showed him three cash balance cards, and said,—'I have come to ask you for explanations; you must have taken the money,' meaning the money represented by the shortages. And it is stated that he asked the pursuer to admit having done so, and said that 'If you don't do so the matter will be put into lawyers' hands.'

"The pursuer proposes two issues, the first founded on the statement alleged to have been made on the 3rd July 1913, and the second on the statement made on the 5th July.

"I am of opinion that the first issue should be disallowed. When the statement complained of was made, the defender had been called into his employer's private room to help to discover the reason for the shortage in the firm's cash. He was the manager vested with authority over the employees, and responsible for the proper conduct of the business. He had, I think, a right and a duty to speak freely to the employees on all that concerned the firm's affairs. The occasion on which he spoke was therefore privileged, for he was presumably acting in the firm's interests, in the discharge of his duty, and there is nothing on record to suggest that he was actuated by any improper motive.

"The second issue, however, is in a different position. The defender went to the pursuer's house after he had been dismissed, and was therefore no longer subject to the defender's authority, and it is said accused him of dishonesty in his wife's presence. It may be that there was some special reason for this visit and that the question of privilege may arise at the trial; but on the pursuer's statement of the facts—and at this stage of the case I can only consider that—it does not appear to me that the defender, who had already expressed his opinion on the matter, had any right or duty to follow the pursuer to his home and reiterate his opinion. I am therefore of opinion that the occasion was not privileged, and that the issue should be allowed."

[1] Fowler v. Homer, (1812) 3 Campbell, 294, Lord Ellenborough, at p. 295; Collins v. Cooper, (1902) 19 T. L. R. 118, Collins, M.R., at p. 119; Odgers on Libel and Slander, (5th ed.) 273.

[2] Collins v. Cooper, 19 T. L. R. 118, at p. 119.

[3] Toogood v. Spyring, (1834) 1 C. M. & R. 181, Parke, B, at p. 193; Jones v. Thomas, (1885) 53 L. T. 678; Taylor v. Hawkins, (1851) 16 A. & E. 308; Odgers on Libel, (5th ed.) 295.

leged malice must be put in issue, and there were no averments here sufficient to substantiate a charge of malice. The allegations of a change of attitude were of the vaguest description, and were quite insufficient for such a purpose; they could be averred in every action by a dismissed employee. Nor were there any averments of intemperance of language such as to infer malice. The language alleged was entirely appropriate to the duties the defender had to perform, viz., to investigate, as manager of a business, charges of dishonesty against the employees.

Argued for the respondent;—The defender did not deny that the words complained of were uttered, and he did not maintain that they were true, therefore his sole defence rested on his plea of privilege. Although the pursuer did not now press for the allowance of the first issue he did not admit that the Lord Ordinary was right in holding that the occasion it referred to was privileged. But with regard to the occasion dealt with in the second issue it was quite clear that no case of privilege arose. The defender was not manager of the pursuer's department, he was merely manager of the tailoring department. At the time of the accusation referred to in the second issue the pursuer had been dismissed from his employment, and the accusation was not made in the course of any "investigation" into the conduct of employees. It was a gratuitous and wanton accusation of dishonesty uttered after the defender and his employer had made up their minds on the matter, and had made up their minds without any due inquiry into the circumstances. It was therefore clearly not privileged. But even if it could be held to be privileged the pursuer had sufficiently averred malice. This was not a charge made to officers of law, and in the circumstances a general averment of malice was all that was required.[1] But if specific averments were necessary the pursuer's averments as to the attitude of the defender were sufficient, if proved, to entitle a jury to bring in a finding of malice.[2]

At advising on 3rd February 1914,—

Lord President.—[After summarising the pursuer's averments]—It is conceded that the expressions used on both occasions were defamatory, but the defender pleads that, on the face of the condescendence, it is plain that both occasions were privileged.

The Lord Ordinary, holding that the averments of the pursuer disclosed a case of privilege on the first occasion, disallowed the issue proposed relative to the defamatory statement then uttered; but held that the defamatory expressions used on the second occasion were not, as disclosed in the pursuer's averments, employed on a privileged occasion, and, holding further that there was nothing on the record to suggest that the defender was actuated by any improper motive, he has allowed the second issue. The pursuer acquiesces in the judgment of the Lord Ordinary with regard to the first issue but not in the whole of the reasoning on which his Lordship's judgment depended. The defender, on the other hand, contends that the second issue should follow the fate of the first.

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[1] Ingram v. Russell, 20 R. 771, Lord President Robertson, at p. 777.

[2] Laidlaw v. Gunn, (1890) 17 R. 394; Dinnie v. Hengler, 1910 S. C. 4, Lord Low, at p. 7.

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Ld. President.

I am of opinion that the course taken by the Lord Ordinary here was correct. No doubt the defender alleges that the motive which prompted the second interview and the object of the defender's call was to follow forth the investigation which had been set afoot at the first interview, that the second stands closely related to the first, indeed that both really formed one continuous interview, and that this is plain from the opening words alleged to have been used by the defender at the second interview —"I have come to ask you for explanations,"—and that the reference to lawyers clearly reveals that the defender came on his master's instructions on his master's business, and not on his own initiative.

Now, all that may probably be true, but I cannot say that, on the face of the record, it clearly is so, for the pursuer avers that no investigations of any kind were undertaken at the first interview, that there were therefore none to be followed forth, that on the contrary the defender at the first interview, without any investigation, without occasion, and without being asked by the employer for his opinion, volunteered the words which I have just read, and that on the evening of the same day the defender, professing to act on the instructions of the employer, dismissed the pursuer and took possession of the keys in his charge; and that, accordingly, at the date of the second interview, the relation of master and servant had terminated, and that there was no authority and no control exercisable by the defender over the pursuer, and no relation in which a privileged utterance could be made. Further, the pursuer does not admit, much less does he aver, that the defender on the second occasion came on the master's business. On the contrary, on the pursuer's averments it would appear that the defender came to the pursuer's house on the second occasion on his own initiative.

Accordingly, I am of opinion that the Lord Ordinary was right in allowing an issue, and in allowing an issue without malice being inserted. But inasmuch as his Lordship has expressed the opinion that there was nothing on the record to suggest that the defender was actuated by any improper motive, the defender would be entitled straightway to claim a verdict in his favour if in the course of the trial it appears that the occasion was privileged. It therefore becomes necessary for us to consider and decide whether or no the averments made by the pursuer on this record are relevant and sufficient, if proved, to displace the privilege and set up a case of malice. I am of opinion, differing from the Lord Ordinary, that they are.

The pursuer undertakes to demonstrate that, on the second occasion, the defender was prompted not by a proper motive, but by an improper motive, in using the expressions which he did. He alleges that in the commencement of the year a total change took place in the demeanour of the defender towards the pursuer, though they had hitherto been close friends; that the defender had become jealous of the confidence which the employer reposed in the pursuer; that he had insisted on his being dismissed, was eager that he should be dismissed from the service, and that he contrived a scheme for his undoing; that he trumped up (for no other expression will serve) these accusations against the pursuer in order to manufacture plausible grounds for his dismissal from the service

of M'Lachlan & Brown; that he knew these accusations were unfounded; that he knew the shortages had taken place in the cash before it reached the pursuer at all; that the slightest investigation would have shown that the accusations were unfounded; that the means of investigation were at his hand; and that he declined to avail himself of them.

Now these averments may be difficult to prove, but if proved I am of opinion that they are sufficient to entitle a jury to infer that the defender, on the occasion in question, was actuated not by the honest motive which the law imputes to a man who uses defamatory expressions on a privileged occasion, but by personal jealousy of the pursuer and a malicious desire to secure his dismissal from the firm's service. On these grounds, and holding these views, I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

Lord Skerrington.—In this action of damages by the pursuer, Mr Suzor, against his former fellow-employee, Mr Buckingham, the pursuer proposed two issues, the first of which was refused, and the second of which was granted, by the Lord Ordinary. The question which we have to decide is whether this judgment is well founded. The pursuer acquiesces in the disallowance of his first issue, but the defender maintains that the second issue also should be disallowed upon the same grounds, viz., that the occasion was one of privilege, and that the pursuer has not relevantly averred malice. In my judgment the Lord Ordinary came to a proper conclusion when he decided that it is not clear upon the face of the pursuer's averments that the occasion referred to in the second issue was privileged. The defender has himself to blame for the result. If he had made an articulate statement of facts he would probably have succeeded in eliciting from the pursuer admissions which would have shown that the occasion was a privileged one.

At the trial it may be proved that on the occasion libelled the defender had express or implied instructions to represent his employer, Mr M'Lachlan; and it may also be proved that the occasion was one on which Mr M'Lachlan, if he had himself been present, would have been privileged to speak freely to the pursuer. The Lord Ordinary says that there is nothing upon the record to suggest that the defender was actuated by any improper motive when he charged the pursuer with dishonesty. It would follow that if the trial Judge should rule that the occasion was privileged a verdict would have to be returned for the defender. I am, however, of opinion that the pursuer has made averments which would entitle a jury, if they see fit to do so, to infer malice on the part of the defender. He ought therefore to be allowed to prove these averments in the event of the Judge at the trial ruling that the occasion was privileged. The pursuer avers that the defender, who had previously been upon friendly terms with him, suddenly became unfriendly, and he attributes this conduct to jealousy on the part of the defender. He further avers that the defender had tried to induce Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed, and that the defender accordingly refrained from making inquiries which would have satisfied him of the pursuer's innocence. From these circumstances, if

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At the trial it may be proved that on the occasion libelled the defender had express or implied instructions to represent his employer, Mr M'Lachlan; and it may also be proved that the occasion was one on which Mr M'Lachlan, if he had himself been present, would have been privileged to speak freely to the pursuer. The Lord Ordinary says that there is nothing upon the record to suggest that the defender was actuated by any improper motive when he charged the pursuer with dishonesty. It would follow that if the trial Judge should rule that the occasion was privileged a verdict would have to be returned for the defender. I am, however, of opinion that the pursuer has made averments which would entitle a jury, if they see fit to do so, to infer malice on the part of the defender. He ought therefore to be allowed to prove these averments in the event of the Judge at the trial ruling that the occasion was privileged. The pursuer avers that the defender, who had previously been upon friendly terms with him, suddenly became unfriendly, and he attributes this conduct to jealousy on the part of the defender. He further avers that the defender had tried to induce Mr M'Lachlan to get rid of the pursuer, and was anxious to find an excuse for getting him dismissed, and that the defender accordingly refrained from making inquiries which would have satisfied him of the pursuer's innocence. From these circumstances, if

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proved, a jury might legitimately infer malice on the part of the defender. For the reasons stated by me in the other action by the same pursuer[1] I think that he might have contented himself with a general averment of malice.

LORD HUNTER concurred.

THE COURT adhered.

MAXWELL, GILL, & PRINGLE, W.S.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

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SAMUEL SUZOR, Pursuer (Reclaimer).—*Cooper, K.C.—Paton.*
JOHN M'LACHLAN, Defender (Respondent).—*Sol.-Gen. Morison—D. P. Fleming.*

Reparation — Slander — Accusation of dishonesty — Privilege — Malice — Sufficiency of averments of malice—Master and Servant.

A cashier, who had been dismissed from his employment, brought an action of damages for slander against his employer, for having, on two occasions (which were admittedly privileged), accused him of misappropriating money, the proposed issue being whether the defender had made these accusations "falsely, calumniously, and maliciously." The pursuer averred that the defender, with whom he had previously been on friendly terms, had conceived an *animus* against him, and had, by a series of petty incidents which he detailed, endeavoured to annoy him and to induce him voluntarily to leave the defender's service; and that having failed in this purpose the defender had taken steps to dismiss him by making the false accusations complained of. He further averred that these accusations had been made and repeated by the defender in the knowledge that they were false, without inquiry and without listening to the explanation of his innocence which the pursuer had offered, and would have been able, to give.

Held (*rev.* judgment of Lord Dewar) that the pursuer had averred facts and circumstances relevant to instruct malice on the part of the defender.

The general rule laid down by Lord President Kinross in *Macdonald* v. *M'Coll*, (1901) 3 F. 1082, and followed in subsequent decisions, as to the necessity in cases of privilege of averring facts and circumstances from which malice can be inferred, *doubted per* Lord Skerrington; and *opinion* that in certain cases of privilege a general averment of malice is sufficient.

1ST DIVISION. Lord Dewar.

ON 26th August 1913, Samuel Suzor, formerly in the employment of Messrs M'Lachlan & Brown, milliners, Stirling, brought an action concluding for £1000 as damages for slander against John M'Lachlan, a partner of that firm.

The pursuer made averments upon record regarding his employment by the defender's firm, and his duties in that employment, similar to those in conds. 1-3 in the action of *Suzor* v. *Buckingham*, which are quoted *supra*, on pp. 299-300.

The pursuer further averred;—(Cond. 5) "On the morning of Thursday, 3rd July 1913, the pursuer reported a shortage in cash to the defender, and advised the defender to instruct the said Grace

[1] *Infra*, pp. 314 *et seq.*

M'Donald to be more careful. In the afternoon of said 3rd July 1913 the defender requested pursuer to attend upon him in his private room within the business premises at 8-12 Murray Place, Stirling. This the pursuer did. The defender then informed pursuer that he had spoken to the said Grace M'Donald, who had explained that she could not help 'shorts' and 'overs,' as she was not the only person who had access to the till, and addressing pursuer said, 'It is most irregular. Where has the money gone? You have taken the money, and it is your pride that keeps you from owning it,' or used words of the like import and effect, meaning thereby and intending to convey to the pursuer that he had been guilty of dishonestly appropriating the money which was unaccounted for. This the defender did in the presence and hearing of Sydney Buckingham, residing at No. 10 Park Place, Stirling, the manager of the tailor and clothiers branch of the business at 59-63 Murray Place, Stirling. On the evening of the same day pursuer was dismissed. . . . Explained that if the defender had allowed the pursuer to explain how 'shorts' and 'overs' were dealt with he would have been able to give a satisfactory explanation of everything. The pursuer admits that the tea-room column of the record sheets was altered when 'shorts' and 'overs' were of small amount so as to square the slips with the actual cash in the till. An examination of the till slips showed this, and a comparison of the record sheets with the tea-room receipt book would have disclosed the amount of the discrepancies." (Cond. 6) "On Monday, 7th July 1913, in response to a letter from defender, the pursuer waited upon the defender in his private room. The pursuer then and there offered to give the defender the fullest information and explanations about shortages, but the defender declined to listen, and stated to the pursuer that he would listen to no explanation unless and until pursuer admitted that he had misappropriated money from the till. Addressing the pursuer the defender said, 'I will not listen to anything. It does not take two to see that you have taken the money. You must have taken the money. You have no character and have nothing to your name. It is only your pride that keeps you from owning it,' or used words of the like import and effect, and added that if pursuer did not admit having taken the money he would compel him to do so by having the books audited and the matter placed in lawyers' hands. These expressions were used by the defender to convey to the pursuer, and were intended by him to convey, that pursuer had dishonestly appropriated the defender's money. The pursuer protested his innocence and offered explanations, but the defender refused to hear him and still persisted in said unfounded accusations." (Cond. 7) "The said statements made on 3rd and 7th July 1913 by the defender of and concerning the pursuer were false and calumnious and were made by him recklessly, maliciously, and without probable or any cause. The defender knew that the pursuer did not handle the cash, and that the shortages occurred and were ascertained before the returns were reported to the pursuer by the said Grace M'Donald. Had the defender even listened to the explanations which pursuer tendered and inquired into the matter he would have found, as was the fact, that all the shortages occurred and were ascertained before the returns were reported to the pursuer by the said Grace M'Donald. Shortages had been inquired into on former occasions and the defender had himself been found at fault. There was no ground whatever for said accusations against pursuer,

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as defender well knew, and they were made by the defender maliciously and recklessly. The defender about the beginning of 1913 changed in his demeanour to pursuer, with whom up till then he had been on friendly and intimate terms. He adopted a guarded and suspicious attitude towards pursuer, and evinced unfriendly feelings towards him. He ceased to speak to the pursuer or to consult with him in the counting-house as he had previously done, and when he did speak to the pursuer he addressed him in a quarrelsome and fault-finding manner. The defender had conceived a quite unwarranted *animus* against the pursuer. At or about the same time the said Sydney Buckingham, who had been in the habit of visiting at the pursuer's house frequently, discontinued his visits and ceased to converse with the pursuer in the counting-house as he had done before. The pursuer believes and avers that the defender, to gratify his *animus* against the pursuer, made said statements maliciously for the purpose of wounding and injuring the pursuer. Further, in or about the end of the month of January 1913, the defender, without informing the pursuer, had arranged for painter work being executed at the premises on a Saturday afternoon. The pursuer left at his usual time on said Saturday after having arranged for the premises being closed up, and on the following Monday he was seriously upbraided by the defender for having been absent from the premises when the painters were there. The defender declined to listen to the pursuer's explanation that he had not been aware that the painters were to be there and had not known till Monday morning that they had been there. The defender then stated that he did not want any more obligation from the pursuer, and that he was to leave the premises on Saturdays at 1 P.M. Defender then instructed a Miss M'Kenzie from 'Mack's' Stores, Stirling, to attend at Murray Place on Saturdays to replace pursuer after 1 o'clock in seeing to the premises being closed up. A few days later in or about February 1913 the defender unwarrantably accused the pursuer of having entered in the cash-book a larger sum than had been paid to the buyers in respect of their visit to London, and demanded to know what had become of the difference. The sum so entered in the cash-book was £48. It was subsequently ascertained that that was the exact amount which the defender himself had paid said buyers, and which had been entered by him at the time in the scroll cash-book. Early in March 1913 the defender took exception to pursuer smoking a cigarette in the premises after business hours, and ordered him to stop doing so. Prior to this pursuer had smoked an occasional cigarette in the shop after business hours, and up till the end of 1912 had been repeatedly invited by defender to do so, and had been supplied with cigarettes by defender who himself smoked. All of these things were done by defender to wound and annoy the pursuer, and, if possible, to induce him voluntarily to leave defender's service. When the defender found that he could not get the pursuer to give up his situation, he took steps to dismiss him by making the false accusations against him before condescended on. The pursuer has in consequence of said unfounded accusations suffered and will continue to suffer greatly in his feelings and reputation, and his chances of securing and retaining responsible employment have been thereby greatly impaired, and his character has been blasted."

The defender pleaded, *inter alia*;—(1) The pursuer's statements being irrelevant and insufficient in law to support the conclusions of

the summons, the action should be dismissed. (3) The occasions in question having been privileged, and there being no relevant averment of malice, the action should be dismissed.

The pursuer proposed two issues for the trial of the cause dealing with the occasions on 3rd July and 7th July respectively. The issues were,—whether the defender "falsely, calumniously, and maliciously" addressed the pursuer in the terms condescended on, "meaning thereby that the pursuer had misappropriated money belonging to the defender."

By interlocutor dated 16th December 1913 the Lord Ordinary (Dewar) found that the averments of the pursuer were irrelevant to support the issues proposed by him, and dismissed the action.*

The pursuer reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Skerrington, and Lord Hunter) on 24th January 1914.

Argued for the reclaimer;—The Lord Ordinary was wrong in holding that the pursuer's averments were irrelevant. Granted that the pursuer was bound, in order to displace the privilege which admittedly existed, to aver and prove malice, there was ample material in this record from which, if proved, the jury might properly find that the defender was actuated by an improper or oblique motive. It was

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* "OPINION.—[After summarising the pursuer's averments]—The pursuer complains of these statements, which he avers falsely accused him of dishonesty, and he proposes two issues. He admits that the occasions on which the expressions complained of were used were privileged, and has consequently put malice in the issues.

"I am of opinion that the issues cannot be allowed. I think it is clear from the pursuer's own statement of the case that the defender, after investigation and inquiry, had reason to believe that the pursuer had taken the money. I assume that he was mistaken in this belief, and that the pursuer was innocent. Yet if the defender honestly believed that the pursuer was guilty, he was clearly privileged in telling him so. That indeed is admitted. But it is said that he was actuated by malice, and the pursuer sets forth a statement of facts from which he contends malice can be inferred. He says that about the beginning of 1913 the defender's demeanour to him changed. He became guarded and suspicious, quarrelsome and fault-finding. He upbraided the pursuer on one occasion because he had left the shop when all the employees were away and painters were in. On another occasion he 'took exception to pursuer smoking a cigarette in the premises after business hours, and ordered him to stop doing so.' I do not think that malice could reasonably be inferred from any or all of these things. There may have been very good reason for the change of demeanour, or it may have changed—as sometimes happens—without any reason at all. To cease visiting, or to find fault, is not evidence of malice; nor is it malicious to ask a servant to attend to his duty; and I can conceive many excellent reasons for stopping cigarette smoking in a milliner's shop. The impression I form from the pursuer's statement of facts is that the defender was at one time an exceptionally considerate and friendly master, and I do not think it is reasonable to infer that his change of demeanour sprang from malice. He appears to have performed the disagreeable duty in connection with the disappearances of cash with care and consideration. After investigation he invited the pursuer to his private room with no one present except the manager, and then told him in moderate terms the opinion at which he had arrived.

"On the whole matter I am of opinion that the issues should be disallowed and the action dismissed, with expenses."

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not necessary, in every case where privilege had to be displaced, to aver extrinsic facts in order to found a relevant case of malice; malice might quite properly be inferred from surrounding circumstances,[1] such as the violence or recklessness of the language used or charges made,[2] or from the failure of the defender to make inquiry into the truth of the charges he was making.[3] In the case of *Farquhar* v. *Neish*[4] doubt had been thrown upon the general proposition to be deduced from the decisions just cited, but that case had been criticised and disapproved in *Reid* v. *Moore*.[5] According to the older law a general averment of malice was held to be sufficient, except in cases of judicial slander, and though this proposition could not now be maintained as a general proposition if the expressions of opinion by the Lord President (Kinross) and Lord Kinnear in *Macdonald* v. *M'Coll*[6] were to be taken as conclusive authority upon the point, it was still open to the pursuer to maintain, as he did maintain, that, in the circumstances of the present case, a general averment would have been sufficient. But the pursuer did not rely upon a general averment; he maintained that there was on the present record ample specification of facts and circumstances, both intrinsic and extrinsic. Privilege was only given to allow the privileged party an opportunity of investigation and of obtaining explanations. The averred refusal of the defender to hear explanation, and his persisting nevertheless in his accusations, disclosed the degree of recklessness that had in former actions been held to amount to malice.[7] Further, the pursuer's averments of extrinsic circumstances were sufficient. Malice might quite properly be inferred from a cumulation of incidents which were small and trivial in themselves,[7] or from a consideration of the defender's previous attitude and conduct towards the pursuer.[8]

Argued for the respondent;—The protection which privilege gave was that it allowed a defender to make a statement which was in fact untrue, if it was made in the *bona fide* belief that it was true. In order to establish malice the pursuer must prove that the defender was actuated by an improper or oblique motive in making the statement. It was the function of the Court to examine the pursuer's averments and to decide whether these averments, if proved, would legitimately lead to such a conclusion. The facts averred here showed that the defender had reasonable ground for forming the belief that the pursuer had acted dishonestly. There was no suggestion throughout the record that the defender, having formed this belief as he was entitled to do, had thereafter acted maliciously or from any oblique motive. There was no averment of any circumstance immediately connected with the utterance of the words complained of which showed that the defender had acted recklessly or in a manner from which malice

[1] Hamilton v. Hope, (1827) 2 F. C. (8vo) 325, *per* Lord Justice-Clerk Boyle, at p. 338; Torrance v. Leaf, (1835) 13 S. 1146, *per* Lord Moncreiff, at p. 1151.

[2] Laidlaw v. Gunn, (1890) 17 R. 394; Neill v. Henderson, (1901) 3 F. 387.

[3] Dinnie v. Hengler, 1910 S. C. 4; Lee v. Ritchie, (1904) 6 F. 642.

[4] (1890) 17 R. 716.

[5] (1893) 20 R. 712, *per* Lord Trayner, at p. 718.

[6] (1901) 3 F. 1082.

[7] Bell v. Black & Morrison, (1866) 38 Scot. Jur. 412, *per* Lord Benholme, at p. 414.

[8] Blake v. Albion Life Assurance Society, (1878) 4 C. P. D. 94.

could be inferred. Indeed, the averments showed that the defender had acted with due caution and with due regard for the pursuer; the defender had not used intemperate language, and had kept the matter as quiet as possible. Granted that the law allowed an action in such circumstances, it would always take a strict view of a pursuer's averments in a case where the statement had not been uttered publicly. As to the pursuer's averments of extrinsic circumstances, all that these amounted to were trivial instances of fault-finding quite insufficient to support the plea of malice. The pursuer's proposition in effect amounted to this, that the mere insertion of the word "maliciously" in the record was sufficient to displace the defender's privilege. Even if there were circumstances to which that proposition might apply, which was doubtful,[1] it certainly did not apply to the circumstances of this case.

At advising on 3rd February 1914,—

LORD PRESIDENT.—The second action is at the instance of the same pursuer [*i.e.* the pursuer in the action of *Suzor* v. *Buckingham* which forms the subject of the immediately preceding report], but is directed against his employer. He seeks damages for slander uttered on two separate and distinct occasions arising out of the incidents to which I have referred at greater length in the former action.

At the interview on the 3rd July the pursuer alleges that the defender, addressing him in the presence of the manager, said, "It is most irregular. Where has the money gone? You have taken the money, and it is your pride that keeps you from owning it," or used words of like import and effect, meaning thereby and intending to convey to the pursuer that he had been guilty of dishonestly appropriating the money which was unaccounted for. Four days later he says he was sent for by the defender, and, on entering the defender's private room, was addressed thus: "I will not listen to anything. It does not take two to see that you have taken the money. You must have taken the money. You have no character, and have nothing to your name. It is only your pride that keeps you from owning it," or used words of like import and effect.

It is conceded that the language used on both occasions was defamatory, that both occasions were privileged, and that malice must accordingly go into both issues. But the defender contends that there are to be found in this record no facts and circumstances adequate in law either to entitle a jury to infer that the defender in using the language he did was actuated by an improper motive, or to establish malice, which is essential if the pursuer is to secure a verdict. The Lord Ordinary, adopting that view, has disallowed both issues and dismissed the action.

I regret that I cannot agree in the course which his Lordship has taken.

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[1] Farquhar v. Neish, 17 R. 716, at p. 719; Sheriff v. Denholm, (1897) 5 S. L. T. 234 and 346, *per* Lord Kyllachy, approved in Macdonald v. M'Coll, 3 F. 1082; Campbell v. Cochrane, (1905) 8 F. 205; Chalmers v. Barclay, Perkins, & Co., Limited, 1912 S. C. 521, *per* Lord Justice-Clerk, at p. 529; Gorman v. Moss' Empires, Limited, 1913 S. C. 1; Couper v. Lord Balfour of Burleigh, 1913 S. C. 492.

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It appears to me that the pursuer has averred—whether he would succeed in proving or no is a very different question—has averred on this record facts and circumstances which are relevant and sufficient to warrant a jury in reaching the conclusion that the protection afforded by privilege is gone, and that the defender was prompted by an improper and malicious motive when he used the language which he did. The pursuer sets out clearly, and undertakes to demonstrate, that the defender had entirely changed in his attitude and demeanour to him some months before these incidents took place, that he had taken a dislike to him and had resolved to get rid of him, that he had made a series of groundless complaints against him in order to induce him voluntarily to resign his situation, and that, finding this course ineffectual, he recklessly launched these accusations against him in order to make a plausible excuse for his dismissal, that he made no investigation into the circumstances which had caused the shortage, that he well knew that shortages were inevitable, that they took place before the cash reached the pursuer's hands at all, that he made no investigation of any kind, and that, well knowing the accusations to be groundless, he refused to avail himself of the means of information which lay at his hand, and recklessly launched the accusation for the sole purpose of affording a plausibly adequate ground for dismissing the pursuer from his service. Now, I cannot doubt that if these allegations are proved they are relevant to infer malice and relevant to warrant a jury in coming to the conclusion that on both the occasions the defender was not actuated by the honest motive which the law would otherwise impute to him.

In coming to this conclusion I apprehend that we are following the decisions of this Court and of the Second Division in the comparatively recent cases of *Dinnie* v. *Hengler*,[1] *Lee* v. *Ritchie*,[2] and *Macdonald* v. *M'Coll*.[3] The law applicable to cases such as this is not mysterious, and ought not, I think, to be doubtful. If malice requires to be proved, then, as a general rule, a bare averment of malice will not be sufficient, for the simple reason that it does not afford to a defender adequate notice of the case which he will be called upon to meet. As Lord M'Laren observed in the case of *Campbell* v. *Cochrane*,[4] "I can hardly think that it would ever be fair to a defender that the law should be satisfied with a mere general averment of malice. No doubt there may be degrees. A party may be held to more strict averments in one class of cases than in another; but I think one obvious reason for requiring some specification is that the defender, when he goes to trial, ought to know the case that he is to meet, and should be put in a position, if necessary, to lead evidence to disprove the case that is to be made against him. But merely to say that a statement is malicious gives no clue whatever to the line of action which the pursuer intends to take at the trial."

No doubt there are more ways than one in which the appropriate and all-essential averments may be made. If malice requires to be inferred from what have been called extrinsic facts and circumstances, those extrinsic facts and circumstances must be clearly set out upon the record. If, again, malice is to be inferred—as in some cases it must be—from the

[1] 1910 S. C. 4. [2] 6 F. 642. [3] 3 F. 1082. [4] 8 F. 205.

circumstances under which the particular slander was uttered, these circumstances must be set out clearly upon the record. But if, on the other hand, malice is to be inferred from the form of language used on the occasions complained of, from its intensity, its violence, virulence, or recklessness, then the language itself is the fact and circumstance from which malice must be inferred.

I adopt without any reservation or qualification the words of Lord M'Laren in the case of *Ingram* v. *Russell*,[1] where his Lordship says, "I may say that it has always been a fixed idea in my mind that it is not enough to use the word 'malice' or 'maliciously' to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate principle or criterion of relevancy." And I may add, speaking for myself, that a distinct averment in a case such as we have before us that the defender deliberately refused to make any inquiry into the truth of the accusations which he was levelling at the pursuer, or a distinct averment to the effect that he knew when he made them that the allegations were false—were destitute of all foundation—would be sufficient averment of malice to displace any case of privilege.

Holding, then, that the averments here are sufficient if proved to warrant a jury in coming to the conclusion that the defender on both occasions was prompted by an improper and not by an honest motive—sufficient to displace, therefore, the honest motives which the law would otherwise impute to the defender, and to destroy the shelter which privilege affords—I am for recalling the interlocutor of the Lord Ordinary, and, if no objection is taken to the form in which the proposed issues are expressed, to allow both issues.

Lord Skerrington.—I agree with the judgment which your Lordship proposes, but I regret that I cannot assent to the legal views which your Lordship has expressed in regard to what is necessary in order to constitute a relevant averment of malice.

The pursuer, Mr Suzor, claims damages from the defender, Mr M'Lachlan, his former employer, upon the allegation that the latter accused him of dishonesty upon two occasions, viz., 3rd and 7th July 1913. The pursuer was dismissed from the employment on the evening of 3rd July, but his counsel admitted that the defender was privileged on both occasions, and he accordingly proposed two issues in each of which he undertook to prove that the words complained of were spoken maliciously. The Lord Ordinary has dismissed the action obviously upon the ground that the facts and circumstances set forth by the pursuer are not relevant to infer malice on the part of the defender. For the reasons which I shall afterwards state, I think that the case is one in which a general averment of malice would have sufficed, but even if I am wrong as to this I cannot agree

[1] (1893) 20 R. 771.

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with the view of the Lord Ordinary. He says,—"I think it is clear from the pursuer's own statement of the case that the defender, after investigation and inquiry, had reason to believe that the pursuer had taken the money." I do not think that the Lord Ordinary has done justice to the pursuer's averments, nor do I think that the pursuer admits that the defender made any investigation or inquiry. On the contrary his complaint is that the defender refrained from making the inquiries which were natural in the circumstances; that he refused to listen to the pursuer's explanations; that he condemned the pursuer unheard; and that he made the accusations recklessly without caring whether they were true or false. I am of opinion that from these facts, if proved, a jury would be entitled, if they thought fit, to draw the inference that the defender made the defamatory statements not from a sense of duty or for the legitimate protection of his own interests, but from some improper motive. The pursuer, however, does not confine his averments to the circumstances in which the accusations of dishonesty were uttered. He further avers in substance that the defender, though at one time very friendly towards him, had become desirous to dismiss him without appearing to act ungratefully towards one who had faithfully served both the defender and his deceased brother. According to the pursuer's averments, which I must at this stage assume to be true, the defender subjected the pursuer to a system of petty persecution in order to induce him to resign his situation. The pursuer founds upon the defender's change of demeanour and conduct as evidence of antecedent malice. The Lord Ordinary has not attached any importance to these averments, but I think that if proved a jury might be entitled to infer that the defender had an improper motive which made him desire to find a plausible reason for dismissing the pursuer. If it should be thought that a decision upon a different though somewhat similar set of facts is of any value in a question of this kind, the case of *Dinnie* v. *Hengler*[1] may be referred to.

The clearest statement of the so-called rule as to averring "facts and circumstances" in actions for defamation is to be found in the opinion of Lord President Kinross in the case of *Macdonald* v. *M'Coll*.[2] He says: "It appears to me that the general rule to be derived from the decisions as to the circumstances under which the pursuer of an action of damages for defamation is bound to allege facts inferring malice, in addition to alleging that the statement complained of was made maliciously, is very well stated by Lord Kyllachy in the case of *Sheriff* v. *Denholm*,[3] in which his Lordship said that the rule which requires a statement of such facts and circumstances must now be taken to apply generally 'to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself.' It might be proper to add to this statement of the rule the words 'or in the exercise of any right.'" He then goes on to state the question which a Judge or Court must determine before allowing an issue in a case of privilege. "The question,

[1] 1910 S. C. 4.
[2] 3 F. 1082, at p. 1084.
[3] 5 S. L. T. 234 and 346, at p. 235.

therefore, comes to be, whether there is anything in the circumstances of this case to displace the general rule, that it is not enough merely to allege that the words complained of were written maliciously, in respect that the circumstances appearing in the record call for explanation on the part of the defender." This general statement of the law was in no way necessary for the judgment, but it is of high authority in respect that it was expressly approved of by Lord Kinnear in the same case, and has since been often cited with approval, and to some extent followed. In my opinion the earlier decisions did not justify any such sweeping statement of the law, which, in my opinion, still stands as it was defined by Lord President Inglis in the case of *Innes* v. *Adamson*.[1] He there says:—"It is perhaps difficult to lay down any general rule, and still more any very definite line of distinction between cases in which it may be sufficient to aver malice in general terms, and those in which the Court requires the pursuer to condescend upon particular facts and circumstances from which the inference of malice is to be drawn. There are undoubtedly two classes of cases, in one of which a general allegation of malice is sufficient, while in the other the more particular averments of malice which I have already indicated are required. In the present case I have no doubt whatever that we are in the second of these categories, and that this is a case in which it is absolutely indispensable that in averring malice the parties should be called upon to state facts and circumstances from which that malicious feeling or purpose or intention is to be inferred." The action was one at the instance of a police-constable against his chief. There can be no doubt that the Lord President would have relegated the present action to the class in which a general averment of malice is sufficient. The rule laid down in *Macdonald's* case[2] is in my judgment not merely unsound in point of law, but is also contrary to common justice and *ultra vires* of the Court.

Before justifying these criticisms I must state clearly what I conceive to be the true meaning of the rule. The judicial dicta are so numerous and confusing that it would be easy to construe it in a sense which its supporters would repudiate. In the first place, the rule does not mean that in certain cases of high privilege it is essential as a solemnity that a pursuer should allege antecedent and extrinsic facts from which malice may be inferred. No doubt in the case of a high official who causes injury to someone while purporting to perform his public duty the presumption in favour of good faith may be so overwhelming as to make it practically impossible to obtain an issue without averring antecedent facts of this kind. Still one can figure a case where the conduct of a public official towards a complete stranger might, as described by a pursuer, be so violent and extravagant as to suggest that the official's mind, if not actually deranged, must have been warped by some evil motive. I labour this point because there are dicta which suggest that in some cases nothing short of extrinsic facts will suffice for relevancy—*e.g.*, *per* Lord M'Laren in *Campbell* v. *Cochrane*.[3] It would be easy to demontrate that this dictum is not good law even in a case of judicial slander, but it is

[1] (1889) 17 R. 11. [2] 3 F. 1082. [3] 8 F., at p. 214.

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unnecessary at present to do so. The same Judge indicated an opposite opinion on this point in a case to which I am about to refer. In the second place, the rule does not mean that all persons who make defamatory statements on privileged occasions are to receive the same measure of protection as if they were public officials. The following passage from Lord M'Laren's opinion in *Ingram* v. *Russell*[1] seems to me to express the true meaning and effect of the rule:—"It has always been a fixed idea in my mind that it is not enough to use the word 'malice' or 'maliciously' to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate principle or criterion of relevancy." The opinion of the Second Division delivered by Lord Lee in the case of *Farquhar* v. *Neish*[2] may be read as meaning that there is no real distinction as regards privilege between the position of a public official and that of an employer, but I cannot believe that anything so palpably unreasonable was intended.

Such being the meaning of the formula in *Macdonald's* case,[3] I ask your Lordships to consider whether it was within the power of this Court to lay down a rule to the effect that the pursuer of an action like the present one shall not be entitled to an issue unless he happens to be able to state what Lord M'Laren called "a circumstantial case of some kind," or what Lord Kinross described as a case, which, if proved, would "call for explanation on the part of the defender." Very often a pursuer can aver some facts either extrinsic or intrinsic from which malice might reasonably be inferred, and, if so, he should give his adversary fair notice of them. By intrinsic facts I mean the whole circumstances surrounding and directly leading up to the utterance of the slander, including the grossness of the charge, its undue publicity, its unnecessary repetition, the impropriety of the language, the failure to make previous inquiries when inquiries would have been natural, and the absence of reasonable grounds for making such an accusation. In some cases, however, it may be impossible for a pursuer truthfully to allege a single fact, extrinsic or intrinsic, suggesting malice on the part of the defender. Did the Judges who have given their approval to the formula really believe that it is only in works of fiction that an innocent man can be made the victim of a malicious and false accusation at the instance of one who had always treated him as a friend and in circumstances which bring a cloud of suspicion upon the head of the victim and a halo of good faith upon that of his accuser? Lord Young laboured under no such delusion. In the case of *M'Ternan* v. *Bennett*,[4] he said:—"There are many cases in which one man acts maliciously towards another, and that other has no idea what has made the man malicious. He may say with perfect truth and honesty,—'I cannot conceive why he should have any malice against me, but his conduct shows

[1] 20 R. 771.
[2] 17 R. 716.
[3] 3 F. 1082.
[4] (1898) 1 F. 333.

that he has; he has made a false statement; I can prove that he knew it to be false, and I aver that; I will prove it out of his own mouth; and if he did that then he must have acted maliciously, although I cannot conceive what has stirred his malice.'" Within my own experience I knew of a case where the rule would have operated as a denial of justice to the victim of a malicious slander but for the accident that the pursuer had been able to aver extrinsic facts which erroneously suggested antecedent malice. I tried the case without a jury, and after hearing the perfectly truthful explanations of the defender I took the view that the antecedent friction between the parties had not induced the defender to use the defamatory language complained of. I should have assoilzied him if he had not gone on to depone that he had made the statement under the influence of a sudden feeling of anger caused by the belief that an apparently innocent question put to him by the pursuer was intended as an insult; and that the words complained of were not intended to give a truthful answer to the pursuer's inquiry but were intended to punish the pursuer for his supposed insult.

In addition to the inevitable denial of justice which must occur in many cases, the rule in question is objectionable because it introduces a painful amount of uncertainty into a department of law which ought to be plain and intelligible to every citizen. A man's character is supposed to be his most precious possession, and yet the formula as applied in practice makes it very much a question of judicial discretion in each individual case whether an aggrieved person shall or shall not be allowed to vindicate his character. The avowed reason and justification of the rule is the prevention of unfounded and blackmailing actions. Such actions are an evil, but it is a much greater evil that Judges should arrogate to themselves the right to open or close the doors of their Courts according to the estimate which they form as best they can from a pursuer's pleadings of his *bona fides* and of his chances of success. I have known statements which were undoubtedly relevant even according to Lord Kinross's standard brushed aside as irrelevant just because a Judge regarded them as incredible. I have also seen what seemed to me to be decidedly arbitrary judgments on the question whether a pursuer's averments disclosed probable cause, though it is obvious that a pursuer cannot go into every detail on so delicate and difficult a question in his pleadings. Further, the discovery of the smallest scintilla of probable cause has often led to the refusal of an issue as if the presence of probable cause excluded the possibility of malice. I am here referring to proper actions for defamation and not to cases of malicious persecution where a defender, however malicious, is not liable if he had probable cause for what he did.

The formula in *Macdonald's* case[1] affords a typical example of the evils which inevitably follow judicial legislation. It was felt to be a grave hardship and also contrary to public policy that public officials should be exposed to frivolous actions of damages in respect of acts done or words uttered in the performance of duties which are often both difficult and delicate and in the due execution of which the whole community has a

[1] 3 F. 1082.

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vital interest. Parliament having unfortunately omitted to provide for such cases the Court thought itself entitled to make good the omission. Public officials in this country very seldom abuse their position. Accordingly the chance of causing injustice was negligible in comparison with urgent considerations of expediency which demanded that public officials should do what they thought to be their duty without fear of the consequences. In *Beaton* v. *Ivory*[1] the Lord President (Inglis) described the case of a public officer as "a very special one." And yet in the course of a few years without any deliberate consideration on the part of the Court and without any protest on the part of the public, this very special protection was gradually extended by some very eminent Judges to all and sundry persons who might use defamatory language on a privileged occasion. The process began with the judgment of the Second Division in the case of *Farquhar*[2] and was completed in the case of *Macdonald*,[3] both already referred to.

The rule as to "facts and circumstances" in actions for slander may be traced partly to confusion of thought consequent upon mixing up three separate questions which ought to have been kept entirely distinct. In this way a rule of evidence has been converted into one of substantive law. The first question is—How may malice be proved? The answer is—By circumstances extrinsic or intrinsic, or by the defender's admission. The second question is—What shall happen if a pursuer does not give fair notice of the case which he intends to prove? The answer is that he must not be allowed to prove facts of which he improperly failed to give his adversary fair notice, and that if in such a case he does not adduce his adversary as a witness and obtain from him some evidence of malice the case should be withdrawn from the jury. The third question is—What constitutes a relevant averment of malice? The answer is that in nine cases out of ten a general averment of malice is perfectly intelligible and sufficient. The context shows that what is meant is that the accusation was made by the defender recklessly and without caring whether it was true or false, or without any belief in its truth, or even knowing its falsehood. In all such cases the law presumes that the words were uttered from a bad motive of some kind and no further specification is needed unless the pursuer chooses to allege a particular motive and desires to be allowed to lead evidence on this point. In exceptional cases more specification would be necessary, *e.g.*, if the pursuer was prepared to admit that the defender believed the slander to be true, but maintained that he uttered it with the object of effecting some purpose different from the purpose for which alone the privilege exists. In such a case the Court must be told the defender's alleged motive in order that they may decide whether it was or was not a legitimate one—in other words, whether there is or is not a relevant averment that the defender abused his privilege.

The decisions and dicta on this branch of the law are exceedingly numerous and it is not always easy to understand or to reconcile them. I have already referred to the case of *Farquhar*[2] decided in the year 1890

[1] (1887) 14 R. 1057. [2] 17 R. 716. [3] 3 F. 1082.

by the Second Division, and to the case of *Macdonald*[1] decided in the year 1901 by the First Division. In the case of *Currie* v. *Weir*[2] the present Lord Justice-Clerk reverted to the law as it stood prior to *Farquhar's* case,[3] and stated that a general averment of malice was quite relevant. He described actions against public officials as exceptional. Lord Trayner was of the same opinion. He had previously stated his disapproval of *Farquhar's* case[3] in *Reid* v. *Moore*.[4] In the case of *Buchanan* v. *The Corporation of Glasgow*[5] Lord M'Laren said that he had doubted whether the Court had not gone too far in the case of *Macdonald*[1] in extending a special privilege to persons in authority so as to make it necessary in any action of damages against them to aver special facts and circumstances inferring malice. He does not appear to have noticed that *Macdonald's* case[1] was one between a master and a former servant whereas the case before him might be assimilated to an action against a public official, and was so regarded by the Lord President. I have already referred to the case of *Campbell* v. *Cochrane*[6] for another purpose. It was treated as a case of judicial slander, but it is valuable because the opinion of the Lord President (Dunedin) is founded on that of his predecessor in *Beaton's* case,[7] from which I infer that he also regarded actions for judicial slander and actions against public officers as wholly special and exceptional.

Actions of damages for judicial slander stand in a position by themselves. No one can doubt that a Supreme Court has inherent power to lay down the conditions upon which alone it will tolerate any interference with the freedom of speech of persons litigating before it, and no one can doubt that the Court of Session has exercised its power in this matter in a way which commends itself to the good sense of the community.

Lord Hunter.—Looking to the nature of the pursuer's averments I do not think that this case can be satisfactorily disposed of without inquiry. I have not, however, found it necessary to consider the question raised by Lord Skerrington as to whether or not a bare averment of malice would have been sufficient to entitle the pursuer to proof. I express no opinion upon that point. I concur in the course that your Lordship proposes.

The Court recalled the interlocutor reclaimed against and allowed the issues.

Maxwell, Gill, & Pringle, W.S.—Duncan Smith & Maclaren, S.S.C.—Agents.

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[1] 3 F. 1082.
[2] (1900) 2 F. 522.
[3] 17 R. 716.
[4] 20 R. 712.
[5] (1905) 7 F. 1001.
[6] 8 F. 214.
[7] 14 R. 1062.

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Liquidators of Glasgow Assurance Corporation, Limited, v. Welsh Insurance Corporation, Limited.

THE LIQUIDATORS OF THE GLASGOW ASSURANCE CORPORATION, LIMITED, Petitioners (Reclaimers).—*Macmillan, K.C.—Black.* THE WELSH INSURANCE CORPORATION, LIMITED, Respondents.—*Clyde, K.C.—C. H. Brown.*

Insurance—Liquidation of insurance company—Ranking of creditors—Company conducting various classes of insurance business—Separate funds—Contract of re-insurance—Policy-holder—Assurance Companies Act, 1909 (9 *Edw. VII. cap* 49), *secs.* 1, 2, *and* 3.

The Assurance Companies Act, 1909, by sec. 3 (1) enacts that an assurance company transacting more than one class of assurance business shall keep a separate account of all receipts in respect of each class of business, and that the receipts of each class shall be carried to, and form, a separate assurance fund. By sec. 3 (2) it is further enacted that "a fund of any particular class shall be as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable." The Act by sec. 1 is made applicable to all companies carrying on assurance business of any of the following classes, viz.—life, fire, and accident assurance, bond investment business, and "(*d*) employers' liability insurance business; that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment."

A Scots insurance company, carrying on employers' liability insurance and other classes of insurance business, entered into a contract of re-insurance with a Welsh insurance company whereby it undertook, in consideration of a percentage of the premiums, to relieve the Welsh company of claims arising under its employers' liability insurance policies. The Scots company having gone into liquidation at a date when it was indebted, under the re-insurance contract, to the Welsh company in certain sums, the latter company claimed to be ranked in respect of these sums on the employers' liability fund of the Scots company along with its direct policy-holders.

Held (1) that sec. 3 of the Act did not give a preference on the separate fund of a particular class of business to the policy-holders over the ordinary creditors of the company having claims in connection with that class of business; and (2) that the Welsh company, as a creditor of the Scots company in its employers' liability insurance business, was accordingly entitled to be ranked, along with the direct policy-holders, on that company's employers' liability fund.

Question whether the Welsh company was a "policy-holder" of the Scots company within the meaning of the Act.

Insurance—Contract of re-insurance—Liability of re-insuring company—Sums paid by re-insured company towards expenses of its policy-holders.

Opinion, upon the construction of a contract of re-insurance whereby an insurance company undertook to relieve another insurance company of claims under its employers' liability insurance policies, that the re-insuring company was bound to indemnify the other company for the legal and medical expenses which the latter was bound, under its policies, to pay to the insured employers.

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2D DIVISION. Lord Cullen.

ON 30th November 1909 the Glasgow Assurance Corporation, Limited, which carried on various kinds of insurance business and, *inter alia*, that of employers' liability insurance, entered into a re-insurance treaty with the Welsh Insurance Corporation, Limited. By this treaty the latter Company agreed to pay to the Glasgow Company 21½ per cent of its workmen's compensation insurance premiums; and in consideration thereof the Glasgow Company undertook, subject to the conditions specified in the treaty, to relieve the Welsh Company of and indemnify it against certain proportions of the liability under the Workmen's Compensation Act, 1906, the Employers' Liability Act, 1880, Lord Campbell's Act, and at common law, for accidents occurring to the employees of employers insured against such liability by the Welsh Company.* This treaty was to

* The treaty contained, *inter alia*, the following provisions:—

"Whereas The Welsh Insurance Corporation, Limited, of Cardiff (hereinafter called the re-insured) undertakes the business of insuring employers against liability for injuries to their workmen and is desirous of being relieved of the whole of such liability in respect of fatal accidents as hereinafter provided and their liability in excess of fifty pounds (£50) for each permanent disablement case of accident as hereinafter provided, The Glasgow Assurance Corporation, Limited, of Glasgow (hereinafter called the corporation) has agreed to indemnify the re-insured against such liability in accordance with the terms and conditions of this treaty which shall be treated as though it had been in force on the first day of October 1909.

"Article 1.—The corporation hereby undertakes to relieve the re-insured of and indemnify the re-insured against all liability under the Workmen's Compensation Act, 1906, Employers' Liability Act, 1880, Lord Campbell's Act, and at common law for fatal accidents and accidents causing disablement occurring to the employees of employers insured against such liability by the re-insured, but under no circumstances will any liability attach to the corporation on account of employees engaged in mining whether for clay, iron, coal, tin, copper, or other mineral. It is also agreed that in the case of accidents causing disablement the re-insured shall bear the first fifty pounds of compensation payable to each claimant, the liability of the corporation being for all sums payable to each such claimant in excess of fifty pounds.

"Article 4.—On the happening of a fatal accident for which the corporation will be liable, the re-insured undertakes to advise the corporation with full particulars as soon as possible, and will use every effort to obtain a favourable settlement, and the corporation undertakes immediately on production of a claim receipt to refund the re-insured the amount paid by them, and permanent cases shall in like manner be dealt with, the re-insured advising the corporation when compensation has been paid to any injured party for a period of six months, but should an accident seem to be of a permanent nature the re-insured will advise the corporation as soon as they conveniently can, and settlement shall be effected as herein provided in respect of fatal accidents.

"Article 5.—It is agreed that the corporation will take over and settle within three months after the re-insured shall have paid a total sum of fifty pounds (£50) in weekly compensation all claims in respect of accidents causing disablement. Such settlement shall be one which is acceptable to and recorded by the registrar of the County Court as provided in the Workmen's Compensation Act, 1906. The re-insured agrees to render the corporation every assistance towards a favourable settlement.

"Article 7.— . . . The corporation agrees that it will submit to the re-insured its revenue account for its Workmen's Compensation Department as lodged with the Board of Trade and within seven days after it shall

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remain in force until 30th September 1914, but on 31st August 1911 it was terminated (in virtue of powers reserved in the treaty) by the companies, subject to the risks still current for which the Glasgow Company had previously become liable under its provisions. During the period while the treaty was in force the Welsh Company paid over the stipulated proportion of its premiums. The Glasgow Company carried the amounts so received by it into the account of its "separate assurance fund," applicable to employers' liability insurance business, kept in pursuance of the Assurance Companies Act, 1909,* and similarly entered, on the other side of that account, the payments of claims made under the treaty, thus treating the re-insurance transaction as part of its employers' liability insurance business under the Act.

On 27th February 1912 the Glasgow Company went into liquidation, and on 20th March 1912 a supervision order was pronounced in the liquidation. At the date of the liquidation the Glasgow Company was indebted to the Welsh Company under the treaty in certain sums, and in the course of the liquidation the Welsh Company lodged with the liquidators a claim for £14,649, 10s. 11d., for which they claimed to be ranked on the Employers' Liability Fund of the Glasgow Company and on the statutory deposit forming part of that Fund.

On 1st September 1913 John M. Macharg, C.A., and another, the liquidators of the Glasgow Company, presented a note for authority to intimate deliverances on claims in respect of the Company's employers' liability insurance business, and the value of the Company's liability to persons interested in the policies granted in connection with that business. Among these deliverances was an adjudication by the liquidators admitting the Welsh Company to an ordinary ranking for £12,789, 3s. 4d., but rejecting their claim to a special ranking, *i.e.*, a ranking on the Employers' Liability Fund.

Answers to the note were lodged by the Welsh Company in which they craved the Court to recall the liquidators' adjudication on their claim. They maintained that under the treaty between the two companies they were policy-holders within the meaning of the Assurance Companies Act, 1909, and, as such, were entitled to a ranking on the Employers' Liability Fund of the Company along with the Company's direct policy-holders. They further maintained that they were entitled to a ranking on that fund for costs, legal, medical, and other expenses, incurred in connection with the determination or settlement of claims made under policies issued by them, and not merely to the ordinary ranking on the general assets which the liquidators had allowed.

To these answers revised replies were lodged by the liquidators, in which they maintained that, upon a sound construction of the Assurance Companies Act, 1909, and of the treaty between the companies, the Welsh Company were not policy-holders of the Glasgow Company; and that the business transacted between the two Companies in virtue of the treaty did not consist of the issue of, or the undertaking of liability under, a policy insuring employers against liability

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have been so lodged and the corporation further agrees that if its ratio of claims to premium income in the said Workmen's Compensation accounts shall in any financial year have exceeded 60 per cent. the re-insured shall have power to cancel this treaty by giving one calendar month's notice of their intention to do so."

* The material sections of the Act are noticed in Lord Hunter's opinion.

to pay compensation or damages to workmen in their employment, and did not fall within the class of Employers' Liability Insurance business in terms of the Assurance Companies Act, 1909; and that the Welsh Company accordingly were not entitled to be ranked upon the Employers' Liability Fund of the Company. They further submitted that the Welsh Company were not entitled to a ranking in respect of costs, and that the deliverance, so far as admitting that Company to an ordinary ranking for these costs, should be amended.

On 18th December 1913 the Lord Ordinary (Cullen) pronounced the following interlocutor:—". . . Recalls the adjudication of the liquidators on the respondents' claim, No. 1379 in the liquidation: Recalls the deliverance appealed against: Finds (1) that the respondents are not entitled to any ranking in respect of the costs, legal, medical, and other expenses incurred in connection with the determination or settlement of claims made under the policies issued by the respondents; and (2) that the respondents are entitled to a ranking on the Employers' Liability Fund of the Company (including therein the statutory deposit) in respect of their claim, in so far as the same arises out of claims paid under policies issued by the respondents of which the Company was under obligation to relieve the respondents, in respect of the agreement or treaty, No. 72 of process: Remits to the liquidators to give effect to these findings, and decerns: Finds the liquidators liable to the respondents in the expenses of the appeal, and remits the account thereof to the Auditor to tax and to report." *

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* "Opinion.—[After stating the facts]—The Welsh Company has, admittedly, a claim in the liquidation for sums due to it under the treaty, and the main question now raised is as to the mode of ranking the due amount of this claim. A subsidiary question is raised as to the validity of part of the claim.

"The argument on the first of these questions related to certain provisions in the Act of 1909.

"By section 1 the Act is made applicable generally to persons or bodies of persons (therein referred to as 'assurance companies') which carry on within the United Kingdom all or any of five specified classes of insurance business. One of these classes (section 1 (*d*)) is: 'Employers' liability insurance business, that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment.' The provisions of the Act in question do not apply to assurance companies in so far as they carry on assurance business of kinds not falling within any of the five specified classes.

"Section 2 obliges an assurance company within the scope of the Act to make a deposit with the Paymaster-General for or on behalf of the Supreme Court of the sum of £20,000 in respect of each or any of the five specified classes of insurance business which it carries on, and provides that 'the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund.'

"The matter of the 'separate assurance fund' is dealt with in section 3, which is in the following terms:—[His Lordship quoted the section]—This section is, in terms, applicable to such companies as either (1) carry on other business than that of insurance, or (2) carry on more than one class of insurance business. The receipts and payments in respect of any of the five specified classes of insurance business which such a company carries on are to be carried to and form a separate assurance fund with the appropriate

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The petitioners (the liquidators of the Glasgow Assurance Corporation, Limited) reclaimed, and the case was heard before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Hunter) on 20th and 21st January 1914.

Argued for the reclaimers;—(1) The Welsh Company were only entitled to an ordinary ranking. They were not a policy-holder within the meaning of sections 29 and 33 (1) (*h*) of the Assurance Companies Act, 1909[1]; and they could not, therefore, rank with the policy-holders on the Employers' Liability Fund. The purpose of the provisions regarding the deposited fund in the 1909 Act was the protection of those who were directly insured with an insurance company. Re-insurance business was not comprehended for the obvious reason that such business was done with companies who were well able to look after their own interests and did not require the statutory protection that individual insurers needed. Nor was the Welsh Com-

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name; and under section 2 (4), where more than one specified class of business is carried on, each of the required deposits is to form part of the separate assurance fund applicable to the particular class of business in respect of which the deposit has been made.

"Section 3 does not legislate for the case of a company whose sole business consists in carrying on one of the five specified classes of assurance business, and which has therefore no need to make a separation of its funds.

"Subsection (2) of section 3, in harmony with subsection (1) is directed to cases where the company is doing more than carrying on one of the five specified classes of assurance business, and its object is to declare that a separate assurance fund required and kept under subsection (1) shall be a security for the policy-holders of the particular class, 'as absolutely . . . as though it belonged to a company carrying on no other business than assurance business of that class,' and that it 'shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable.'

"In such a case the policy-holders of any particular class thus have the same claim on a separate assurance fund applicable to that class as they would have had on the unseparated funds of the company if the company had carried on only business of that class. They may, therefore, come into competition with other lawful creditors of the company whose claims arise out of the same class of the company's business. Section 3 (2) does not secure them against such competition, but only against competition with creditors under contracts incident to other classes of business.

"Assuming that the Glasgow Company had carried on only a business of employers' liability insurance, using that description in a general sense, and had, in the course of its business, undertaken re-insurances of another company's risks, as they did by the treaty now in question, it could not have been said that it was going beyond the ordinary scope of such a business. Re-insurance for the spreading of risks is an ordinary feature of the various kinds of insurance business both in this country and elsewhere. But while this may be so, the liquidators of the Glasgow Company maintain that the undertaking of re-insurance of another company's risks is no part of an employers' liability insurance business as such a business is defined in section 1 of the 1909 Act for the purposes of that Act, and, in particular, for the purpose of the provisions as to keeping separate assurance funds. If this contention be sound, then where an employers' liability insurance

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[1] 9 Edw. VII. cap. 49.

pany, as a creditor of the Glasgow Company, entitled to rank on the Employers' Liability Fund. The re-insurance treaty did not fall within the description of business contained in section 1 (*d*) of the Act. The words in that subsection "the undertaking of liability under policies" were meant merely to provide for the amalgamation of insurance companies. Re-insurance was a separate class of business from direct insurance; the interest insured and the conditions of insurance were entirely different.[1] As appeared from Notes (3) and (5) of Table (A) and Note 1 of Table (D) of the First Schedule to the Act, the re-insurance business was not an item to be inserted in the accounts, and, therefore, was not a class of business with which the Act dealt; and this view was confirmed by the provision as to valuation in section 17 and in the Sixth Schedule (D) to the Act. (2) In any case the Welsh Company could not, under the terms of their treaty, claim a ranking for more than the principal sums paid

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company engages, lawfully under its constitution, in transactions for re-insuring other companies' risks, these transactions fall to be regarded as being, from the point of view of the statute, a separate species of insurance business (to which the Act does not apply), and it is necessary that the company, in order to a due observance of the statute, should keep a 'separate assurance fund' for its business so far as consisting of the direct insurance of employers under its policies, from the accounts of which funds its receipts and payments in respect of such re-insurances fall to be excluded.

"The definition in section 1 runs:—'Employers' liability insurance business, that is to say, the issue of, or the undertaking of liability under, policies insuring employers, &c.' Re-insuring other companies is not the issuing of such policies. And equally, say the liquidators, it is not 'the undertaking of liability under' them. In one sense it is not. The re-insuring company does not become the debtor of the employers holding the policies which are the subject of the re-insurance. There is no privity of contract. But, in another sense, the re-insuring company does undertake the liabilities under such policies, for it undertakes to bear and discharge these liabilities, its creditor being the company re-insured. The former construction of the statutory words is the more literally exact. But it may be that the wider construction is the preferable one.

"Here I may recall the fact that the Glasgow Company, in keeping their accounts, acted on the wider view. In the accounts of their separate assurance fund applicable to their employers' liability insurance business (lodged with the Board of Trade in pursuance of the Act) they regularly entered on the one side, the premiums received from the Welsh Company, and, on the other, the payment of claims made by them in pursuance of the treaty. This is said to be the ordinary practice in such cases. I do not know as to that. The statute falls to be construed on its terms. The liquidators say that the Glasgow Company was wrong in entering the said receipts and payments as they did. It may be that it was; and the question at issue must be considered irrespective of the method in which the said accounts were *de facto* kept.

"Now, re-insurance is an almost universal feature in the conduct of insurance business in its various branches both in this country and in others. This is so well known that it is, I think, justifiable to keep the fact in view

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[1] Nelson v. Empress Assurance Corporation, Limited, [1905] 2 K. B. 281; Lancashire Insurance Co. v. Inland Revenue Commissioners, [1899] 1 Q. B. 353. *In re* Popular Life Assurance Co., Limited, [1909] 1 Ch. 80; *In re* Life and Health Assurance Association, Limited, [1910] 1 Ch. 458, were also referred to.

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to the parties insured with them. They could not be ranked for the amount of their expenses.

Argued for the respondents;—(1) The second finding in the Lord Ordinary's interlocutor was sound. In the first place, the respondents were policy-holders with regard to employers' liability insurance in the sense of the 1909 Act.[1] An insurance policy was merely a contract for indemnity against a risk in respect of a premium paid; and the re-insurance treaty was clearly of this nature. Re-insurance was part of the ordinary business of an insurance company, and the Act of 1909, in speaking of "the issue of, or the undertaking of liability under, policies" had in view both direct insurance and re-insurance. In the second place, the respondents were creditors of the Glasgow Company in the employers' liability department of their business. On principle there was no reason why a policy-holder should be preferred to an ordinary creditor of the Company, *e.g.*, a

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in considering the intendment of the Act of 1909. And it seems unlikely that the Legislature should have intended that, where a company carries on an employers' liability insurance business or any other of the five specified classes of insurance business to which it relates, the undertaking of re-insurance should fall to be treated as a thing apart, and as a separate species of business. The re-insurance amounts to a spreading of risks among insurance companies, and it cannot well be said in its nature to militate against the interests of policy-holders.

"The insurance statutes show that the practice of effecting re-insurances was within the contemplation of the Legislature as a feature of insurance business. The prototype Act of 1870, in its schedule form for the separate assurance fund account of a life assurance company doing other business, has a note appended to it in these terms—'Items in this . . . account should be the net amounts after deduction of the amounts paid and received in respect of re-assurances.' The schedule forms in the Act of 1909 have this note: 'Items in this account to be the net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks.' It is thus clear that the Legislature had expressly in view the practice of re-insurance as an ordinary feature of an insurance company's business, and, in particular (under the Act of 1909), as an ordinary feature of an employers' liability insurance business. The liquidators, however, appeal to the terms of the 1909 note and say that, while it recognises re-insurance as a feature in the business of the re-insured company, it does not recognise re-insurance as a feature in the business of the re-insuring company. It is true that the note is only directed to the mode of stating the accounts of a re-insured company. But I confess I find it difficult to believe that the Legislature intended this one-sided recognition of re-insurance—that is to say, that it should be treated, in the case of a re-insured company, as an ordinary element in its business, but that, in the case of a re-insuring company, it should be treated as a separate line of business. No reason for such a distinction was advanced in the argument.

"The premiums received by an insurance company form, while it is a going concern, the fund from which realised risks are satisfied. Under some policies claims arise and have to be satisfied. Under others no claims arise. And the success of the company's business depends on its premium income being in excess of the claims emerging under its policies. Now, while this is so, the liquidators' argument concedes that a company doing employers' liability insurance business is entitled, under the statute, to hand over to another company, under a re-insurance agreement, any given part of its received premiums going to make up the natural fund for satis-

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[1] 9 Edw. VII. cap. 49.

tradesman who supplied it with furniture. The common law gave policy-holders no preference over other creditors; and this was still the law governing companies which carried on only one class of business. The 1870 Act,[1] section 4, provided that the life insurance fund of a life insurance company carrying on other business as well should be the security of the policy-holders as though it belonged to a company carrying on no other business than that of life insurance, that is to say, the fund was to be separated, but the common law still ruled the claims of parties on the fund. Section 3 of the Act, which provided for the return of the deposit to the company when the fund reached £40,000, showed that the deposit was not made for the purpose of providing security to the policy-holders. The Act of 1872[2] made no difference in the position; and the Act of 1909[3] merely applied the rule as to separation of funds to the specified classes of insurance business, but did not otherwise affect the rank-

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faction of claims by its policy-holders, and thus to deplete that fund. This, taken by itself, is to the prejudice of the re-insured company's policy-holders who look to that fund. Surely it must be intended by way of equivalent that the proportion of the premiums paid by these policy-holders which is transferred to the re-insuring company shall go into the employers' liability insurance fund of that company, and that the re-insured company, for behoof of its policy-holders, is to have recourse against that fund. In that way the policy-holders of the re-insured company are put in much the same position as if they had insured partly in the one company and partly in the other. The splitting up of the risk is done, not directly by them, but by the company whose policies they have taken. And it is common ground that that company may, in a question with its policy-holders, lawfully take such course under the statute.

"I was not favoured with any argument for the liquidators directed to showing, on principle, why the Legislature should have intended to make the one-sided recognition of re-insurance business which they maintain. The argument consisted in tabling the definition in section 1 of the Act, and also the note to the schedule form dealing, as that note does, only with the mode of giving effect in a re-insured company's accounts to re-insurance of its own risks, and in pointing out that there is no corresponding note saying that a re-insuring company should include in its accounts the premiums received and payments made by it under re-insurance transactions. But I do not find it very difficult to conclude that it was taken for granted that such receipts and payments would enter the accounts of a re-insuring company. All the note deals with is 'net amounts.' The re-insured company is thereby directed not to enter separately (1) the gross amounts of its received premiums and payments made therefrom, and (2) the proportion of its received premiums paid over for re-insurance and the amounts received by it by way of indemnity under re-insurances; but to deduct the latter from the former in order to state net sums. This is only a direction as to a particular mode of stating a re-insured company's account. It remains, I think, that re-insurance was contemplated by the Legislature as an ordinary feature in the conduct of an employers' liability insurance business.

"The liquidators of the Glasgow Company have rejected the claim of the Welsh Company for ranking on the 'separate assurance fund' of the former Company. Following the views which I have expressed, I am of opinion that the deliverance of the liquidators is wrong and that the Welsh Company is entitled to have its claim ranked on that fund.

"The second question raised is a subsidiary one and relates to a part of

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[1] 33 and 34 Vict. cap. 61. [2] 35 and 36 Vict. cap. 41.
[3] 9 Edw. VII. cap. 49.

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ing of creditors on the fund. Section 33 (*e*) demonstrated that the deposit was not meant for the security of the policy-holders. (2) The Lord Ordinary's first finding was wrong. The Glasgow Company undertook to indemnify the Welsh Company against all liability, and this general obligation was not limited by any of the other provisions of the treaty. The liquidators' deliverance was illogical, for the respondents were entitled to a ranking on the special fund or to none.

At advising on 6th February 1914,—

LORD HUNTER.—The principal question raised under this reclaiming note is whether the respondents, who are an insurance company carrying on business in Wales, are entitled to rank, in the liquidation of a Scots insurance company, upon the Employers' Liability Fund of that Company, in respect of admitted indebtedness by the Scots Company to the Welsh Company.

Both the Companies prior to the liquidation of the Scots Company carried on different classes of insurance business—*inter alia*, that of employers' liability insurance. By what is described as a re-insurance

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the claim of the Welsh Company which the liquidators say is not a valid matter of claim under the terms of the treaty. It is composed of legal and medical expenses to which the Welsh Company were put in connection with claims under their policies falling within the indemnity undertaken by the Glasgow Company in the treaty of re-insurance. The question turns on the terms of the treaty.

"A general indemnity by way of re-insurance may very well devolve such incidental expenses on the re-insuring company. But a particular and partial indemnity may or may not do so according to the terms in which the bargain is conceived. In the present case the Welsh Company, having issued policies and being in receipt of the whole premiums payable under such policies, agreed to pay over a certain proportion of such premiums to the Glasgow Company, and the Glasgow Company, in consideration thereof, undertook to indemnify the Welsh Company against a certain part of the policy risks. It was a matter of bargain as to what should be included in the Glasgow Company's undertaking. If they were to pay such legal and medical expenses as are here in question the consideration to be paid to them would, naturally, be greater than if they were not to do so. One is relegated to the actual terms of the re-insurance treaty. Article 1 thereof is in general terms. Articles 4 and 5 go on to formulate specifically the obligations of indemnity undertaken by the Glasgow Company relating, respectively, to (1) cases of fatal accidents to workmen, and (2) cases of disablement. Article 4 binds the Glasgow Company 'on production of a claim receipt, to refund to the re-insured the amount paid by them,' and goes on to say that 'permanent cases shall in like manner be dealt with.' This seems to me to confine the obligation of indemnity to what the Welsh Company might have to pay to the insured. Article 5 deals with cases of disablement generally. The Welsh Company is to pay the first £50 of compensation due in such cases, and the Glasgow Company is to 'take over and settle within three months after the re-insured shall have paid a total sum of £50 in weekly compensation all claims in respect of accidents causing disablement.' This article, also, seems to me to limit the obligation of the Glasgow Company to money payable to the insured. I am therefore of opinion that the liquidators are right in their contention that there falls to be excluded from the claim of the Welsh Company for ranking so much thereof as is composed of the said legal and medical expenses incurred by the Welsh Company."

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treaty between the two Companies, dated 30th November 1909, the Scots Company, in consideration of the payment of a premium by the Welsh Company, undertook to relieve the latter of, and indemnify them against, all liability under the Workmen's Compensation Act, 1906, Employers' Liability Act, 1880, Lord Campbell's Act, and at common law, for fatal accidents and accidents causing disablement occurring to the employees of employers insured against such liability by the Welsh Company. There were certain exceptions to the general obligation of re-insurance undertaken by the Scots Company, but these need not be noted as they do not affect the present question. The premium payable by the Welsh Company was a proportion of the gross premium received in respect of the risks undertaken by them. The treaty of re-insurance was to remain in force until 30th September 1914, but provision was made under article 7 empowering the Welsh Company, in a certain event, to cancel the treaty on giving one month's notice of their intention to do so. The agreement was, in conformity to notice sent by the respondents and accepted by the Scots Company, terminated on 31st August 1911, but certain of the risks did not run off until after that date.

The Scots Company went into liquidation on 27th February 1912, and at that date they were indebted in a considerable sum to the Welsh Company in respect of claims upon risks current at the date of the termination of the treaty. The liquidators of the Scots Company rejected the claim of the Welsh Company to rank upon the Employers' Liability Fund of the Company in liquidation, but allowed them a ranking upon the general assets of the Company. I understand that the latter ranking is of no value, as the Company had at the date of liquidation practically no general assets. On the other hand, the Employers' Liability Fund is of considerable amount, consisting largely of a statutory deposit.

By the Assurance Companies Act, 1909,[1] certain provisions, that had previously been made applicable to companies carrying on the business of life insurance, were extended to other companies carrying on other classes of insurance business. By the first section of the Act the companies to which the Act applies are companies carrying on all or any of five specified classes of insurance business, one of these classes being employers' liability insurance business. By section 2 an insurance company within the scope of the Act must deposit and keep deposited with the Paymaster-General for or on behalf of the Supreme Court a sum of £20,000 in respect of each class of the five specified classes of business—the deposit made in respect of any class of business to form part of the separate insurance fund required to be kept for such business. As an insurance company may carry on several classes of insurance business or other business than that of insurance, provision is made in such a case for separating the funds connected with the different businesses. Section 3 of the Act is in the following terms:—"(1) In the case of an assurance company transacting other business besides that of assurance, or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class

[1] 9 Edw. VII. cap. 49.

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of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund. (2) A fund of any particular class shall be as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

The solution of the present question depends on the proper interpretation of this section. The liquidators maintain that the section gives the policy-holders in any class of insurance business to which the Act applies a security over the whole insurance fund applicable to that class of business, so as not only to exclude entirely the holders of policies and creditors referable to the other classes of the Company's business, but to give the policy-holders a preference over the ordinary creditors of the Company in that particular class of business. Their contentions as against the Welsh Company are that that Company are not policy-holders of the Scots Company, and, in any event, are neither policy-holders nor creditors of that Company so far as its employers' liability business is concerned. The Lord Ordinary has reversed the deliverance of the liquidators on the ground that the position taken up by them is unsound. I agree with him in the result which he has reached and in the reasoning by which he has arrived at that result.

It has to be kept in view that the insurance fund applicable to any of the classes of business enumerated by the statute of 1909 consists not only of the statutory deposit, but of all receipts of the Company in respect of that particular class of business. I think it would require very clear language to show that the Legislature intended to give the policy-holders an absolute security over such a fund so as to leave all other creditors dealing with the Company in that line of its business nothing but a claim to the surplus remaining over after full satisfaction of the claims of the policy-holders. The language used does not appear to me to have brought about such a result. Even as regards the statutory deposit, I do not find any indication of intention to confer upon the policy-holders such a preference as is claimed. In the argument presented to us it was admitted that a provision as to deposit is first found in the Life Assurance Companies Act of 1870.[1] That Act provided in section 3 that every life assurance office established or to be established should deposit £20,000 with the Accountant-General of the Court of Chancery to be invested in certain securities selected by the company who were to receive the income therefrom. There is nothing, however, in the provision to suggest that in the case of liquidation the policy-holders are to have a preference on

[1] 33 and 34 Vict. cap. 61.

this fund over the other creditors, and the deposit is to be returned to the company when the life assurance fund accumulated out of the premiums amounts to £40,000. The 4th section of that Act provides that a company carrying on life assurance business and any other business shall keep the funds of its life business separate from its other funds, and it is enacted that the life assurance fund "shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance." These are practically the same words as are afterwards found in section 3 (2) of the 1909 Act. The effect of the two clauses in the Act of 1870 is to make deposit of the statutory amount a condition of carrying on the business of life insurance, and to provide for complete separation of life insurance funds from other funds where a life assurance company does other business. The protection given to the life policy-holders of the company is against creditors whose claims do not arise in connection with the life insurance business of the company, but not against creditors upon the life insurance business proper. The statutory deposit was not under this Act part of the insurance fund of the Company. By the Life Assurance Companies Act, 1872,[1] section 1, the deposit made by a life company is deemed to have been made by and to be part of the assets of the company; it is also deemed to form part of the life insurance fund, and to be subject to the provisions of section 4 of the Act of 1870. As the deposit is made part of the assets of the company, I do not see anything in this statute to support the contention of the liquidators that policy-holders have a preference over the ordinary creditors. In the year 1907, by the Act 7 Edw. VII. cap. 46, the provisions of the Life Assurance Companies Acts, 1870 to 1872, were made applicable to companies carrying on the business of insuring employers against liability to pay compensation or damages to workmen in their employment.

The Act of 1909 was passed to consolidate the provisions of the Life Assurance Acts and to extend them to certain other classes of insurance. As in the preceding Acts so in that Act there is nothing to indicate that the policy-holders, in the case of a company carrying on only one class of insurance business, should be preferred on the assurance fund to other creditors of the company. In the case of a company carrying on several businesses, the policy-holders in one class of business were to be put in the same position, as regards the insurance fund applicable to that business, as if the company carried on no other business. The object and effect of section 3 is, in my opinion, as I have indicated with reference to section 4 of the Act of 1870, to effect separation of the funds of different businesses carried on by the same company, but not to grant preferences over the separated funds to some, as contrasted with other, creditors having claims in connection with the same class of business.

If the view which I have just expressed be sound, the respondents are entitled to rank on the fund provided that they are creditors of the Scots

[1] 35 and 36 Vict. cap. 41.

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Company with reference to their employers' liability business. The Act of 1909 defines that business as "the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment." The contention of the liquidators is that the issuing of direct policies to employers is in its nature distinct from re-insuring risks undertaken by other companies. This may be true. At the same time, as the Lord Ordinary points out, re-insurance for the spreading of risks is an ordinary feature of various kinds of insurance business both in this country and elsewhere. In the case of a company carrying on only one of the enumerated classes of insurance businesses, say employers' liability assurance, and therefore having only one insurance fund, and, in the course of its business, re-insuring other companies in connection with employers' liability risks undertaken by the latter, either in virtue of power to do so in their memorandum or as an incident in their business, I think that it would be only natural to treat the premiums received from re-insurance as receipts from their employers' liability business and the re-insured companies as creditors upon the insurance fund. Direct insurance and re-insurance appear to be two methods of carrying on the same class of insurance business rather than two separate classes of such business. I think the words "issue of policies" are apt to cover cases of direct insurance, and the words "undertaking of liability under policies" are apt to cover cases of indirect insurance. It is significant that in the definition of the five different classes of insurance business affected by the provisions of the Act of 1909, the undertaking of liability under policies is referred to in the cases of life, fire, accident, and employers' liability where re-insurance is common, and is not referred to in the case of bond investment business, where, as I understand, re-insurance is practically unknown. The only explanation suggested by the liquidators as to the meaning of "undertaking liability under policies" was that it refers to the case of two companies amalgamating. That appears to me to be a much less natural meaning to attach to the words than that contended for by the respondents. In re-insurance the insurance company no doubt take into consideration not so much the character of the risk itself as the skill and prudence of the re-insured company, and they have no contract with the policy-holders of the re-insured company. Their liability, however, arises on the occurrence of the same event, death of a policy-holder in the case of life insurance, and injury or death of a workman in the case of employers' liability insurance. They have undertaken the liability of another, but that was a liability under a policy of insurance upon human life, or of insurance of employers against liability to pay compensation or damages to workmen.

The schedule forms attached to the Act of 1909 prescribe the form of the accounts and balance-sheets which have to be kept by assurance companies, and which require to be deposited at the Board of Trade within six months after the close of the period to which they relate. To the form of revenue account there is a note appended—"Items in this account to be the net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks." The liquidators argue

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that this note assists their case, as it recognises the Company's right to re-insure its own risks but makes no mention of their undertaking the re-insurance of the risks of others. I agree with the Lord Ordinary that it is improbable that the Legislature intended this one-sided recognition of re-insurance, and that it would or might lead to hardship or anomaly, as pointed out by him. In the revenue account under the head of premiums the amount received for re-insurance, just as the amount received for direct insurance, will be properly entered.

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From the respondents' side of the bar we were informed that insurance companies doing re-insurance business enter the premiums as effeiring to the Life Assurance or Employers' Liability Assurance Fund, according to the character of the risk re-insured. That was not admitted by the liquidators, and therefore cannot be taken as a fact. It is, however, admitted in the present case that the Scots Company, in making up their revenue account applicable to employers' liability insurance business, always entered on the receipt side the premiums paid by the Welsh Company. These premiums have therefore gone, at all events in part, to satisfy claims of holders of employers' liability policies of the Scots Company. The treaty of re-insurance shows, I think, that both parties contemplated that this would be done, and that the Employers' Liability Assurance Fund of the Scots Company would be available to meet the claims of the Welsh Company. On no other footing can I interpret article 7 of that document which provides that the Scots Company would submit to the Welsh Company its revenue account for its workmen's compensation department as lodged with the Board of Trade within seven days after its being lodged, and that if the ratio of claims to premium income in this revenue account in any financial year should have exceeded 60 per cent, the Welsh Company should have power to cancel the treaty.

It is not necessary in the view which I take of the rights of creditors of the Company to decide whether or not the respondents are policy-holders of the Company. In applying the provisions of the Act of 1909 to employers' liability insurance companies, section 33 (*g*) provides: "The expression 'policy' includes any policy under which there is for the time being an existing liability already accrued, or under which any liability may accrue." That does not, however, assist one in ascertaining whether or not a document is a policy. The form of document to which the term "policy" is ordinarily applied is certainly different from that of the treaty of re-insurance between the two Companies. At the same time I think the word "policy" may be held, and is properly held, to cover any document evidencing a contract of insurance within the scope of the Company's employers' liability insurance. I should therefore be prepared to hold that the respondents are policy-holders of the Scots Company in liquidation.

A subsidiary point was raised by the respondents as to the first finding of the Lord Ordinary excluding them from "any ranking in respect of the costs, legal, medical, and other expenses incurred in connection with the determination or settlement of claims made under the policies issued by the respondents." This matter is dealt with by the Lord Ordinary in the latter part of the note attached to his interlocutor. The question depends on the construction of the treaty of re-insurance. The primary

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obligation undertaken by the Scots Company is to relieve the Welsh Company of "all liability under the Workmen's Compensation Act, 1906, Employers' Liability Act, 1880, Lord Campbell's Act, and at common law for fatal accidents and accidents causing disablement occuring to the employees of employers insured against such liability by the re-insured." Article 4 provides for the Scots Company refunding, in the case of death or permanent disablement, the amount paid by the insured. If that amount includes legal or medical outlays for which the insured employers were liable under the Acts above mentioned, or at common law, I think that the re-insured have clearly a claim to recover the same from the Scots Company, and to this extent I do not agree with the Lord Ordinary's finding. Article 5 has a similar provision in cases of disablement—the Welsh Company paying the first £50 of compensation, and the Scots Company taking over and settling "within three months after the re-insured shall have paid a total sum of £50 in weekly compensation all claims in respect of accidents causing disablement."

I am inclined to agree with the Lord Ordinary's interpretation of the treaty in so far as he excludes expenses incurred by the re-insured themselves. In the course of the debate, however, counsel for the Welsh Company made statements as to the actings of parties under the agreement which were not admitted by the liquidators. I am not prepared to say that evidence as to the way in which parties themselves interpreted the treaty of re-insurance is or may not be a material element to be taken into consideration by the Court in dealing with this question. I think that parties ought to be agreed upon a statement as to what has occurred or expressly renounce probation. It is also unsatisfactory that no information was given to us as to what is included under expenses for which a claim is made by the Welsh Company, or by whom the expenses were incurred. Until some such statement is made, I do not think that this question ought to be finally disposed of.

I think that we ought to recall the first finding of the Lord Ordinary, affirm the second finding, and *quoad ultra* remit to the Lord Ordinary.

Lord Salvesen.—The leading question in this case depends on a construction of section 3 (2) of the Assurance Companies Act, 1909. In construing this section I have had more difficulty than your Lordships, and I confess that for some time the inclination of my mind was in the opposite direction. In the first place, I am unable to hold with the Lord Ordinary or with Lord Hunter that the Welsh Company were policyholders within the meaning of that section. The word "policy-holder" has a popular and well-understood meaning, and does not include a party to a re-insurance treaty such as that on which the Welsh Company base their claim. This re-insurance treaty gives no direct action at the instance of the parties insured against the re-insurers. It is a mere contract of indemnity as between the original insurer and the Glasgow Company, the liability under which falls to be measured in each case by the conditions of the policies issued to the insured taken in conjunction with the terms of the treaty itself.

There is more to be said for the view that such a treaty of re-insurance

constitutes an "undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment" to use the words of section 1 (*d*) of the 1909 Act. I find it, however, unnecessary to express an opinion on this point, as it is at all events plain that the Welsh Company were creditors of the Glasgow Company at the date of its liquidation. If the Glasgow Company had done no other business than this particular class of insurance I cannot find any warrant for the view that all its creditors would not be entitled to rank on the whole funds which it possessed, nor for differentiating in this matter between the deposit fund and the other assets of the Company. The difficulty is that in section 3 (2) language is used which at first sight suggests that policy-holders are to have a security for their claims which by implication is to be denied to creditors who are not policy-holders. The clause to which I refer is in these terms:—"Shall be as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class." On further consideration, however, I think this clause is a mere superfluity, and means precisely what is more accurately expressed in the succeeding clause, "shall not be liable for any contracts of the Company for which it would not have been liable had the business of the Company been only that of assurance of that class," &c. One is unwilling to assume that the Legislature used two separate and apparently cumulative clauses to express exactly the same thing, but perhaps it was assumed that in the liquidation of an insurance company which carried on only one form of insurance business the policy-holders strictly so called would be the chief creditors; and that other claims might be treated as negligible—as for the most part indeed they would be where the only business carried on had been direct business with insured parties, whether or not the claims of policy-holders were re-insured by the company who undertook the risk. In this view the only material point is whether the Welsh Company are creditors of the Glasgow Company. If so they will rank upon the whole funds in the same way as a stationer who supplied the forms of policies used in the employers' liability insurance business or any agents who had unsatisfied claims of commission for obtaining such business.

It was argued, however, on behalf of the Glasgow Company that the business which was done under the treaty of re-insurance was not of the nature of employers' liability insurance business but was to be treated as a separate business to which the provisions of section 1 of the Act do not apply; as for instance marine insurance. If it were so, no doubt the policy-holders or other creditors in connection with that separate business would not be entitled to rank upon the special deposit of £20,000, but would be relegated to any general assets representing the capital originally taken up in the Company. It is certainly remarkable that the Act of 1909 contains no direct reference to re-insurance of the kind embodied in the treaty in question. On the other hand, in the schedule appended to the Act re-insurance of the Company's own risks is recognised. The premiums paid in respect of such re-insurance are to be deducted in stating the premium income; and I presume that payments made under policies also fall to be entered under deduction of the amounts recoverable from a re-

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insuring company. I think it may fairly be implied from the mention of re-insurance that mutual re-insurance was to be treated on the same lines. It is here, however, that my main difficulty lies; because it is at least conceivable that Parliament meant to treat insurance business of this class as being distinct from proper insurance risks undertaken to the policy-holders direct; just as undoubtedly marine insurance business would be so treated.

Lord Salvesen.

On the second question which relates to the construction of the re-insurance treaty I agree with Lord Hunter in holding that the respondents are entitled to a ranking in respect of the legal and medical expenses which they have had to pay to the holders under policies issued by them. As regards the further question whether the legal and medical expenses which the Welsh Company properly incurred in connection with claims made upon them under such policies do not also form a good item of charge I am far from clear. The treaty of re-insurance does not expressly exclude such a claim; and if it be the fact that the parties to the treaty dealt with each other from the first on the footing that such claims were included—as we were told at the bar—I think this contemporaneous exposition of what the parties meant by the contract would have been of value in construing it. I doubt whether the liquidators would be entitled on the mere language of the contract to maintain a view of its meaning which was contrary to that upon which the parties to it had consistently acted for several years, if that be the fact. On this matter, therefore, I should prefer to have some inquiry or admissions by the parties before deciding that the Welsh Company had no claim in respect of the legal and medical expenses which they incurred as matter of ordinary business in settling the claims made by their policy-holders; and I understand that this matter will not be foreclosed by the interlocutor now to be pronounced.

Lord Guthrie.

Lord Guthrie.—I agree. On the main question in the case, namely, the right of the Welsh Insurance Corporation, Limited, to a ranking secured on the Employers' Liability Fund of the Glasgow Assurance Corporation, Limited, I think the Lord Ordinary has come to a sound conclusion, and I take the case as he has done apart from any alleged practice of bookkeeping on the part of the Glasgow Corporation.

The Welsh Corporation admit that, if their claim is sound, the re-insurances effected by them with the Glasgow Corporation must have formed an integral part of the employers' liability business carried on by the latter. If it did not, then the Welsh Corporation would only be entitled to the ordinary ranking conceded to them by the liquidators, because, by section 3 (2) of the Assurance Companies Act of 1909, the Employers' Liability Fund "shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable." The Welsh Corporation bases its claim on two grounds. First, it says that the re-insurances, which it effected with the Glasgow Corporation, fell under the definition of employers' liability insurance business contained in section 1 of the Act of 1909, "that is to say, the issue of, or the undertaking of liability under, policies, insuring employers against liability to pay compensation or damages to workmen in their employ-

ment." They say that these contracts of re-insurance were either policies issued by the Glasgow Corporation, or at all events that, under these contracts, there was by the Glasgow Corporation "the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." I read the statute as making a clear distinction in section 1 between two classes of documents, a distinction which excludes these re-insurance contracts from the category of policies "insuring employers against liability to pay compensation or damages to workmen in their employment," and includes them within the category of documents involving "the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." The contracts of re-insurance are not called policies either in the Glasgow Corporation's memorandum, which expressly authorises them, or in the re-insurance treaty of 30th November 1909 entered into between the Welsh Corporation and the Glasgow Corporation, although, no doubt, in the latter the payments made by the Welsh Corporation to the Glasgow Corporation are called premiums. Confining attention to the definition in the Act, it seems to me an unnecessarily strained construction to bring contracts of re-insurance between one insurance company and another under the category of "policies insuring employers." I think that phrase refers to policies between insurance companies and employers insuring employers directly, and not to contracts to which employers are no parties and of whose existence they may be unaware. But, however this may be, it seems to me clear that contracts of re-insurance cannot be reasonably excluded from the scope of the alternative in section 1 of the Act. Cases of amalgamation of companies may be provided for under this alternative, but I read it as primarily applicable to contracts of re-insurance, which have been familiar features of insurance business in Great Britain, at all events since 1880, and the existence of which was recognised both in the Act of 1870 and in the Act of 1909, the former referring to re-insurances of both kinds, and the latter to re-insurances of company's risks. This view is not noticed by the liquidators in the note appended to their adjudication.

Second, the Welsh Corporation say that, as creditors, their claim is good, because it does not involve, in the words of the section 3 (2) already quoted, any application of the Employers' Liability Fund "directly or indirectly for any purposes other than those of the class of business to which the fund is applicable." A tradesman, who supplied furnishings or other articles for premises used in whole or in part for the employers' liability business, would be entitled to rank on the fund created for and in connection with that business, and would not be bound to submit to a general ranking. If so, I do not see any distinction for the present purpose between such a claim and the claim of the Welsh Corporation, who, whether the Glasgow Corporation did or did not issue a policy to them, were certainly parties with the Glasgow Corporation to a contract of insurance, which was an ordinary incident of that Corporation's employers' liability business.

As to the Welsh Corporation's claim for medical and legal expenses,

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I agree with your Lordships in the views expressed and the course proposed.

THE COURT recalled the Lord Ordinary's first finding, affirmed the second finding, and *quoad ultra* remitted the cause to the Lord Ordinary.

MACPHERSON & MACKAY, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

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J. & M. Craig (Kilmarnock), Limited, v. Inland Revenue.

J. & M. CRAIG (KILMARNOCK), LIMITED, Appellants.—*Clyde, K.C.*—*Hunter.*

J. J. COWPERTHWAITE (Surveyor of Taxes, Kilmarnock), Respondent.—*Sol.-Gen. Morison*—*R. C. Henderson.*

Revenue—Income-tax—Trading Profits—Ascertainment—Purchase of going concern—Entries in purchaser's books—Entries made for purely bookkeeping purposes—Income-Tax Act, 1835 (16 *and* 17 *Vict. cap.* 34), *section* 2, *Schedule D.*

A limited company was formed to take over as a going concern the manufacturing business then being carried on by a company in liquidation. The consideration was £25,000 in cash and an obligation to relieve the sellers of certain contingent liabilities which could only emerge and be ascertained at a future date.

For the purpose of opening their books the new company allocated the purchase price of £25,000 as follows:—£19,375 to buildings, plant, &c. (arrived at arbitrarily by taking ⅘ of the values standing in the books of the old company), and the remainder, £5625, to stock-in-trade. They, at the same time, valued the stock-in-trade on an ordinary stocktaking basis, which brought out the value at £12,798, 1s. 4d. They used this valuation for their trading and profit and loss accounts; and squared these with the opening entry of £5625 by treating the difference, viz., £7173, 1s. 4d., as a "stock suspense account" to provide for the contingent liabilities they had undertaken under the contract of purchase.

When the first balance-sheet for a complete year of trading was made up by the company, the Inland Revenue claimed income-tax on their profits calculated on the basis of taking the sum of £5625 as the opening value of the stock. The company maintained that the figure that should be taken was the true value of the stock, viz., £12,798, 1s. 4d.

Held that the Inland Revenue was not entitled to take the purely bookkeeping entry of £5625 as conclusive evidence of the true value of the stock, but was bound to ascertain the true value and assess for income-tax on that basis.

Exchequer Cause. 1ST DIVISION with three consulted Judges.

ON 13th March 1913 a case was presented for the opinion of the Court, under the Taxes Management Act, 1880, on an appeal by J. & M. Craig (Kilmarnock), Limited, against an assessment for income-tax made upon them by J. J. Cowperthwaite, assessor of taxes, Kilmarnock.

The case stated:—

"At a meeting of the Commissioners for the special purposes of the Income-Tax Acts, held at the Inland Revenue Office, Glasgow, on 29th July 1910, for the purpose of hearing appeals, J. & M. Craig (Kilmarnock), Limited (hereinafter called the appellants), appealed against an assessment on £4386—less wear and tear allowance, £210—for the year ended 5th April 1908; against an assessment on £6901—less wear and tear allowance £319—for the year ended 5th April 1909; and against an assessment on £6901—less wear and tear

allowance £303—for the year ended 5th April 1910, made upon them by the Commissioners for the district under section 2, Schedule D, of the Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), in respect of trade profits. The appellants were represented by Mr David Carruthers junior, their secretary.

"I. The following facts were admitted or proved:—

"(1) The appellants are a Limited Company formed in 1907 to acquire as a going concern a portion of the assets and business of J. & M. Craig, Limited, coalmasters and fireclay manufacturers (in liquidation), viz., the Kilmarnock land and works consisting of the lands of Hillhead, the Hillhead Brickworks, Longpark Pottery, colliery plant and machinery, mineral leases, fixed and moveable machinery, plant, fittings, and fixtures, stock-in-trade, moulds, tools, &c., together with the goodwill of the Kilmarnock business, but excluding the book-debts.

"(2) The business and assets referred to were exposed in one lot for public sale on 16th August 1907, and were bought on that date on behalf of the appellants at the reduced upset price of £25,000. The purchasers were bound under the conditions of sale to relieve the liquidator of the rent for the unexpired portion of the leases of the minerals, and to settle the claims for damage due to the proprietor of the minerals at the termination of the lease, as well as the outstanding claims for annual surface damages due to the agricultural tenants. The amount of the damages due to the proprietor is indefinite, as it cannot be ascertained until the end of the lease, but was estimated by the proprietor at the date of the liquidation at £1800. The outstanding claims of the tenants have since been settled for £446.

"(3) The last valuation of the stock-in-trade at the Kilmarnock Branch was made by the liquidator twelve months prior to the date of its sale to the appellants, and the lump purchase price—£25,000—was not apportioned by him in any way among the various assets, nor was there any valuation made at or immediately prior to the sale to the appellants, showing the relative values of the subjects acquired, or how the purchase price fell to be apportioned between them.

"(4) The appellants directly after their acquisition of the concern allocated for bookkeeping purposes the purchase price—£25,000—between the various assets as shown in statement 'Opening entries in the books of J. & M. Craig (Kilmarnock), Limited, at 17th August 1907' (marked 'A'), viz.:—

Fol. in Statement.						
4	Hillhead Brickworks—Buildings A/c	£2500	0	0		
8	Hillhead Colliery Buildings and Land A/c	7600	0	0		
12	Hillhead Brickworks—Plant A/c	2380	0	0		
16	Hillhead Colliery—Plant A/c	1750	0	0		
28	Hillhead Brickworks—Office Furniture A/c	45	0	0		
40	Longpark Pottery—Buildings A/c	2700	0	0		
44	Longpark Pottery—Plant A/c	2390	0	0		
52	Longpark Pottery—Office Furniture A/c	10	0	0		
					£19,375	0 0
20	Hillhead Brickworks—Stock A/c	£1500	0	0		
24	Hillhead Colliery—Stock A/c	180	0	0		
48	Longpark Pottery—Stock A/c	3464	0	8		
60	Edinburgh Branch Stock and Plant A/c (value of *Plant* stated to be nominal)	480	19	4	5,625	0 0
	Total purchase price				£25,000	0 0

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"(5) The appellants at the same time caused a valuation to be made of the stock-in-trade included in the said purchase price—£25,000—and found the value of the same, on the basis of ordinary stocktaking, to be £12,798, 1s. 4d.; the separate items comprising this sum appear in Statement 'A' under the following heads:—

Fol. 20. Hillhead Brickworks . .	£3,311	8	6
Fol. 24. Hillhead Colliery . . .	293	9	7
Fol. 48. Longpark Pottery . . .	8,391	11	0
Fol. 60. Edinburgh Branch . .	801	12	3
	£12,798	1	4

"There is always a considerable demand for such a stock, and there is no difficulty in ascertaining its market value at any given date. The lands included in the purchase were also valued on behalf of proposed lenders, the value fixed by the valuation being £7000.

"(6) When the appellants came to open their books and to allocate the purchase price among the various assets they entered the stock at the aforesaid value—£12,798, 1s. 4d.—and the land at the amount of the valuation—£7000. As no valuation had been made of the buildings, plant, machinery, and other assets, they entered these at a proportionate figure corresponding to their value as standing in the books of the old Company, J. & M. Craig, Limited (in liquidation), in comparison with the price paid. That is to say, the whole assets purchased by the appellants originally stood in the books of J. & M. Craig, Limited (in liquidation), at approximately £75,000, and were purchased for £25,000, hence the assets, the value of which had not been ascertained, were entered at approximately one-third of this value as standing in the books of J. & M. Craig, Limited (in liquidation). As the appellants were unable to put a definite figure on the mineral damages, they did not add any definite sum to the purchase price on this account. They deducted from the value of the stock as taken—£12,798, 1s. 4d.—the amount—£5625—remaining after deducting the value of the land and buildings on the basis mentioned above from the purchase price of £25,000, and carried the amount—£7173, 1s. 4d.—to an account which they called a 'Stock Suspense A/c.' This account was intended to include the liability for mineral damages.

"(7) At the close of the appellants' financial year on 11th November 1908 a balance-sheet ('C') was made up on the foregoing lines, the 'Stock Suspense A/c' being called therein 'Reserve Fund.' Such balance-sheet was duly audited and presented to the shareholders as provided in No. 107 of the articles of association ('G'). The figures from which the total of the 'Stock Suspense A/c' is arrived at are shown in Statement 'A,' viz.:—

Fol. 20. Hillhead Brickworks—Stock Suspense A/c .	£1811	8	6
Fol. 24. Hillhead Colliery—Stock Suspense A/c .	113	9	7
Fol. 48. Longpark Pottery—Stock Suspense A/c .	4927	10	4
Fol. 60. Edinburgh Stock and Plant * Suspense A/c .	320	12	11
* Stated to be of nominal value.	£7173	1	4

Deduct—

Per note of 25/7/11 on Statement A	Error in pricing old clay bings . . .	£499	0	0	
	Error in pricing Stock of Catalogues . .	38	12	6	537 12 6
				Total,	£6635 8 10

being the amount shown in balance-sheet as at 11th November 1908 ('C') under the head—'Excess of Valuation of Stock at 17th August 1907 over proportion of purchase price applicable thereto.'

"(8) The business of the appellants having been set up within the period of three years referred to in sec. 100, First Case, First Rule, Schedule D, of 5 and 6 Vict. cap. 35, their first accounts, viz., from 17th August 1907 (date of their purchase of the concern) to 11th November 1908, form the basis of the assessments for each of the three years to which their present appeal relates, subject to any application to the District Commissioners, by whom the assessments were made—for adjustment of liability for the years subsequent to 1907-8, ended 5th April 1908—under the provisions of sec. 24 (2) of the Finance Act, 1907.

"In the assessments under appeal, the appellants' profits for the aforesaid period, 17th August 1907 to 11th November 1908—viz., one year and eighty-seven days—viz., £8546, 8s. 11d., were calculated on the assumption that the commencing value of the stock as at 17th August 1907 must be taken as £5625, the apportioned value as in Statement 'A' referred to in paragraph (4). . . . [bringing out the following assessments]:—

"*Year* 1907-8, *ended 5th April* 1908.—The proportion of the foregoing profit, £8546, 8s. 11d. for the period 17th August 1907 to 5th April 1908, viz., 232 days = £4386, as assessed. *Year* 1908-9, *ended 5th April* 1909.—The proportion of the profit, £8546, 8s. 11d., for one year = £6901, as assessed. *Year* 1909-10, *ended 5th April* 1910.—The proportion of the profit, £8546, 8s. 11d., for one year = £6901, as assessed. [Here followed a statement as to the method on which the allowances for wear and tear had been calculated.]

"II. At the hearing of the appeal Mr Carruthers, on behalf of the appellants, contended:—

"(1) That the assessments in dispute should have been based on the appellants' trading and profit and loss accounts for the period 17th August 1907 to 11th November 1908, as prepared for their own purposes, and that the value of the stocks in hand at the beginning of the period as entered in such accounts should be accepted as representing the true value of such stocks, viz.,

Opening Stocks as at 17th August 1907 as per Company's Trading and Profit and Loss Accounts ('B').

Stock of goods, viz.,							
Hillhead Brickworks,			£3207	0	4		
Hillhead Colliery,			293	9	7		
Longpark Pottery,			8304	12	8		
						£11,805	2 7
Not shown separately in Profit and Loss A/c.,	Stock of Catalogues,					104	8 2
	"	"				86	18 4
	Stock at Edinburgh,					801	12 3
		Total,				£12,798	1 4

as appearing in Statement 'A.' *Vide* paragraph I. (5).

"(2) That the appellants' profit should be calculated for income-tax purposes as follows:—[Here followed a statement in which the value of the opening stocks was stated at £12,798, 1s. 4d., and the profit arrived at on that basis as £2011, 18s. 1d.; bringing out the following assessments]:—

"*Year* 1907-8, *ended 5th April* 1908.—The proportion of the above

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profit, £2011, 18s. 1d., for the period 17th August 1907 to 5th April 1908, viz., 232 days = £1033. *Year* 1908-9, *ended 5th April* 1909.—The proportion of the profit, £2011, 18s. 1d., for one year = £1625. *Year* 1909-10, *ended 5th April* 1910.—The proportion of the profit, £2011, 18s. 1d., for one year = £1625.—[Here followed a contention that a further reduction of the assessment should be made in respect of wear and tear.]

"It will be observed that the difference between the appellants' profits as calculated by the Surveyor of Taxes per statement in paragraph (8), viz., ... £8546 8 11

Add—Premium on sinking fund allowed in error, . 101 13 0

£8648 1 11

Less—Excess taxed dividends, . . . 0 15 0

£8647 6 11

and the profits as per appellants' calculation (contention (2)), ... 2011 18 1

Difference, £6635 8 10

represents the sum appearing in the balance-sheet as at 11th November 1908 ('C') as 'Reserve fund being excess of valuation of stock at 17th August 1907 over proportion of purchase price applicable thereto.'

"(4) That the manner in which the so-called profits—£8546, 8s. 11d.—on which the assessments were based—were arrived at is not correct; that the real value of the stock in hand was ascertained by the appellants at the time they acquired it; that it was also ascertained in the same manner at the close of the period covered by their first account; and that the difference between the two stocks is the correct amount to be carried to the profit and loss account.

"(5) That the appellants were entitled to apportion the total purchase price among the various assets in any proportion they pleased, so long as they did so fairly. In the present case they purchased the whole concern at its market price. The only item of which they could ascertain the separate market value was the stock, and having ascertained the value of this, they were entitled to assume that they purchased the remainder of the assets at the difference between the value of the stock and the total purchase price. The appellants' method of preparing the accounts should have no effect on the merits of the case. The figures in the balance-sheet 'C' were entirely arbitrary and, in a sense, fictitious, inasmuch as the only item of which the value had actually been ascertained was the stock. The value put upon the latter must be assumed to represent approximately the sum which would have been realised for it had it been sold as a separate item by the liquidator of the old Company and the sum which it would have cost the Company to replace it by manufacture. It did not include any surplus stock, but was the ordinary stock carried by the concern as its working stock. The amount may fluctuate temporarily, but is approximately the same from year to year. The appellants admitted that no part (if there was any) of the stock in hand at the end of the period covered by the profit and loss accounts ('B') could have been earmarked as forming part of the original stock purchased from the liquidator of the old Company, and that it

is possible that the bulk, at any rate, of the closing stock may consist of goods the full cost of the manufacture of which has been debited in the profit and loss accounts ('B'), though it may also have included a portion of the stock purchased from the liquidator.

"(6) That the so-called reserve fund—£6635, 8s. 10d.—was merely a book entry, and did not represent an appropriation from profits, and the appellants tendered a fresh balance-sheet, as at 11th November 1908, ('D') in which the stock was shown at its ascertained value, the land at the valuation which had been made and the remainder of the purchase price—with the addition of a sum of £1800 estimated mineral damages due to the proprietors at the termination of the lease—distributed over the buildings, machinery, and other assets. By this rearrangement of the figures the item 'Reserve Fund' in the first balance-sheet ('C') wholly disappears.

"(7) That should the judgment of the Special Commissioners be adverse to the appellants on the main question they would be entitled to allocate the so-called reserve fund among the whole assets, and that it should not be allocated to stock alone, as it follows that if the stock has been overvalued by them, the other assets have been correspondingly overvalued, and that a proportionate deduction should be made not only from the stock but from the whole assets, and, in the event of the decision of the Special Commissioners being against the appellants on this point, that at any rate the whole of the estimated claim for mineral damages should be deducted from the reserve fund, as such damages are specifically allocated to the latter in the balance-sheet ('C').

"III. The Surveyor of Taxes, Mr J. J. Cowperthwaite, who appeared for the Crown, contended:—

"(1) That any profits made by the appellants on the sale of the stock purchased from the liquidator of the old Company were profits realised in the ordinary course of trade and hence were properly included in the assessments to income-tax, Schedule D. He further contended that the proportion—£5625—of the total purchase price—£25,000—allocated by the appellants to stock in the opening entries in their books (Statement 'A') on the assumption apparently that the whole business and assets were purchased at one-third of the value that such business and assets stood in the books of the old Company, must be regarded as fairly representing the actual cost to the appellants of such stock, and hence that their profit and loss accounts should commence with such approximate cost—£5625—(as in paragraph (8)) and not, as contended by the appellants, with the valuation—£12,798, 1s. 4d.—made on the basis of ordinary stocktaking. He called special attention to the fact that there was no proof that any portion of the old stock purchased from the liquidator remained unsold at the end of the period covered by the profit and loss account, and contended, therefore, that any profit derived from the sale of such stock was omitted from that account although carried to the balance-sheet ('C') under the head of 'Reserve Fund.'

"(2) That if the contentions of the appellants as to the proper manner of treating the stock purchased were correct, a firm purchasing by tender stocks of bankrupt drapers, &c., at—say 33% below cost price—and selling off the same at a substantial profit, could nevertheless by opening their profit and loss accounts with the value of such stocks as ascertained on the usual basis of stocktaking, show little or no profit assessable to income-tax, schedule D.

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"(3) That in the balance-sheet ('C') the appellants show the value of the ground, buildings, machinery, and plant and moulds at £19,375 (viz., £19,593 less £218 proportion of expenses) and that this sum deducted from the total purchase price—£25,000—leaves £5625 as the value of the stock. If the latter had cost £12,798, 1s. 4d.—its value on ordinary stocktaking basis—the balance remaining as the cost of the ground, buildings, machinery and plant, and moulds, would be £12,202 only, whereas the appellants stated that the lands alone had been valued at £7000, thus leaving only £5202 for buildings, machinery, and plant and moulds, and gave in their reply ('F') —referred to in paragraph (9)—the value of the plant and machinery alone, for the purposes of wear and tear allowances as £6598.

"(4) That as regards the balance-sheet ('D') which the appellants sought to substitute for the original balance-sheet ('C'), the former was not certified by the auditors or submitted to the shareholders. Moreover in the duly certified balance-sheet ('E') for the following year 11th November 1909, the reserve fund—altogether omitted in balance-sheet 'D'—re-appears at the same amount as in the first balance-sheet ('C'), thus tending to prove that the appellants were evidently still of opinion that the original allocated price of the stock —£5625—was not too low, and that any loss calculated from the stocktaking figure—£12,798, 1s. 4d.—at which profit and loss account was opened—arising from the sale of such stock, was being debited to revenue. . . .

"(5) That as refuting the appellants' contentions that the 'figures in the balance-sheet ("C") are entirely arbitrary, and in a sense fictitious,' and that the reserve fund created 'did not represent an appropriation from profits,' reference was made to No. 103 of the articles of association ('G') which requires 'true accounts to be kept,' and to No. 99 which provides, *inter alia*, that 'the directors may, before recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a reserve or reserves,' —also to No. 107 which deals with the balance-sheets to be laid before the Company in general meeting, and refers to the amount recommended to be paid by way of dividend, and the amount, if any, proposed to be carried to a reserve fund.

"(6) That with reference to the appellants' claim that in any event the whole of the estimated sum—£1800—for mineral damages due to the proprietor at the termination of the lease should be allowed, there was no provision in the Income-Tax Acts authorising a deduction of this nature. He did not, however, object in the circumstances to admit the £446, 2s. 4d. charged against the reserve fund and actually paid to agricultural tenants in respect of surface damages as a deduction from the trade profits—£8546, 8s. 11d.—(arrived at as shown in paragraph (8)). By giving effect to this allowance the amended liability for each of the years under appeal would be as follows:—

Profits, . . .	£8546				
Less surface damages,	446		Proportion of Profit.		Wear and Tear Allowance.
	£8100	— for	1907-8, £4157	less	£210
		„	1908-9, 6541	„	319
		„	1909-10 6541	„	303

. . . . . .

"V. The special Commissioners reserved their decision, and after-

wards on full consideration of the facts and arguments submitted to them, determined that the only reduction to be made in the assessments was in respect of the allowance for surface damages—£446—referred to in paragraph III. (6). They therefore reduced the assessments accordingly, viz. :—

1907-8 Reduced to £4157, less Wear and Tear Allowance, £210.
1908-9 Reduced to £6541, less Wear and Tear Allowance, £319.
1909-10 Reduced to £6541, less Wear and Tear Allowance, £303."

The case was first heard before the First Division on 17th June 1913; it was re-heard before the same Division on 25th November 1913; and on 12th December it was appointed to be heard before a Court of seven Judges.

The case was accordingly heard on 27th January 1914 before the First Division, with Lord Dundas, Lord Salvesen, and Lord Guthrie.[1]

At advising on 6th February 1914,—

LORD PRESIDENT.—The seeming obscurity which surrounds the controversy in this case vanishes upon a reasoned scrutiny of the figures. The question we have to decide is—what are the trading profits assessable to income-tax of a limited company for the period from 17th August 1907 to the 11th November 1908. The Special Commissioners of Income-Tax, holding that the value of the stock-in-trade at the commencement of the period is £5625, have determined that the amount of profits for the period is £8546. The appellants, on the other hand, holding that the value of the stock-in-trade at the commencement of the period was £12,798 and ought not to be embraced in the trading, contend that the net profits assessable to income-tax are £2011. The difference between these two figures—the £5625 and the £12,798—after making an adjustment which is immaterial to the question at issue, amounts to £6635. That sum appears in the balance-sheet of the appellants for the year as at 11th November 1908, and reappears in the balance-sheet as at 11th November 1909, under the denomination "reserve fund." To determine the quality and the composition of that sum of £6635 is to solve the problem.

The Commissioners say that like many, indeed most, reserve funds, the £6635 consists of hived-up profits. The appellants on the other hand maintain that it is a sum set apart before the earning of profits actually began in order to meet certain contingent claims. In my judgment the contention of the appellants is correct and the amount of their profits for the period in question is not £8546 but £2011.

To see how that conclusion is reached, it is necessary to trace the genesis of the £6635. The appellants' Company was formed in the year 1907 to take over certain departments of a larger concern then in liquidation. They

[1] *The following authorities were referred to at the hearing:*—Coltness Iron Co. v. Solicitor of Inland Revenue, (1881) 8 R. 351, *aff.* 8 R. (H. L.) 67; Blyth's Trustees v. Milne, (1905) 7 F. 799; Tebrau (Johore) Rubber Syndicate, Limited, v. Farmer, 1910 S. C. 906; City of London Contract Corporation v. Styles, (1887) 2 Tax Cases, 239, *per* Esher, M.R., at p. 244; Russell v. Town and County Bank, (1888) 13 App. Cas. 418, *per* Lord Herschell, at p. 424; Dowell's Income-Tax Laws, (7th ed.) p. 274, *et seq.*

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purchased from the liquidator a miscellaneous assortment of assets, consisting, *inter alia*, of stock-in-trade. Now the consideration for all these assets was, first, a round sum of £25,000 in cash, and second, an engagement to relieve the liquidator of certain claims under mineral leases due to the landlord at the expiry of the lease and to the agricultural tenants at once. The appellants set aside the £6635 in order to meet these contingent claims. The claim of the agricultural tenants has now emerged and has been settled and, with the assent of the Inland Revenue, £446 has been deducted from the £6635 in order to pay the agricultural tenants' claims. That leaves the sum of £6189 at the credit of this reserve fund, and there it remains to meet the claims of the landlord which are at present undetermined but will emerge at the expiry of the lease. Of all the assets purchased from the liquidator the market value of one alone was susceptible of definite ascertainment. It is agreed that for the stock-in-trade there was always a considerable demand and that its true market value, at any given time, was susceptible of ascertainment. The appellants straightway proceeded to ascertain the value of their stock-in-trade, and, valuing it on the basis of ordinary stocktaking, they reached the figure of £12,798. With that sum they commenced the trading period, as their trading and profit and loss accounts disclose. But before they commenced to earn profits at all they set aside £6635 value out of the £12,798 in order to meet the contingent claims to which I have referred.

If £12,798 is the true value of the stock-in-trade at the commencement of the period, taken on an ordinary stocktaking basis, and if the appellants are entitled to set aside, before trading commenced, a certain proportion of that £12,798 to meet the claims which will yet emerge against the Company, then it is not denied that the determination of the Commissioners cannot be sustained. But the Commissioners say that this is an inadmissible process and that the true figure at which the stock-in-trade must be taken at the commencement of the period is £5625 and not £12,798. If it is to be taken at £5625, it is conceded that the profits for the period amount, as the Commissioners have determined, to £8546.

The appellants say that the £5625 is, to use their own language, an entirely arbitrary figure, and, in a sense, fictitious, and that, if we can realise its origin, that will become apparent. It arises thus: the appellants found it necessary for bookkeeping purposes to allocate, not the whole consideration which they paid for the assets to which I have referred, but the cash price which they paid for these various assets. Now they could not—no man could—tell what was the exact price which was paid for each one of these assets, and the way they set to work was this: they took one-third of the value of these assets as they stood in the books of the selling Company, and they assigned that to each item in their own books. That absorbed £19,375 of the £25,000, leaving over £5625, which they straightway proceeded to allocate to the stock-in-trade. Now it is apparent that the £5625 thus reached does not represent the true value of the stock-in-trade, nor indeed does it represent the price which they paid for the stock-in-trade to the selling company. If this be so, then plainly the trading period to which I have referred cannot

commence with a stock-in-trade of £5625, and if not there is only one alternative offered, viz., the £12,798. If we take the £12,798, therefore, as the appropriate value of the stock-in-trade at the commencement of the trading period, ascertained, as I have described, on an ordinary stock-taking basis, it follows inevitably that the profits of the appellants for that period were £2011.

Thus far all appears to me to be plain sailing. My difficulty only arises when I come to formulate the question of law which we have to decide. There is no help to be found in the case. Mr Clyde shared my difficulty in some measure, and the Solicitor-General pressed home the point, arguing with great force that this is a pure question of fact upon which the Commissioners were not only the best, but the only judges. Now if I thought it was necessary to our decision of this case to balance conflicting estimates of value or price, or to weigh conflicting valuations of property, I should decline to disturb the determination at which the Commissioners have arrived. But, after much consideration, I have come to the conclusion that the correct question of law submitted to us is this—is there in this case legal evidence adequate to support the determination of the Commissioners that the profits of this Company for the period in question were £8546, and not £2011, or otherwise is there in this case legal evidence to warrant the conclusion that £5625 represents either the true market value for stocktaking purposes or even the proportion of the cost price paid for the stock-in-trade?

Without hesitation, for the reasons I have given, I would answer both questions in the negative, and, if your Lordships agree with me, then the conclusion we must arrive at is this, that this appeal be sustained, that the determination of the Commissioners be recalled, and that we remit to them to fix the profits at which this Company is to be assessed, having in view the judgment we now pronounce.

Lord Dundas.—I agree with your Lordship in the chair, and I have nothing to add.

Lord Johnston.—I also concur in the conclusion at which your Lordship has arrived, But I may say that I have never, as your Lordship has, had any difficulty about there being a question for this Court to determine. Notwithstanding that it is said that you can prove anything by figures, it is true that figures themselves are facts, or represent facts. Probably they are the only things that do represent facts. But the method of arriving at the result deducible from figures regarded as facts, and, in particular, the method on which the accounts of a registered company are to be kept is one of principle and therefore of law. It has throughout seemed to me that unquestionably this case raised the question of the principle upon which registered companies under certain circumstances require to keep their accounts. I further think that the case is not by any means an exceptional one, and that it is therefore a case of more general interest than has hitherto been supposed. There must be many cases nowadays—looking to the great multiplication of public companies—in which a company is constituted for the purpose of

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doing exactly what this Company has done, viz., taking over the assets of a previous firm or company and carrying on its business. I have therefore had no doubt about the competency of the case before us. I pass then to the case as stated.

Though only registered in November the appellants seem to have taken over the business as from 17th August 1907, and they were at once obliged to make opening entries in their books so that these might be kept in form suitable to the conduct of their business as a limited Company. The preliminary question is, what was their business out of which they were to make their profit or loss, and the answer is easy and clear. It was primarily the manufacture and sale of fire-clay goods. But they also, as a necessary adjunct or concomitant of their business, had to deal in—that is to buy and sell—certain goods not manufactured by them, and they had to dispose of surplus coal, as they could not use up the whole coal wrought under their mineral lease in their manufacturing operations. It cannot be said that, buying as they did a going business and its assets, real and personal, it was particularly easy to adjust these opening entries in such way as to exhibit intelligible and accurate results to shareholders, to provide for contingent liabilities undertaken, and at the same time to give on the face of their accounts sufficient and correct information to the Inland Revenue for income-tax purposes. The difficulty arose from the fact that a slump sum had been paid for the whole assets as a *unum quid*, and that these assets (including such goodwill as there was of the old business) were of different descriptions. They consisted of land, leases, works, and plant. These were of the nature of fixed capital assets. But they included also stocks of goods and raw material. These were of the nature of floating assets. They have on the whole taken, I think, a very reasonable and proper course, and are not to be penalised for so doing. In the circumstances, as was to be expected, the total assets of the old Company were acquired at a price very much below their book value as standing in the books of the old Company, and even very probably below the *cumulo* valuation which would have been put by a valuer *separatim* on the different items. But in such transactions there is a large element of risk in taking over the assets of a bankrupt business, and there is no reason to think that the gross price, coupled with the incidental and contingent obligations undertaken, was not a fair consideration for the gross assets, taking the broad and the long of it. The appellants in the opening entries, printed in Appendix A, made an endeavour to put a capital value on each of the assets taken over by them. But it is a book entry value merely, and as regards the separate items entirely empirical. Notwithstanding, the Inland Revenue have seized upon these figures, and upon the figures which consequently enter the first balance-sheet of the appellants as at 11th November 1908, in order to assess the appellants for income-tax, as if these figures were not empirical but real. I am not surprised that the Inland Revenue officials at first sight should have taken advantage of these figures, but I think that a little consideration would have shown that they could not really be made the basis of assessment. The course they have taken is, I think, at once condemned by the statement of the Commissioners in the 4th head of the case, viz., "The appellants,

directly after their acquisition of the concern, allocated for bookkeeping purposes the purchase price." Figures adopted for bookkeeping purposes can be no true guide to the ascertainment of profit and loss. Hence it will not be surprising if the profit which the Inland Revenue have deduced is found to be not a real but a fictitious profit.

The Inland Revenue are not entitled as matter of course to hold the Company to entries made in their books for purely *bookkeeping purposes*, and these entries may in many cases be wholly disregarded, and that for two reasons:—The first, a general reason, viz., that the Revenue cannot have it both ways; they cannot accept entries in a company's books when they find them to be to the advantage of the fisc, and discard them when they are to its disadvantage. They invariably set aside, and rightly so, entries which would favour a company, but which do not give the real results of their business. And I do not think that they can be allowed to hold a company to entries which favour the Revenue, but equally do not show the real results of their business.—The second, a special reason, that the Revenue Authorities cannot be allowed to pick and choose their figures, taking those that suit them and rejecting others. Of this the statement in article I. (4) of the case is an excellent example and extremely misleading. For whereas State A appended to the case is itself a collection of entries, found in as many as twelve different folios of the Company's ledger, the said statement in article I. (4) of the case, on which the contention of the Revenue is mainly founded, is itself not a fair representation of State A, but eliminates essential entries.

The true initial consideration, which must I think guide those concerned in arriving at the profits of the appellants' Company for assessment to income-tax, is this:—The Company's capital account must be distinguished from its trading account. It is essential that the capital account be so stated that, according to the principles which regulate joint stock company management, the true position of the Company may be disclosed and its capital be kept as a matter of accounting intact. But it is equally essential that the Company's trading accounts and profit and loss accounts be kept on such a basis and in such a form as to show true and real results. The appellants did not buy the assets of the old Company to turn them over *en bloc* and make their profit on the transaction, as if they were an assets company or a dealer in bankrupt businesses—they bought them to carry on the manufacturing and mercantile business of the old Company, for which these assets were adapted. Looking at the position from this point of view, a large part of the assets were, as I have said, of the nature of fixed capital assets. These for the purposes of the Company's bookkeeping might call for capital values being put on them, but values which, less or more, would in no way affect the result of the Company's business as a profit-earning concern. Such items were the lands and leases, the works, and the plant. But there were other assets of a different kind, viz.: the floating assets consisting of the stocks of material to be worked up, and of the manufactured articles to be sold. With these the appellants' Company had to commence business, and it was on the turnover of these, and their replacement by further material and further manufactured articles, that the Company was to make its

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profit or loss. If the appellants' Company were not to show fictitious results and delude their shareholders, it was necessary that they should begin their business operations on a true and not a fictitious valuation of these assets. They could never reach correct figures for these assets if they simply took, as the Inland Revenue maintain that they did take, and irrevocably take, the gross price paid, and, having attributed empirical values to the fixed or capital assets, simply attributed the balance whatever it might be, less or more, to the working stock in their trading and profit and loss accounts. I think that the appellants took the proper course, and re-valued the working stock on a basis of stocktaking, with the result that whereas, on the empirical division of the £25,000 the sum left for the working stock was £5625, the revaluation made on stocktaking basis was £12,798. And with this latter sum distributed over its different departments the Company commenced its trading accounts.

I do not for one moment say that this revaluation is one which must be accepted by the Department without examination. I think that the Inland Revenue were entitled to have its fairness and accuracy tested and, if necessary, corrected. But their counsel intimated that if the determination of the Commissioners of Inland Revenue were found to be wrong, they accepted the figure of £12,798 as a fair valuation for the purpose for which, and at the date as at which, it was made.

On the principle of the thing, the course taken by the Company was the right course to adopt, and unless this course had been adopted proper trading and profit and loss accounts, such as are found in Appendix B, could not have been prepared. Were the values based on an empirical apportionment of the gross price of £25,000 taken, the profit deduced would be a manifestly fictitious profit. To the principle of these trading and profit and loss accounts I can see no objection whatever, and from them, after making due allowances, I think that the appellants' assessable income can easily be ascertained. It may neither be the trading profit shown of £2410, 14s. 3d., nor the balance on profit and loss carried to the balance-sheet of £675, 0s. 3d. But it can be ascertained by the methods which the Inland Revenue adopt in dealing with similar accounts.

What has led to the disagreement between the Company and the Inland Revenue is the necessity of reconciling the capital account and the trading and revenue accounts, as parts of one whole system of accounts, in the Company's balance-sheet. £25,000 had been paid for the gross assets. Of this £19,375 had been attributed, for bookkeeping purposes only, to real estate. There was left £5625 (I am taking the figures without making certain minor corrections which were found necessary) as the apparent amount of capital attributable to stock. But the real value of the stock was found to be £12,798, 1s. 4d. How was the difference to be dealt with? It amounted to £7173, 1s. 4d. It was correctly, I think, placed to suspense account, and held against the future and contingent liabilities undertaken by the Company. And, if it is not required for these, it will still remain as a book entry on suspense account, against which may be written depreciation of assets or losses of the Company. Unfortunately the directors dropped the term "sus-

pense" and adopted the equivocal term "reserve." But this made no real difference. One thing is certain: that the Revenue's contention that it represented "an appropriation from profits" is entirely without foundation. The fallacy which underlies the position maintained for the Department is, I think, illustrated by the analogy suggested by them in article III. (2) of the case. This Company is not in the position of a firm purchasing by tender stocks of bankrupt drapers, &c., at, say, 33 per cent below cost price, selling them off at a profit, and trying to avoid income-tax by revaluing them and entering them in their books on the basis of ordinary stocktaking. Such a firm would be engaged, as I believe some are, in the business of buying and selling off bankrupt stocks and making its profit on the turnover. A manufacturing firm, which acquires a going manufacturing business with its current stock, not merely to turn over the stock, but to do so only as an incident in carrying on the manufacturing business and continuing to market its products, stands in a wholly different position. It is the erroneous application to the latter class of business of considerations which apply only to the former which has, I think, led to the erroneous conclusion at which the Commissioners have arrived.

I think, therefore, that the judgment of the Special Commissioners was wrong, but that the parties should be left to readjust figures, which I have no doubt that they can do much better than the Court. The judgment can then be based on these figures. If they cannot agree they may come back to the Court.

Lord Salvesen.—The facts in this case, so far as material, are very simple. The appellants' Company was formed in 1907 to acquire as a going concern part of the assets and business of a previous company of coal-masters and fireclay manufacturers. This company had gone into liquidation, and certain assets consisting of mineral leases, brickworks, a colliery, and a pottery with their plant and stock-in-trade were exposed in one lot for public sale. They were bought by the appellants at a slump price of £25,000. This sum, however, did not represent the full purchase consideration, because the appellants were taken bound under the conditions of sale to relieve the liquidator of the rent for the unexpired portion of the mineral leases, and to settle the claims for damages due to the proprietor of the minerals at the termination of the leases, as well as the outstanding claims for annual surface damages due to the agricultural tenants. The amount of the damages due to the proprietor is stated in the case to be indefinite, as it cannot be ascertained until the end of the leases; and whether the leases are valuable, as no doubt they were assumed to be, depends upon whether the minerals can be worked to profit.

After their acquisition of these assets the appellants allocated the price for bookkeeping purposes. They apportioned £19,375 to all the assets other than the stock-in-trade, leaving £5625 as the assumed value of the latter. At the same time they had the stock-in-trade separately valued on the basis of ordinary stocktaking, and this valuation brought out a sum of £12,798, 1s. 4d. With the various sums contained in this valuation applicable to the separate branches of their business they

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opened the trading accounts from which their profit and loss accounts are made up.

The first trading account commences with the date of the incorporation of the Company and ends on the 11th November 1908, at which date the books were then, and annually thereafter, closed. This period covers a year and eighty-five days; and for income-tax purposes the results fall to be apportioned over two periods, namely, from 17th August 1907 to 5th April 1908, and from 5th April 1908 to 5th April 1909. The trading accounts show a balance amounting to some £2400 gross, or £675 net profits, the exact amount not being material. To this sum the Commissioners have added substantially the difference between the value of the stock at £12,798 and the sum of £5625, which for their own purposes the appellants allocated against the stock out of the cash purchase price of £25,000. The question is whether this sum falls to be treated as profits and is assessable for income-tax.

Counsel for the Inland Revenue maintained that the sum of £5625 must be treated as the purchase price of the stock-in-trade as fixed by the appellants themselves, and ought to enter the trading accounts in the same way as any goods which they purchased for their business in the ordinary course of trade fell to be entered at the invoice prices paid. They said that the appellants were not entitled to go back on the apportionment which they had deliberately made, and which they did not even now seek to have altered or corrected: that accordingly their trading accounts ought to have commenced (treating them for simplicity as one), not with the figure of £12,798 as the value of the stock-in-trade, but with the figure of £5625. If this were so of course the trading accounts would show a larger profit to the extent claimed in the first period of the Company's trading.

In my opinion the claim of the Inland Revenue is neither in accordance with the books of the Company nor with the truth and reality of the matter. The difference between the two sums already referred to was not in fact treated as profits. In the first balance-sheet £675, 0s. 3d. was stated as the net balance on profit and loss account. The excess of valuation of the stock was put to reserve fund, in order to meet the unascertained liabilities which were part of the purchase consideration. Until these were run off it would have been improper to treat this sum to any extent as profit; yet, if the respondent is right in his contention, the directors might have divided the whole sum as dividend among the shareholders, for he treats it as a fund accumulated out of the profits of the year. I cannot imagine any more improper act for the directors to have done than to have followed the respondent's lead in this matter. It may turn out that the amount is wholly insufficient to meet the liabilities in question. It was, moreover, not a sum which in any way depended on the results of the year's trading. The precise difference was ascertained at the time that the account opened. How, therefore, it can be represented as profits of the period down to 11th November 1908 I fail to see. Had the appellants chosen to apportion the £25,000, which was the cash purchase price, to the stock-in-trade to the extent of £12,798 as representing the value of the stock-in-trade and allocated the remainder to the other assets the

present question could never have arisen. They could have had a similar, and possibly a larger, reserve fund by having a valuation made of the heritable properties, for it may be assumed that the total assets must in the appellants' view have had a greater value than the cash purchase price they paid, otherwise they would not have undertaken the liabilities with regard to the mineral leases and claims by surface proprietor and tenants. The mere fact that the appellants had estimated the total value of the assets which they acquired at a higher figure than the cash purchase price would have been no ground for treating the difference as part of the profits earned; and that too even if the appreciation had not merely been assumed but was capable of accurate ascertainment by the end of the year and there had been no indefinite liabilities to set against it. An appreciation of capital value is not the subject of taxation under the Income-Tax Acts, although if it is actual it may be reflected in the profits of succeeding years.

In the view I have taken this case falls to be decided upon its own special facts, and does not afford any basis for laying down principles of general application. Had the sole subject of the purchase been the stock-in-trade at a price of £5625, and a profit had been realised of £7000 in the course of a single year by its disposal, a case would have arisen very much more favourable to the respondent. This is how he proposes to treat the transaction, although it is plain from its nature that the seller would not have sold the stock separately from the less realisable heritable subjects with all their contingent liabilities. As the case stands, however, it is impossible to affirm that the sum placed to the reserve fund by the appellants at the very commencement of their existence represents actual profits of the first period of their trading. I am accordingly of opinion that the Commissioners were wrong in allowing this figure to enter the account for income-tax purposes; and that this so-called reserve fund, which was virtually a suspense account to meet unascertained liabilities, is not assessable for income-tax.

Lord Mackenzie.—I concur.

Lord Skerrington.—I concur.

Lord Guthrie.—I am of the same opinion. The argument of the Inland Revenue was based on two assumptions:—First, that, of the £25,000 paid by the appellants in 1907 for the acquisition of the business of coalmasters and fireclay manufacturers at Kilmarnock previously carried on under the same name, £5625 was the true proportion paid by the appellants for the stock taken over by them; and second, that there was no consideration for their acquisition other than the £25,000, disregarding in particular the liability for mineral damages of substantial although indefinite extent undertaken by them. The appellants have shown both these assumptions to be unfounded. But it would not necessarily have followed that the appellants' valuation of £12,798 must be accepted. The Commissioners, however, do not dispute that, if the figure of £5625 relied on by them is rejected as empirical, the proper sum to be

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taken as the value of the stock is £12,798, the sum arrived at by a valuation the fairness of which is not challenged.

In my opinion, the appellants are entitled to prevail on the merits of the question, there being no reasonable ground on which the finding of the Commissioners can be supported. I also think that the argument based on the appellants' books is unfounded. The course taken by the appellants in splitting up the £12,798 under stock account and stock suspense account was not only justifiable, it was the proper course in the circumstances. It does not follow either that £5000 was a correct proportion to take of the £25,000, or that £7173 (corrected to £6635) was a correct valuation of the liabilities undertaken in addition to payment of the sum of £25,000. Mr Clyde, as I understood, admitted that questions may arise between the appellants and the Inland Revenue, if it ultimately turns out that the amount of the unascertained liability for mineral damages does not exhaust the suspense account fund. But no such questions arise under the case presented for our decision.

THE COURT sustained the appeal, reversed the determination of the Commissioners, and remitted to them to fix the profits on which the appellants were to be assessed according to the principles laid down in their Lordships' opinions.

LAING & MOTHERWELL, W.S.—SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

No. 44.

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MRS CONSTANCE LINDA LUCY OR SECKER AND ANOTHER, Pursuers (Respondents).—*Horne, K.C.—J. G. Jameson.*
DONALD WALTER CAMERON OF LOCHIEL, Defender (Appellant).—*Macphail, K.C.—Hamilton.*

Property—March fence—Cost of erecting march fence between Highland sheep farms—Rights of proprietors—Act 1661, *cap.* 41.

The owner of an estate in the highlands of Inverness-shire, founding on the Act 1661, cap. 41, brought an action against the owner of the neighbouring estate to compel him to concur in erecting, and to pay half the cost of, a sheep fence between the estates, which marched with each other for five miles. Both estates were occupied as moorland sheep farms, the figures for rental, acreage, and stock being £92, 3500 acres, 1600 sheep for the pursuer's estate, and £270, 6500 acres, 2970 sheep for the defender's. The estimated cost of erecting the fence (something over £500), when added to the capitalised equivalent of the charges for interest, upkeep, and depreciation, made the total cost amount to over £2000. It was proved that the fence would prevent a considerable amount of straying from one estate to the other and the trouble, loss of time, and disturbance consequent thereon, and that the defender would share in these advantages to a substantial extent, though not to so great an extent as the pursuer. It was also proved that the estimated cost did not exceed the average cost of similar fences in similar situations.

Held that the pursuer was entitled under the Act to the decree craved, in respect that the demand did not involve such a want of community of benefit or such a grave disproportion of benefit to expense as amounted to oppression of or injustice to the defender.

MRS CONSTANCE LINDA LUCY OR SECKER AND ANOTHER, the proprietrices *pro indiviso* of the lands and sheep farm of Callart, lying in the parish of Kilmallie and county of Inverness, brought an action in the Sheriff Court at Fort-William, against Donald Walter Cameron of Lochiel, proprietor of the lands of Ballachulish, in the parish of Ballachulish and county of Inverness, in which they craved the Court to find and declare that the defender was bound to concur with the pursuers in erecting a march fence between their respective lands and to pay one-half of the expense thereof.*

The pursuers averred, *inter alia*:—(Cond. 1) "The pursuers' and defender's lands are contiguous, and there is at present no fence between them. Pursuers' lands are at the march entirely in their own occupancy as a sheep farm, and the defender's lands are, at the march *ex adverso* of pursuers' lands, let or sub-let as sheep farms. Much trouble and annoyance is caused by sheep straying from one estate to the other. In these circumstances it is believed and averred that the erection of a fence is necessary, not only to keep the sheep stocks grazing on the respective lands separate from each other, but also to prevent undue encroachment on the part of one sheep stock on the grazing lands which should be reserved for the other or others. In particular, during the winter the sheep from the lands belonging to the defender come on to the pursuers' lands in large numbers in search of shelter, with the result that the grazings of the latter are overstocked and the feeding insufficient. It is quite impracticable for pursuers to take action against owners of trespassing sheep, and the only means to prevent such trespass is by the erection of a march fence as stated." (Cond. 2) "The most suitable fence would be a strong wire fence of the kind commonly used on hill sheep farms in the district. Looking to the nature of the ground, neither the cost of erection nor of the maintenance of such a fence will prove excessive, and the advantages which will accrue to both properties will much more than counterbalance the annual cost of upkeep."

The defender, in his answers and in a separate statement of facts, set forth a number of circumstances which, he alleged, showed that the fence was unnecessary, and that the expense was out of all proportion to any possible advantage.

The pursuers pleaded;—There being no march fence between the said properties, and such fence being necessary, pursuers are entitled to decree with expenses as craved.

The defender pleaded, *inter alia*;—(3) The fence proposed would not be to the mutual advantage of both the estates, and is unnecessary. (4) In any event, the cost of the erection and maintenance thereof would be out of all proportion to any advantage to be derived by the defender from the said fence.

A proof was allowed and led. The import of the evidence is set forth in detail in the Sheriff-substitute's note, *infra*.

On 1st February 1913 the Sheriff-substitute (Malcolm) pronounced the following interlocutor:—"Finds in fact (1) that the pursuers are proprietors *pro indiviso* of the estate of Callart, and the defender

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* The Act 1661, cap. 41, entitled "Act for planting and incloseing of ground" enacts ". . . that wher inclosours fall to be vpon the border of any persons inheritance the next adiacent heritor shall be at equall paines and charges in building ditching and planting that dyk which parteth their inheritance. . . ."

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is proprietor of the estate of Ballachulish and others, which estates march with one another for a distance of 5 miles or thereby; (2) that the pursuers' estate of Callart is occupied by them as a sheep farm, and the defender's estate, where it marches with Callart, is divided into four sheep farms of Loch Leven, Sallachail, Glenshelloch, and Lundavra, each of which is let to and occupied by a tenant; (3) that the sheep stock on the pursuers' estate is 1600 or thereby, and the combined sheep stocks on the defender's estate amount to 2970 or thereby; (4) that the valuation of the farm on the pursuers' estate as entered in the Valuation Roll is £92, and the combined rental of the farms on the defender's estate marching with Callart is £270; (5) that straying of sheep from the respective estates on to each other takes place in considerable numbers; (6) that the erection of a march fence between the estates would be of mutual benefit; (7) that a fence 3 feet 3 inches high with iron tarred standards and droppers and galvanised wire could be erected at a cost of about £510 or thereby, and a fence of similar height, wholly galvanised, at a cost of about £550 or thereby; (8) that the cost of erection of either such fence would not be disproportionate to the resulting advantage and the value of the estates: Finds in law that the pursuers are entitled to have a wire march fence erected, and that the defender is bound to concur with them in the erection of such a fence, and to pay one-half of the expenses thereof; therefore to that extent decerns in terms of the prayer of the initial writ, reserving meantime the question whether the fence should be constructed with tarred iron standards and droppers or should be galvanised throughout. . . ."*

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* "NOTE.—The pursuers are proprietors *pro indiviso* of the estate of Callart, which on its western or north-western side is contiguous with the defender's lands of Ballachulish, the march extending from Loch Leven on the south to the stream called Allt-na-Lairige-Mor on the north. The defender's property is divided into the four farms of Loch Leven (otherwise called North Ballachulish), Sallachail, Glenshelloch, and Lundavra, each of which lies on the line of march with the Callart estate, and is let and occupied as a sheep farm. The Callart estate is occupied as a sheep farm by the pursuers themselves. The situations of the respective properties and farms are shown coloured on the Ordnance Survey map produced by the pursuers.

"The present action is brought for the purpose of having the defender ordained to concur with the pursuers in the erection of a march fence between their respective properties. The action is based on the Scots Act 1661, cap. 41. This Act has received interpretation by the Courts in several early cases and in a number of more recent ones, and the general result may be accepted as stated by Mr Rankine in his book on Land Ownership (3rd edition), p. 537, that 'the Act applies to march fences in every sort of locality in which a fence is actually required, and usually whatever be the nature of the boundary.' But its application is subject to two limitations:—(1) the Act applies only to cases in which mutual, though not necessarily equal, advantages will accrue to the coterminus proprietors, and (2) the cost of erecting and maintaining the fence must not be disproportionate to the advantage to be gained by its erection.

"The pursuers aver that much trouble and annoyance is caused by the respective sheep stocks straying from the one estate on to the other, and they make the further special averment that were it not for the straying of sheep from the farms on the defender's estate on to their farm, especially during the winter, by which the grazings of the latter are overstocked and the feeding depleted, they would be able to winter a number of their hoggs

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The defender appealed, and the case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 22nd, 23rd, 28th, and 29th January 1914.

Argued for the appellant;—The judgment of the Sheriff-substitute should be recalled, in respect that the pursuers were not legally entitled to compel the defender to concur in erecting and to pay half the cost of the march fence. It was not suggested that the pursuers had any right at common law to enforce their demand.[1] Their right, if they had one, was derived from the Act 1661, cap. 41, and the decisions following thereon. The defender conceded that it must now be admitted that the Act applied to march fences, and that it was too late to argue either that the Act was meant solely to deal with enclosures made in the interest of agriculture, or that, in so far as it related to fencing, it was temporary and not permanent in its effect.[2] On the Act and the decisions, however, the law undoubtedly now

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at home, with consequent pecuniary saving. In the interests of both estates, they contend that a march fence is necessary to prevent straying and encroachment. The defender denies that a fence is necessary, or that any advantage would accrue to his estate therefrom, and he maintains that the cost of its erection and maintenance would be out of proportion to any benefit to be gained.

"I think it is abundantly proved that considerable straying does take place from each estate on to the other. The evidence of the pursuers' witnesses, Thomas Watson, sheep manager, and John Watson and Dugald MacGregor, shepherds, is that at the Callart fank at each gathering there are from forty to fifty sheep from Loch Leven; from forty to fifty from Sallachail, a few from Glenshelloch, and a few from Lundavra. In the Larochmore fank, which also is on Callart farm, there are at each gathering from twenty to thirty Lundavra sheep and from fifteen to twenty Sallachail sheep. This evidence is corroborated in a general way by the witnesses, John Cameron, estate overseer, James Macphee and Hugh Cameron, and it is practically uncontradicted by the evidence for the defender, except by the witness Carmichael, in the case of Loch Leven farm. The attitude of the defender rather is that straying in equal or even greater numbers takes place from the Callart estate on to his, and that as there is thus practical equality of give and take, there is no ground for interference. D. C. Carmichael, tenant of the farm of Loch Leven, says that from twenty to thirty Callart sheep are got on Loch Leven, and his subtenant, Alexander Cameron, says he got forty Callart sheep at the last winter gathering, and that there are about fifteen in summer. Duncan MacIntyre, tenant of Sallachail, and Dugald MacIntyre, his manager, put the number of Callart sheep got in Sallachail fank as about thirty, and say about an equal number of their sheep are got in Callart fank. Duncan MacCallum, tenant of Lundavra, puts the number of Lundavra sheep got in the Callart fank at from twenty-five to thirty, and about the same number of Callart sheep got at Lundavra. These figures are for each gathering and there are about eight gatherings in the year. The figures therefore mean that there are on the Callart estate more or less continuously throughout the whole year from 140 to 150 sheep from the four farms on the defender's estate, and similarly on the Ballachulish estate from the pursuers' farm from 90 to 100 sheep. These are the numbers actually got in the fanks, but it is according to the evidence that at least an equal number of sheep which have strayed over the march

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[1] Strang v. Steuart, (1864) 2 Macph. 1015.

[2] Dunbar v. Gordon, (1713) M. 10,477; Riddel v. Marquis of Tweeddale, (1769) M. 10,489; Ersk. Inst. ii. 6, 4.

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was that the party demanding the fence could not succeed unless he satisfied the Court that, viewed from the point of good estate management, it was in the interest of both estates that the fence should be erected. There were no absolute rules on the matter, and no presumptions of law in one or other direction. The Court had an unfettered discretion, their duty being simply to determine, to use the exact words of the Act, whether the fence "fell to be made," and that depended upon whether the balance of considerations were for or against the proposal, the interests of both estates being given their due weight. Thus, in *Earl of Cassillis* v. *Paterson*,[1] Lord President Blair, with the concurrence of "several of the Judges," limited the scope of the Act to "lands that could be inclosed with mutual advantage," and laid it down that "in every case the nature of the ground and facilities of building and repairing the dike must be looked to." In *Earl of Peterborough* v. *Garioch*,[2] the element of

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escape or are driven back to their own ground at gathering, and are not gathered in.

"It is contended for the defender that as the trespass has been mutual without complaint on either side in the past, and that as the give and take is equal on both sides, the necessity for a fence does not arise. But, although there do not seem to have been complaints on the part of the occupiers of the farms *inter se* which would probably be of little avail, there is evidence that at least two former tenants of Callart complained of trespass of sheep and wanted a march fence erected,—see the evidence of pursuers' witnesses, John Cameron, overseer, James Macphee and Hugh Cameron. As regards equality of give and take, however that may be, it must now be accepted as the situation of matters that the pursuers, as occupiers of Callart, object to the trespass of strange sheep on their ground, and also desire to keep their own sheep as far as possible on their ground. In this they are within their rights, and they are entitled to take such steps as are legal to secure their object. The practical question in this action is whether, with that object in view, they are entitled to have a march fence erected at mutual expense, or whether they must not seek their remedy in one or other, or both of the methods suggested by the defender.

"The purpose of the Act 1661, cap. 41, is undoubtedly the prevention of trespass by bestial. This is apparent from its terms, and it is expressly stated by Lord Kinnear in the case of *Earl of Airlie* v. *Farquharson*, (1887) 24 S. L. R. 761, and by Lord M'Laren in the case of *Graham* v. *Irving*, (1899) 2 F. 29. *Prima facie*, therefore, where the trespass is considerable, a proprietor is entitled to have the Act put into operation, unless the circumstances are such as to bring the case within either or both of the limitations mentioned above.

"The defender, however, maintains that the case is one to which both of these limitations apply. He contends, in the first place, that no benefit would accrue to his property from the erection of the fence. It was admitted by his agent to have been proved that there might be some benefit to Callart. Recognising that the pursuers are entitled to take some steps to have the trespass stopped, his first suggested remedy is the one somewhat vaguely referred to in his answer 1 to article 1 of the condescendence, where he says, 'If the pursuers desire to prevent such straying, if any, it is competent for them to take proceedings against the owners of such sheep in the ordinary way, which, if acted upon, would render the erection of a march fence unnecessary.' This was admitted at the hearing to mean putting into operation the statute 1686, cap. 11, anent poinding of trespassing stock, and it has been decided that that statute applies to unenclosed Highland

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[1] 28th February 1809, F. C.

[2] (1784) M. 10,497.

mutuality of benefit was clearly recognised, and its absence entailed the failure of the pursuer; and in *Lord Advocate* v. *Sinclair*[1] a fence was refused on the ground that its cost would be disproportionate to the value of the lands, a similar result being arrived at on similar grounds in *Earl of Airlie* v. *Farquharson*.[2] In *Blackburn* v. *Head*,[3] founded upon by the pursuers, Lord Kyllachy clearly recognised the necessity for the existence of mutual benefit, but he was wrong in his view as to what constituted mutual benefit. In any case that decision was of little value in the present case, because there the ground of judgment (as in *Lockhart* v. *Seiveuright*),[4] was that the defender was bound to contribute to the upkeep of an already existing fence, *de facto* the common property of the parties, and that depended on different considerations from the question now before the Court, viz., whether the defender was bound to contribute towards a non-existing fence which he did not desire. *Penman* v. *Douglas*

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sheep farms.—(*Pringle* v. *M'Rae*, (1829) 7 S. 352.) But I think it is certain that as compared with the operation of this remedy a fence would be a distinct advantage. The continual or even occasional poinding of trespassing stock, and paying of penalties for their recovery, would certainly mean friction and ill-feeling between the tenants, damage to the stock, trouble in reclaiming them, retaliation, and bad neighbourhood generally. The obviating of all this trouble was of itself described as a benefit sufficient to justify the erection of a fence by Lord Kyllachy in the case of *Blackburn* v. *Head*, (1904) 11 S. L. T. 521, where he says: 'There must, of course, be some measure of mutual benefit; but there is no rule, so far as I know, that the benefit must be equal. On the contrary it is, I should think, quite enough that while the one proprietor is saved from the incursions of his neighbour's bestial, the other proprietor is at least saved from the risks and difficulties, and perhaps pains and penalties, which by our law attach to the trespass of one man's bestial on his neighbour's property.'

"The other remedy suggested by the defender for the prevention of trespass is herding of the marches. Obviously, however, the march could not be herded throughout its whole length, and night and day, so as to prevent trespass as effectively as a good fence would. Moreover, I think it is proved that continual herding is open to other objections. In addition to the trouble and time entailed, it would involve disturbance of the sheep, which is acknowledged by those with practical knowledge to be bad for them, and it would also mean that they would not be free to graze up to the march on either side, a considerable strip of pasture being thus more or less barred to both stocks.

"It was made a point of argument for the defender that a march fence between two sheep stocks is very unusual, although one between sheep and deer is quite common. There are, however, instances of march fences between sheep stocks spoken to by the witnesses John Cameron, overseer, Thomas Watson, John Watson, Ewen Cameron, and Dugald MacIntyre, the last two being defender's witnesses, and fences between two sheep stocks on the same property are not uncommon. Indeed such fences exist on the defender's property of Ballachulish, to which this case relates, between Loch Leven farm and the Onich crofters' lands, between Sallachail farm and the Onich crofters' lands, and between the farms of Glenshelloch and Lundavra. The reasons given by Mr N. B. Mackenzie, late factor for the defender, for the erection of these fences, or some of them, are that there was continuous trespass by the sheep stocks, and friction between the tenants and complaints by them, and these are precisely the circumstances

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[1] (1872) 11 Macph. 137.
[2] (1887) 24 S. L. R. 761.
[3] (1904) 11 S. L. T. 521.
[4] (1758) M. 10,488.

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Argued for the respondents;—The Act, which, as the defender admitted, must now be held applicable to march fences, was passed to encourage the erection of fences, and provided for no exceptions, the obligation upon the "adjacent heritor" to bear his share in the expense being an absolute one so far as the Act was concerned.[1] The Act, however, had been the subject of a considerable amount of judicial decision, and at an early date it was recognised that it might "if taken in its greatest latitude, be used as a cover for oppression."[2] It was accordingly held in *Earl of Peterborough* v. *Garioch*[3] that the Act was only applicable in "cases in which mutual, though not therefore equal, advantages were to accrue to the conterminous tenements; and as in no instance authorising an act of oppression or of injustice to any individual," and in *Earl of Cassillis* v. *Paterson*[4] the general law upon the question had been laid down in almost precisely similar terms by Lord President Blair. This view of the law was the one upon

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have been proved which should tend to make the expense of upkeep in the present case unduly high.

"In considering the question whether the probable expense above arrived at is disproportionate to the benefits to be derived from the fence, one feels the difficulty of forming or applying a measure of comparison. The probable cost of erection admits of being ascertained and stated in pounds, shillings, and pence; the benefits to be derived are not capable of such expression. An element of much weight in the question is no doubt the rentals of the respective properties, although I do not consider that it is a conclusive or the only element. The valuation of the farm of Callart is £92; the combined rental of the four farms on the defender's estate is £270. It is a matter for observation, therefore, that the pursuers do not consider their share of the cost of erection of the fence disproportionate to a valuation which amounts to only one-third of the defender's rental. The defender's share of the cost of erection, if the above estimate be approximately correct, would amount to something under one year's rental if a fence with black standards and droppers be erected, or about one year's rental if a fence wholly galvanised be erected. I am unable to come to the conclusion that in the circumstances this is disproportionate, or at any rate so disproportionate as to oust the operation of the statute, keeping in view the benefits which I think would accrue.

"Each case falls to be judged by its own facts and circumstances, and little guidance is afforded by the reported decisions. In the short report of the case of *Earl of Cassillis* v. *Paterson*, 28th February 1809, F. C., where it was held that the benefit of a march-dyke would not repay the expense of building and repairing it, the defender's land is stated to have been of very considerable extent and worth not more than £90 a year, but we are not informed of the cost of erection of the dyke. In the case of *Earl of Peterborough* v. *Garioch*, (1784) M. 10,497, the ground of judgment was that no advantage would result to the defender. In the case of *Earl of Airlie* v. *Farquharson*, cited above, in which it was held that the fence would not be sufficiently beneficial to the defender to justify its erection, the report does not inform us as to the rentals of the estates, nor specially as to the cost of the fence, but as for seven-eighths of its length it would be at a height of over 3000 feet, it was accepted that it would be costly to erect and maintain; further, while it would keep sheep out of the pursuer's forest it would not keep deer out of the defender's farm, the advantages being thus almost entirely one-sided. In the case of the *Lord Advocate* v. *Sinclair*, (1872) 11 Macph. 137, the annual value of the de-

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[1] Pollok v. Ewing, 7 Macph. 815, Lord Jerviswoode, at p. 816.
[2] Ersk. Inst. ii. 6, 4. [3] M. 10,497. [4] 28th Feb. 1809, F. C.

which all subsequent decisions had proceeded, and the soundness of the law laid down in the above two cases had been recognised either expressly or impliedly in all the more recent cases.[1] The pursuers accordingly were entitled to succeed unless the defender could show that he would obtain no appreciable advantage whatever from the fence, or that the cost of the fence would be so out of proportion to the advantages, that it would amount to injustice or oppression to order its erection. A comparison of the facts in the present case with those in preceding cases did not help the defender. In *Earl of Cassillis* v. *Paterson*,[2] the march dyke was ordered although its cost was £608, and the advantage to the defender was insignificant. In *Earl of Peterborough* v. *Garioch*,[3] where the fence was refused, its cost was out of all proportion to the defender's lands, which were valueless and barren. In *Earl of Airlie* v. *Farquharson*[4] the fence was refused because the advantage was all on one side, the proposed fence being of a kind which would keep the defender's sheep out of the pursuer's forest but would be no hindrance to the pursuer's deer. In *Lord Advocate* v. *Sinclair*[5] a defender, whose lands were worth only £2, 2s. annually, was not saddled with a share of a fence which would have cost £80. *Penman*[6] merely decided that the Act would not be applied against feuars whose property did not exceed five or six acres. In *Blackburn* v. *Head*,[7] Lord Kyllachy thought that the necessary condition that there must be some mutuality of benefit was sufficiently satisfied on the side of one of the proprietors by his being saved by the fence from the risks and penalties attaching by our law to the trespass of one man's bestial on his neighbour's property. The present case, however, was free from any of the specialties which had created difficulty in some of the previous decisions; it was not a case of an attempt to secure for the benefit of deer or grouse a right which had been introduced for the benefit of cattle,

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fender's ground was only £2, 2s., while the expense of the fence would have amounted to from £70 to £80. Moreover, the proposed fence was held to be objectionable in that it would have affected the defender's property in such a way that part of it would be of no use at all. On the general scope of the Act 1661, cap. 41, I was referred also to the case of *Scott* v. *Duke of Argyll*, (1907) 14 S. L. T. 829.

"On the fullest and most careful consideration I have been able to give to the case, I am of opinion that the pursuers are entitled to have a march-fence erected at mutual expense. With regard to the most suitable type of fence, whether it should be constructed with black tarred standards and droppers and galvanised wire, or should be galvanised throughout, I have felt that the parties in the course of their proof on that point are not true contradictors. Their evidence relating to it was not directed to determining what, on the assumption that a fence is to be erected, would be the most suitable of these two types, but was intended to affect the question of whether or not a fence is to be erected at all. It may be that, should the latter question be finally determined in favour of the erection of a fence, the parties may be able to come to an agreement as to the precise type, failing which I think it could best be determined by a remit to a man of skill. I have therefore reserved the question meantime."

[1] Graham v. Irving, (1899) 2 F. 29; Earl of Airlie v. Farquharson, 24 S. L. R. 761; Blackburn v. Head, 11 S. L. T. 521; Scott v. Duke of Argyll, (1907) 14 S. L. T. 829.

[2] 28th Feb. 1809, F. C. [3] M. 10,497. [4] 24 S. L. R. 761.

[5] 11 Macph. 137. [6] M. 10,481. [7] 11 S. L. T. 521.

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sheep, and agriculture. It was just a typical case for the enforcement of the Act. The Act was meant to prevent trespass, and trespass, with all its attendant evils, had been fully proved. There was nothing abnormal in the amount of stock on either farm, and it could not be suggested that the cost of the fence was excessive. To say that there was no mutuality of benefit, or that the proposal was unjust and oppressive to the defender, was absurd, in view of the facts that the rental and sheep stock and acreage of the defender's farms were all largely in excess of the pursuers', who would nevertheless have to bear half of the cost. As to the objection based upon the fact that the fence would be intersected by a public road, the pursuers were willing to erect a wing fence which would prevent straying at that point. It was not possible in the circumstances for the pursuers to put into operation the Act 1686, cap. 11, relating to poinding.[1]

At advising on 20th February 1914,—

LORD DUNDAS.—At the conclusion of a full and helpful debate at our bar, I had a strong impression that the interlocutor appealed against was right. Subsequent study of the case in all its bearings has confirmed that impression. The learned Sheriff-substitute has evidently bestowed great care and pains upon his task, and his note contains a full analysis of the evidence and discussion of the law. As I agree with the Sheriff-substitute's conclusions, and (speaking generally) with the way in which his reasons are expressed, it is unnecessary that I should go into the case in detail.

The march upon which it is proposed to erect a fence at the joint expense of parties is about five miles long. The character and contours of the land present no exceptional difficulty. The ground on both sides is occupied by the parties as sheep pasture; and the evidence shows (what one would expect) that the sheep on each estate do trespass and stray to a considerable extent upon the neighbouring property. The pursuers thus present a very strong *prima facie* case for their demand. It cannot, at this time of day, be disputed, though the point was formerly doubtful, that the portion of the Act 1661, cap. 41, upon which the application rests, is of perpetual and not merely temporary effect—(Ersk. Inst. ii. 6, 4; *Dunbar* v. *Gordon*[2]; *Riddel* v. *Marquis of Tweeddale*[3]). The right of any proprietor to compel his neighbour to join in the cost of erecting a march fence, "where inclosures fall to be upon the border of" his "inheritance," is not expressly qualified or limited by any words of the Act. Mr Erskine, in the passage above cited, under the title "Of the right which the vassal acquires by getting the feu," and the sub-head "everything connected with the land is part or pertinent," writes: "As to inclosures, the vassal has a superadded right, by positive statute, to

[1] Reference was also made in the course of the discussion to Seaton v. Seaton, (1697) M. 10,476; Earl of Crawford v. Rig, (1669) M. 10,475; Ord v. Wright, (1738) M. 10,479; Paterson v. Macdonald, (1880) 7 R. 958.

[2] M. 10,477.

[3] M. 10,489.

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compel proprietors whose lands lie conterminous with his own to bear half the expense of building, ditching, and planting a dyke upon the limits which divide their grounds, or otherwise fence the march, 1661, c. 41." The learned author adds, however, "as this statute may, if taken in its greatest latitude, be used as a lever for oppression, it is not in practice extended against feuars whose property exceeds not five or six acres—*Penman*.[1] Several other cases may be figured where equity requires a similar judgment." (See also Stair, ii. 3, 75.) And the reported cases show that the Court has always held itself entitled to refuse a petition for a march fence where "oppression," or the like, would result to the defender. Thus, in *Earl of Peterborough* v. *Garioch*,[2] "the opinion of the Court was, that this Act of Parliament ought to be interpreted as respecting cases in which mutual, though not therefore equal, advantages were to accrue to the conterminous tenements; and as in no instance authorising an act of oppression, or of injustice to any individual. Accordingly the Lords sustained the defence." In that case, it appears that the defender's property, "though of large extent, was mountainous and barren, and yielded but a small rent," and she pleaded that the expense would, "however little her more opulent neighbour might feel it, be a burden far too heavy for her circumstances to bear." We were informed that the Session Papers disclose that the defender's rental was £80 or £90, and that the proposed fence was to cost £81, 17s., and would entail an annual expenditure of about £20. In *Earl of Cassillis* v. *Paterson*,[3] Dr Paterson succeeded in obtaining decree for the erection of a march dyke round his lands at the joint expense of himself and the Earl, whose estate completely surrounded his own. The rubric bears that the application was under the Act 1669, cap. 17, but I understand it was really based also upon the Act 1661, cap. 41. The Court "thought, from the report and inspection which had been taken by the Sheriff, there was sufficient evidence *in point of fact* against the plea of" the defender, Lord Cassillis. We were told that the Session Papers show that the stone dyke which was ordered to be erected was to cost about £608, and so far as appears, the defender could obtain little positive benefit from its erection. Though the pursuer was successful, Lord President Blair "expressed his opinion (and in this several of the Judges concurred) that though there was no express exception in the statute, it was quite impossible to interpret it so as to apply absolutely to every case of an open march. That this would put it in the power of proprietors to ruin each other. That, therefore, the Court had so construed this statute as to confine it to lands that could be inclosed with mutual advantage." After referring to *Lord Peterborough's* case,[2] the Lord President concluded by saying that "in every case the nature of the ground and facilities of building and repairing the dike must be looked to." Again, in *Lord Advocate* v. *Sinclair*,[4] the Court's position in regard to these matters is illus-

[1] M. 10,481.
[2] M. 10,497.
[3] 28th Feb. 1809, F. C.
[4] 11 Macph. 137.

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trated. The Lord Justice-Clerk (Moncreiff) said he had "no notion that the provisions of the statute could apply to a rocky strip of ground along the sea-shore such as this, or that the expense that is proposed for the erection of this fence is at all legitimate. . . . This strong wire fence is to be erected for the purpose of clearing the boundary between patches of ground the value of which amounts altogether to two guineas a year, and the expense of it, according to the estimates, is to be between £70 and £80." The petition in that case seems to have proceeded on the narrative of the Acts 1661, cap. 41, and 1669, cap. 17; but, as Mr Rankine[1] justly observes, "the same objections of want of community of benefit, or disproportion of benefit and expense, which are given effect to in applications under the earlier statute alone, are equally of weight when the later Act is also invoked."

I need not cite further authority. As already said, the present pursuers' position, upon the salient facts of their case, is *prima facie* a very strong one. That the pursuers will derive advantage from the benefits, such as they may be, arising from the march fence seems to be clear enough, and was not, I think, disputed in the arguments. What one has really to consider is whether or not, when one looks at the matter from the defender's point of view, there is any such want of community of benefit, or such grave disproportion of benefit to expense, as to amount to "oppression" or "injustice" in the sense in which these words have been used and applied in previous cases. I do not think the affirmative can be maintained. The defender's appeal to the harmonious and neighbourly manner in which affairs have for long been allowed to go on, upon a friendly basis of give and take, without serious (if indeed any) complaint on either side, or expressed desire for a march fence, does not, I am afraid, amount to a legal argument; now that the Court has been invoked, it must deal with the parties according to their respective rights at law. Then, the defender maintains that the erection of a march fence between the sheep stocks of conterminous owners is unknown in Inverness-shire, and I do not think any instance of this is established by the evidence; but the point does not, to my mind, carry much weight, for it could scarcely be contended, and I do not think it was contended, that the Act 1661, cap. 41, is not applicable to a case where sheep fall to be separated from sheep, as much as to any other circumstances where trespass of stock over the marches exists or is reasonably apprehended. The defender put forward a further point to the effect that, as the public road (on which admittedly gates are not allowed) runs along the lower side of the Callart estate, a march fence ending at the road side would be, if not wholly futile, at least of manifestly diminished value and effect so long as sheep could pass freely, by means of the road, from one of the estates to the other. But the pursuers state on record, and their counsel repeated at our bar, their willingness "to erect, at their own expense, along the side of the road a fence for such length as would

[1] Land Ownership, (4th Edn.), p. 618, ft.

prevent sheep passing round the end thereof," *i.e.* of the march fence. This attitude appears to me to deprive the defender's point of any weight it might otherwise have possessed so far as directed against the erection of a march fence at all, but the matter is one which the learned Sheriff-substitute will doubtless keep in view, and deal with in such way as may be right and just, before he pronounces a final decerniture in the case. The defender's counsel further presented an earnest argument to the effect that the fence, if erected, would really confer no benefit or advantage on the defender, or, at all events, that the cost would be so wholly disproportionate to any advantage he (or even both parties) could possibly derive from it as to be unjust or oppressive. The Sheriff-substitute has expressed the opinion that the balance of advantage lies in favour of the erection of a march fence, and has given a careful summary of the various benefits which he thinks would accrue to both proprietors from its erection. I agree with him in holding, as the result of the evidence, that the defender would share in all (or most) of these benefits to a substantial extent, though not so largely as the pursuers may be expected to do. The cost will certainly fall somewhat hardly upon him. The expense of erection of the fence will not—I assume from the Sheriff-substitute's interlocutor that he will see to this—exceed, at the most, £550, one-half of which sum means to the defender just about a year's rent; but, when the annual cost of upkeep, repair, and interest is taken into account, it seems that the total cost of this fence to the defender may be equivalent to a capital sum of about £1000, and such an amount does appear to me to be a heavy price for such benefits as may accrue to him from the erection of the march fence. But it is probably not larger proportionately than the defender had to pay, for example, in the case of the *Earl of Cassillis*[1]; and, at all events, I am not prepared to say that, in the whole circumstances of this case,—and each case of this sort must be considered and decided upon its own merits—the erection of the fence would impose undue hardship, or anything like oppression or injustice, upon the defender. I think the pursuers are entitled to the remedy they seek. I am, therefore, for dismissing the appeal, affirming the interlocutor of the Sheriff-substitute, and remitting the case to him for further procedure.

Lord Mackenzie.—The finding of the Sheriff-substitute appealed against is that the pursuers are entitled to have a wire march fence erected, that the defender is bound to concur with them in the erection of such a fence, and to pay one-half of the expense. Alternative estimates of the cost of a suitable fence are given by the Sheriff-substitute in his interlocutor—one being £510, the other £550, and there is a finding that the cost of erection of either such fence would not be disproportionate to the resulting advantage and the value to the estates. The defender's lands of Ballachulish extend to 6500 acres and carry a

[1] 28th Feb. 1809, F.C.

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sheep stock of 2970. They lie to the west. The pursuers' estate of Callart extends to 3500 acres lying to the east, and carries a sheep stock of 1600. The march extends from Loch Leven on the south northwards for approximately five miles. The highest point in the march is about 2000 feet. The defender's estate is divided into four farms, which are let for a *cumulo* rental of £270. Callart, which is in the occupation of the proprietrices, is valued at a rental of £92. So far as regards the initial cost of the fence, taking it at £550, Lochiel's one-half represents a little more than one year's rental. The pursuers' one-half is equivalent to three years' rent. Over and above the cost of contruction must, however, be taken into consideration the necessary annual charges for depreciation, interest on capital, and upkeep. The Sheriff-substitute, in his careful and clear note, states that he does not think any special circumstances have been proved which would tend to make the expense of upkeep unduly high. But it was admitted by the pursuers' counsel that an allowance of £60 a year would have to be made to meet the charges above enumerated. One-half of this—£30—would have to be borne by the defender. If this is capitalised at 4 per cent it would mean an additional £750, or a total capital charge of over £1000 on both estates. These figures are sufficient to show that a serious question is raised in the present case. The motives which have prompted the owners of Callart to take action in the matter are explained in the proof, though it is not easy to understand why they should not have been content that the respective properties should continue to be occupied on the principle of mutual give and take, which seems to have prevailed for a great many years with some benefit to each, and with no great amount of proved dissatisfaction on the part of the respective tenants. It is to be observed, however, that in 1909 the character of the occupation of Callart changed. Instead of being let to a tenant who had to make his living out of the land it came into the natural occupation of the owners, and their manager may have found that the want of a fence was a cause of trouble to himself in the administration of the estate. Whatever the motive may have been, and however strong reasons there are arising out of good neighbourhood in favour of allowing the old state of matters to continue, the question has been raised and must be decided by this Court in accordance with established legal principle. The Sheriff-substitute has summarised the benefits which would accrue to both properties from the erection of a fence. It is proved that the sheep stocks on both estates do stray across the march to a considerable extent. The numbers found in the fanks at gathering time are given in the proof, and these are, of course, by no means exhaustive of the actual trespass on the ground. It may be that there are incidental advantages to both sides from this crossing and recrossing, but it is impossible to use that fact as a legal argument when once the owners of Callart say they wish to keep their own estate to themselves. The only effectual way to secure this is by the erection of a fence. It was contended that even a fence is not impassable, and that the existence

of a fence may give greater trouble if sheep get through than if there was no fence at all. In the present case there is a notable difficulty arising from the fact that at its southern end the proposed fence would terminate at a public road, and therefore the respective sheep stocks would not be separated unless further fencing is erected along the north side of the road. This, I understand from what was said at the bar by the pursuers' counsel, they are prepared to put up. It is, in my opinion, clear that a proprietor can much more effectually protect his estate from trespass by getting a march fence erected than by either herding the marches or poinding his neighbour's sheep when they come on his lands,—a remedy which, though sanctioned by statute, is calculated to cause friction and ill-feeling between the respective owners. It was said that it was most unusual to have such a sheep fence in Inverness-shire. The question, however, is what are the pursuers' legal rights?

The statute upon which their claim is founded is the Act 1661, cap. 41, which provides "that where inclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dike which parteth their inheritance." Were the matter not foreclosed by decision there is much to be said for the view that when the Act was passed it was never intended to apply to a march fence in a Highland district such as the present. The earlier part of the statute, now no longer law, refers to the parking and inclosing of ground and planting of wood and preserving the same. There are strong reasons for maintaining on the words of the Act that the latter clause should be interpreted with reference to the leading provisions of the statute. This, however, cannot now be maintained. Mr Erskine, who died one hundred years after the Act was passed, and whose Institutes were published after his death, states[1] "as to inclosures, the vassal has a superadded right, by positive Statute, to compel proprietors whose lands lie conterminous with his own to bear half the expense of building, ditching and planting a dyke upon the limits which divide their grounds, or otherwise fence the march,—1661, c. 41." He points out, however, that, as the statute may, if taken in its greatest latitude, be used as a cover for oppression, it is not in practice extended against feuars whose property does not exceed five or six acres, and adds that several other cases may be figured where equity requires a similar judgment. Counsel for the defender in the present case maintained that the matter was one in the discretion of the Court, and that, unless satisfied that the erection of the fence was necessary for good estate management, effect should not be given to the pursuers' demand. No doubt the question is to a certain extent one of degree, but, looking to the authorities, I am unable to accede to the argument so put. The law on the matter is stated thus, in the case of the *Earl of Peterborough* v. *Garioch*[2]: "The opinion of the Court was, that this Act

[1] Ersk. Inst. ii. 6, 4.

[2] M. 10,497.

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of Parliament ought to be interpreted as respecting cases in which mutual, though not therefore equal, advantages were to accrue to the conterminous tenements; and as in no instance authorising an act of oppression or of injustice to any individual." The result in that case was the refusal of the demand for a fence. Mrs Garioch's answer (which was successful) was "that her property, though of large extent, was mountainous and barren, and yielded but a small rent; and that of course the expense of the proposed inclosure of lands, which could not be meliorated by that operation, would, however little her more opulent neighbour might feel it, be a burden far too heavy for her circumstances to bear." The rubric in the case is as follows: "The Act 1661 not to be extended to the case of a conterminous tenement, where the charges of inclosing would not be compensated by the resulting improvement." This rubric must be construed in the light of the opinion of the Court already quoted. The most remarkable application of the Act is that reported in the case of the *Earl of Cassillis* v. *Paterson*,[1] in which Dr Paterson was the pursuer and the Earl the defender. The Court there ordered the erection of a stone dyke—the cost of which, according to the Session Papers, would amount to over £600—in order to inclose the pursuer's lands from those of the defender. Part of this fence was apparently to inclose cultivated ground, but the defender objected to the inclosure of what, in the Session Papers, is described as wild moorland ground,—this portion of the fence being estimated to cost £400. The upper part of the pursuer's estate is described as sheep pasture. The only Act mentioned in the report is the Act 1669, cap. 17, the Act regarding straightening of marches, but it appears that the process was also under the Act 1661, cap. 41. It is difficult from the Session Papers to see that the rubric in this case is supported by the facts. The rubric says: "Act 1669, c. 17, applies only where advantage from dyke equal to expence of building and keeping it up." No advantage to the Earl of Cassillis is disclosed in the Session Papers, though the Lord President expressed his opinion, in which it is stated several of the Judges concurred, that the Court had so construed this statute as to confine it to lands that could be inclosed with mutual advantage. The decision in the case of the *Earl of Cassillis*[1] was therefore a much stronger one in favour of the pursuers here than that pronounced in the case of *Riddel* v. *The Marquis of Tweeddale*.[2] There an order for a fence was made under the Act 1661, cap. 41, between Riddel's lands and the estate of Tweeddale, but it appears that in the course of the proceedings Riddel gave up his demand for a fence along that portion of his lands which was not cultivated. The cases of *Riddel*[2] and *Cassillis*[1] were no doubt cases of what may in a sense be termed proper inclosures, and not march fences such as the present, but the defender's counsel in the present case admitted that it was now too late to say that the law applicable to inclosures does not cover march fences as well. The Act was applied to a case of

[1] Feb. 28, 1809, F. C.

[2] M. 10,489.

hill pasture in *Pollock* v. *Ewing*,[1] though no doubt there were specialties in that case—the fiar of the estate alone appearing to defend, the life-renter having consented, and the fence ordered was to be constructed along the margin of the burn on the pursuer's lands. From the observations in *Graham* v. *Irving*[2] it may be inferred that, had the march been a dry one, a fence would have been ordered; the reason it was not being that the march was the *medium filum* of a stream 42 feet wide. The later cases in the Outer House—*Earl of Airlie* v. *Farquharson* (Lord Kinnear, Ordinary)[3]; *Blackburn* v. *Head and Another* (Lord Kyllachy, Ordinary)[4]; and *Scott* v. *The Duke of Argyll* (Lord Salvesen, Ordinary)[5]—recognised the legal right of the pursuers as defined in the above quoted opinion of the Court in the case of *The Earl of Peterborough*.[6]

Upon the facts, I am of opinion that there will be mutual though not equal advantages to both estates from the erection of the march fence. The question remains whether in ordering the fence we should be authorising an "act of oppression" or of "injustice" to the defender. This raises sharply the question of the total expense. The case of the *Lord Advocate* v. *Sinclair*[7] is an illustration of the circumstances in which the Court will refuse to order a fence. As the Lord Justice-Clerk stated in his opinion, the wire fence there was to be erected for the purpose of clearing the boundary between patches of ground, the value of which amounted altogether to £2, 2s. annually, and the expense of it, according to the estimates, was to be between £70 and £80. As his Lordship pointed out, that was absolutely out of the question. It is impossible in the present case to shut one's eyes to the fact that a more difficult question would have been raised if the appellant, with a rental of £270, had been seeking to force this fence upon Callart with an annual value of £92. The case of *Lockhart*[8] makes it clear that each proprietor is liable to contribute one-half of the expense of upholding the march fence. According to the argument in that case, after the dyke is erected it must follow at common law, independent of the Act 1661, cap. 41, that each heritor must contribute equally to uphold and repair their common property. The capital charge on Callart on the principles of prime cost of construction, interest on capital, depreciation, and annual upkeep, amounting in all to over £1000, would be equal to eleven years' rent thereof as at present appearing in the Valuation Roll. We have not, however, to decide that question. Those responsible for giving advice to the proprietrices of Callart have apparently advised them that it is for their interest to incur this heavy pecuniary liability. After anxious consideration of the case, I am unable to say that what we are asked to do can be described as authorising an act of oppression against the defender. I accordingly think the judgment of the Sheriff-substitute must be affirmed.

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[1] 7 Macph. 815.
[2] 2 F. 29.
[3] 24 S. L. R. 761.
[4] 11 S. L. T. 521.
[5] 14 S. L. T. 829.
[6] M. 10,497.
[7] 11 Macph. 137.
[8] M. 10,488.

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Secker v. Cameron.

LORD CULLEN.—The pursuers' case is founded on the proposition that, under the Act 1661, cap. 41, a landward proprietor is entitled to have a fence erected along his march at equal expense to him and the conterminous proprietor if the fence will be advantageous to both, and if the circumstances of the case are not such as to make his demand oppressive and unfair. The pursuers are, I think, well founded in this proposition. And, if so, the question is how it applies to the circumstances of the present case.

The normal advantage of a march fence is that it prevents trespass by bestial from one property to the other across the line of march. On the evidence before us in the present case it is clear, and is, indeed, undisputed, that there is much straying of sheep from the one property to the other across the line of march. It does not seem to me to be a relevant answer for the defender to say, even if true, that such a practice of mutual trespass is mutually beneficial, and that the sheep do better under it than they would do if confined respectively to their own ground. The pursuers are not called on to submit to a community of occupation.

Unless, therefore, the erection of the proposed march fence at joint expense, although mutually beneficial in preventing trespass, which *de facto* takes place in a substantial degree, can be said to be oppressive to the defender, the pursuers are within their rights in asking that it be erected. This comes to be a question of the cost of erection and upkeep of the fence. The defender contends that the cost is too great. It is hardly practicable to weigh in nice scales, and in terms of money, the advantages which will accrue to both proprietors from the erection of a march fence which will secure to them exclusive enjoyment of their properties. The question must be looked at broadly in view of the general intendment of the statute and the decisions.

The decisions following on the statute undoubtedly admit of exceptions being made where a demand for a march fence at joint expense is oppressive to the conterminous proprietor. But the exception does not appear to have been admitted in any case approximately resembling the present one. The case of *Earl of Peterborough* v. *Garioch* [1] was an extreme one. In *Earl of Airlie* v. *Farquharson* [2] the advantage of the proposed fence was held to be one-sided. In the case of the *Earl of Cassillis* v. *Paterson* [3] the Court, while recognising the rule of the *Earl of Peterborough's* [1] case, refused to apply it, although the cost of the march dyke there in question amounted to £608, and although the Earl of Cassillis maintained (with force, as the Session Papers show) that the advantage of the march dyke would lie mainly with Paterson.

In the present case, the erection of the proposed fence, along a march of about five miles, is estimated to cost from £510 to £550, this representing a normal rate of cost. The cost of its upkeep is a matter of

[1] M. 10,497.

[2] 24 S. L. R. 761.

[3] 28th Feb. 1809, F. C.

opinion. Taking the defender's estimate, it will amount to £40 per annum, to which may be added another £20 per annum by way of a sinking fund to provide for replacement at the end of twenty-five to thirty years. This represents a substantial burden on both proprietors. In relation to the rentals of the respective lands, it will bear much more heavily on the pursuers than on the defender, in the proportion of about three to one. That the pursuers are willing to undertake this disproportionate burden is not conclusive against the defender on the question whether the erection of the proposed fence will be an oppressive proceeding from his point of view. But the defender, as well as the pursuers, will derive substantial advantages from the erection of the fence which are well set out in the lucid and painstaking note of the Sheriff-substitute. And while the expense to the defender will undoubtedly be a considerable one, I am unable to conclude that it will subject him to a burden which, in the light of the authorities, can be styled oppressive, so as to avoid the general rule of the statute.

A special point was raised by the defender. The south end of the proposed march fence will end at the north side of a public road. Along the north side of that road the lands of both parties to the east and west are at present unfenced. And it is said by the defender that, if the march fence be erected, sheep may still trespass from the one to the other property by circumventing the south end of the fence. This is possible. It may detract in some degree from the effectiveness of the march fence as a means against trespass. But I do not read the evidence as meaning that the proposed march fence, throughout its five miles or so of length, will not be a substantially efficient protection against trespass across the line of march. The Sheriff-substitute does not advert to the point in his note, from which I infer that it was not pressed in argument before him. The pursuers have offered to fence to some extent their land on the north side of the road so as to guard against the possibility of sheep circumventing the south end of the proposed march fence there. It is in their interest to do so in so far as this may be necessary. And I can hardly suppose that the pursuers, being willing to go to the expense of paying one-half of the proposed march fence, will be likely to omit to take this additional precautionary measure if necessary. It is equally open to the defender to fence his land on the north side of the road. But, as I think that the proposed march fence in itself will be useful and advantageous to both properties in preventing trespass across the line of march, I do not think that we can put it on the pursuers, as a condition of their right to have it erected at joint expense, that they shall fence their lands along the north side of the road in question so as to secure a last degree of utility to the march fence.

THE COURT dismissed the appeal and affirmed the interlocutor of the Sheriff-substitute.

MURRAY, BEITH, & MURRAY, W.S.—LINDSAY, HOWE, & Co., W.S.—Agents.

No. 45.
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D. & J. NICOL, Complainers (Respondents).—*Clyde, K.C.—Paton.*
THE TRUSTEES OF THE HARBOUR OF DUNDEE, Respondents (Reclaimers).—*Sandeman, K.C.—Ingram.*

D. & J. Nicol v. Dundee Harbour Trustees.

Title and Interest to Sue—Statutory trust—Harbour—Ultra vires—Title of private trader and ratepayer to interdict ultra vires action of statutory harbour trustees—Lord Advocate's title to sue.

A body of harbour trustees, incorporated by Act of Parliament, were vested in a monopoly of ferry within certain local limits, and had power, in the event of a deficiency in the ferry revenues, to increase the rates payable by shipowners using the harbour. One of the steamers maintained by the trustees for the purposes of the ferry was hired out by them from time to time for excursions beyond the ferry limits. A firm of shipowners, part of whose business consisted in hiring out excursion steamers, and who paid rates to the trustees for the use of their harbour, brought an action of interdict to restrain the trustees from so using the ferry steamers, and proved that their profits from excursion traffic had been reduced by the action of the trustees.

Held (*diss.* Lord Dewar) that the firm of shipowners had a title and an interest to sue (*a*) as traders, and (*b*) (*rev.* the judgment of Lord Skerrington, Ordinary) as ratepayers.

Opinions, per Lord Salvesen and Lord Guthrie, that the Lord Advocate would have had no title to sue the action.

Harbour—Ferry—Statutory trust—Ultra vires—Harbour Trustees vested in ferry undertaking—Right to use ferry steamers for excursions beyond ferry limits—Dundee Harbour and Tay Ferries Consolidation Act, 1911 (1 *and* 2 *Geo. V. cap. lxxx.*).

A body of harbour trustees were vested by private Act of Parliament in a monopoly of ferry within certain local limits. For the purposes of the ferry the trustees maintained several steamers which were not all required for the ferry at the same time, and occasionally they hired out one of the steamers for excursions beyond the ferry limits. They had no power expressed in their Act to use the steamers for any other than ferry purposes.

Held (*diss.* Lord Dewar) that the trustees were not entitled to use the ferry steamers to carry passengers from and to places outwith the boundaries of the ferry.

2D DIVISION. Lord Skerrington.

ON 16th March 1912, D. & J. Nicol, shipowners, Dundee, presented a note of suspension and interdict against the Trustees of the Harbour of Dundee, in which they craved the Court to interdict the respondents, their servants, and all others acting with their authority, (1) from engaging in passenger steamer traffic from and to ports and places on the Tay outwith the boundaries of the Tay ferries as defined and limited by the Dundee Harbour and Tay Ferries Consolidation Act, 1911, or at all events outwith the boundaries of the harbour of Dundee as defined and limited by said Act; (2) from employing their steamers or other vessels in excursion or other traffic from and to the harbour of Dundee not in connection with the Tay ferries; (3) from hiring out or tendering or offering for hire their steamers or other vessels or any one of them, either gratuitously or for lump sums or otherwise, to excursion parties or others for excursions or cruises, or for other purposes not connected with the said Tay ferries.

The complainers averred that they carried on a large business as shipowners in Dundee, that they were owners of the steamship "Marchioness of Bute," which plied for passenger traffic on the Tay,

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and which they were in the habit of hiring out for excursion parties from Dundee, and that they were large contributors to the revenues of the respondents' undertaking as ratepayers of the harbour of Dundee, and as such were qualified to vote at the elections of trustees for the harbour. They further averred that the respondents carried on and worked the Tay ferries as part of their undertaking under the Dundee Harbour and Tay Ferries Consolidation Act, 1911,* and instead of confining the use of their steamers to the purposes of the

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* The Dundee Harbour and Tay Ferries Consolidation Act, 1911 (1 and 2 Geo. V. cap. lxxx.), enacts:—

Sec. 147.—". . . The Trustees may levy on and in respect of all vessels entering or departing from the harbour . . . the rates specified in . . . Schedule B. . . ."

Sec. 158.—". . . . The Trustees may from time to time . . . increase the rates or any of them . . . provided that such addition shall not at any time exceed one third part of such rates respectively."

Sec. 186.—"On and after the appointed day, the Tay Ferries and the ferries and passages across the River Tay between Newport and Woodhaven in the county of Fife, and Dundee in the county of Forfar, and the right of ferry and right of ferry harbours or landing places at Dundee, Newport, and Woodhaven respectively, and the right of ferry along the coast between Ferry-Port-on-Craig and Balmerino on the south, and from Broughty Castle to Invergowrie Burn on the north . . . and the power of regulating and the jurisdiction over all ferries along the said lines of coast . . . shall be transferred to and shall vest in the Trustees, and shall become part of their undertaking under this Act."

Sec. 189.—"The Trustees may purchase, build, hire, keep, and maintain a sufficient number of vessels of such construction or description as they may deem expedient, and may carry on the Tay ferries themselves or let the same by public auction for any period not exceeding five years . . . and it shall not be lawful for any vessel to ply for hire on any of the ferries or passages vested in the Trustees, or over which they have jurisdiction, without a licence from the Trustees. . . ."

Sec. 190.—". . . The Trustees shall, subject to the provisions in this section mentioned . . . work the ferries between Dundee and the ferry harbour of Newport, so that there shall be at least sixteen trips each lawful day and five trips each Sunday [in each direction]. . . ."

Sec. 194.—"It shall be lawful for the Trustees to levy or to order or direct to be levied at the ferries of Dundee, Newport, or Woodhaven respectively, and at the piers and ferry harbours vested in the Trustees, for or in respect of the conveyance of passengers, animals, and goods by the ferry vessels from Dundee to Newport or Woodhaven or from Newport or Woodhaven to Dundee, and also along the whole line of coast on both sides of the Tay over which the right of ferry vested in the Trustees extends, the rates specified in the Schedule J to this Act annexed." Schedule J provides, *inter alia*—"Tay Ferries Rates—Hire of a steamboat . . . each £15 per day. Hire of a steamboat . . . each £10 per half day."

Sec. 214.—"The Trustees may apply any part of the moneys borrowed or received or to be borrowed or received by them for the purposes of the Tay ferries under the provisions of this Act and the rates and other revenues of the harbour and the Tay ferries, in working, improving, and maintaining the Tay ferries and works connected therewith in such manner as shall from time to time appear to the Trustees expedient."

Sec. 215.—"The rates levied and the money received and paid at and in respect of the Tay ferries shall be included in the accounts kept by the Trustees . . . Provided that the accounts of the Trustees shall be so kept as to show separately the receipts and expenditure of and applicable to the Tay ferries."

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ferries, had illegally hired them out for pleasure trips on the Tay to points outwith the limits of the harbour and ferries as defined by the Act. They also averred that a new steamboat ostensibly acquired for the purpose of the ferry had really been acquired for excursion purposes. They further averred that by this illegal use and hiring out of their boats, the respondents were depriving the complainers of a large part of their business; that the rates charged by the respondents were altogether inadequate, and such as no private shipowner could compete with; that the rates charged for the trips would prove a loss to the trustees were all the expenditure properly debited; and that by these illegal actings the respondents were competing with the complainers' business.

The complainers pleaded;—(1) The respondents having no power to engage in or to employ their steamers for passenger traffic as libelled, either generally or for excursions, or to lend or hire out their steamers or other vessels for such traffic, complainers are entitled to have them restrained from doing so, and interdict should be granted as craved. (2) The hiring out by the respondents of their said steamers . . . being *ultra vires* of the powers conferred on them by said Dundee Harbour and Tay Ferries Consolidation Act, 1911, the complainers are entitled to interdict as craved. (3) The actings of the respondents complained of being illegal and *ultra vires*, the complainers are entitled to interdict as craved.

The respondents pleaded;—(2) The complainers having no title to sue, and *separatim* no interest to insist in these proceedings, the same should be dismissed. (4) The respondents being entitled to hire their steamboats, the prayer of the note, so far as it seeks to interdict them from doing this, should be dismissed.

On 12th July 1912 the Lord Ordinary (Skerrington) allowed a proof before answer. Proof was taken on 17th and 18th December 1912. The import of the evidence appears from the following narrative which is taken from the opinion of the Lord Ordinary:—

"The complainers are shipowners and ship brokers and agents in Dundee. Part of their business consists in owning and working excursion steamers for passengers. In the present action they complain of and seek to restrain what they allege to be unfair and illegal competition on the part of the respondents, the Trustees of the Harbour of Dundee, as owners of the Tay ferries. The respondents were incorporated on 18th August 1911 in succession to the then existing trustees by the Act 1 and 2 Geo. V., cap. lxxx. The Tay ferries have been vested in and managed by the Harbour Trustees since the year 1873, and they form part of the respondents' undertaking. These ferries consist of the ferry from Dundee to Newport and of a disused ferry from Dundee to Woodhaven. The area over which the respondents' right of ferry exists is defined by section 186 of their Act, and is shown on the plan No. 42 of process. It extends along both sides of the estuary of the Tay from Balmerino on the west to Tayport on the east, exclusive, however, of the ferries at Balmerino and Tayport, the latter of which belongs to the North British Railway Company. The limits of the harbour of Dundee, as defined in section 81, include the ferry limits as above described, and extend eastward to the sea.

"The complainers aver that the respondents' predecessors recently acquired a new steamboat ostensibly for the purpose of replacing one of the ferry boats, but really for use as an excursion steamer; that the 'Newport,' which was the steamer referred to, was never employed

on ferry traffic, and that large sums were expended upon special repairs which were necessitated by reason of her use in excursion traffic. All these averments have been disproved. The 'Newport' was built by the then existing Harbour Trustees at a cost of £10,000, because they required a new steamer for the purposes of their ferry, in addition to the two steamers which they already possessed, one of which was more than fifty years and the other more than thirty years old. Since September 1910 the 'Newport' has been regularly used for ferry purposes, except when she was under repair or being overhauled. By section 189 of their Act the respondents are constituted the judges as to the number of vessels which they think it expedient to maintain for the purposes of the ferry, and they have fixed the number at three for the present. Normally only one steamboat is used for the ferry, but on Saturday afternoons and on holidays a second steamboat is used at the same time. The respondents' maintain two complete crews, one of which works from 5 A.M. until 2 P.M., when the second crew comes on duty and works the ferry until midnight. When two ferry-boats are running simultaneously one crew has to be paid for overtime. As regards the use of the ferry-boats for excursions, it appears from No. 37 of process that during the period from 1st June 1910 till 10th September 1912 there have been nineteen excursions, for which £155 in all was received. These figures include the period since the respondents' incorporation in August 1911, during which there have been seven trips, for which £70 was received. The respondents' predecessors occasionally gave the use of a steamer for an excursion gratuitously, but the respondents have adopted the policy of making a regular charge on each occasion of £15 for a whole day or £10 for a half day. Two out of the seven trips for which the respondents are responsible took place on Saturday afternoons, when the two regular crews were engaged on the ferries, and when it was therefore necessary to engage a scratch crew from among the men employed on the harbour. In the ordinary case a ferry steamer, when used for an excursion, is manned by the spare crew, who are paid overtime, and who have the help of a pilot taken from one of the harbour tugs. After deducting wages, coal, and oil, one-half of the £10 charged for an afternoon's excursion is profit; but this calculation allows nothing for insurance, repairs, and general oncost. Private owners could not afford to let their steamers for excursions at £15 per day or £10 per half day. The respondents' boats have a crew of seven hands all told. The complainers' boats are smaller, but have crews twice as numerous. On every occasion the agreement to provide an excursion steamer was conditional on the boat not being required for ferry purposes."

On 8th January 1913 the Lord Ordinary (Skerrington) pronounced the following interlocutor:—"Repels the second plea in law for the respondents and interdicts, prohibits, and discharges them, their servants, and all others acting with their authority from carrying passengers by means of the Tay ferries steamers from and to places outwith the boundaries of the ferries as defined by the Dundee Harbour and Tay Ferries Consolidation Act, 1911, and decerns: *Quoad ultra* finds it unnecessary to deal with the prayer of the note of suspension and interdict." *

* "OPINION.—[After the narrative quoted above]—The respondents and their predecessors have been careful to subordinate their excursion traffic to

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ferry accounts, the ferry being run as a separate undertaking at a profit. Even if as ratepayers the complainers had an interest, they could not move in the matter until they could show that they had actually suffered prejudice. *On the merits.*—The reclaimers had not acted *ultra vires*. A general power to hire out steamers was implied in the terms of their Act,[1] but, in any event, the occasional hiring out of a steamer not required at the time for the ferry was an act impliedly within their powers, being an act which might "fairly be regarded as incidental to" their undertaking, and not expressly prohibited.[2] A corporation was not bound to keep spare plant lying idle and profitless; it was fairly incidental to the keeping of such plant to use it to the best advantage, provided it was not used for purposes altogether foreign to the main undertaking.[3]

Argued for the respondents (complainers);—*On the question of title.*—The complainers had a title to sue. As members of the

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that he pointedly refrained from endorsing Sir John Romilly's views. I respectfully dissent from the view that, because a company in the performance of their statutory duties have to keep steamers which sometimes are not required for the statutory purpose, the company have implied power to use their steamers 'as they think fit for the profit of the Company, and either to let them out to private parties for excursions or to carry excursion parties themselves.' This doctrine seems to me to be as unsound as it is far reaching and dangerous. If the respondents have not implied power to run excursion steamers to points outside the ferry limits, their statute impliedly forbids them to do so. In *Attorney-General* v. *Great Eastern Railway Company*, (1880) 5 App. Cas., at p. 486, Lord Watson stated the principle as follows, namely, 'When a railway company has been created for public purposes the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication.' Accordingly the respondents lie under a statutory duty to refrain from carrying on business of the kind objected to by the complainers. Of course I say nothing which can touch the respondents' right to alienate either permanently or temporarily by a lease ships or other plant for which they have no immediate use. They may also be entitled to demise one of their ships together with a crew to a person who proposes to engage in excursion traffic. But they have, according to my judgment, no power to use a ship for excursion traffic while they retain the possession of it and the control of the crew. The respondents' superintendent deponed that he always retained the control of any steamers which he let out for excursions. The respondents' counsel cited an American case, *Brown* v. *Winnisimmet Company*, 11 Allen, 326, where it was decided that a ferry company had power to lease its surplus boats to other parties. The case is fully reported in Lawson's Rights, Remedies, and Practice, vol. i., sec. 391, note (6). While I have no quarrel with the decision, I think that some of the opinions of the Court and of the learned commentator are not reconcilable with the law of *ultra vires* as laid down by the House of Lords.

"The next question is whether the complainers have a sufficient title and

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[1] Section 194, Schedule J.

[2] Attorney-General v. Great Eastern Railway Co., (1880) 5 App. Cas. 473, *per* Lord Selborne, L.C., at p. 478.

[3] Forrest v. Manchester, Sheffield, and Lincolnshire Railway Co., (1861) 30 Beav. 40, *per* Romilly, M.R., at p. 47, *affd.* 4 D. F. & J. 126; Simpson v. Westminster Palace Hotel Co., Limited, (1860) 2 D. F. & J. 141, *affd.* 8 H. L. Cas. 712; Brown v. Winnisimmet Co., 11 Allen, 326 (American), also reported in Lawson's Rights, Remedies, and Practice, vol. i., section 391, note 6; Brice on Ultra Vires (3rd ed.), p. 135.

public, in whose interests the Harbour Trustees were incorporated, they had a title to restrain the Trustees from acting *ultra vires* if they could qualify an individual interest to do so. Both title and interest were always necessary to give a title to sue, but where a member of the public sued a body created by statute for public purposes his title was assumed, and only his interest required to be proved.[1] To this extent the action partook of the nature of an *actio popularis*, just as, in an action on right of way, any member of the public could sue, because as such he had both a title and an interest.[2] The jurisdiction of the Court to entertain such an action was undoubted.[3] The English law on the subject was inapplicable. There, technically, the Attorney-General alone had a title to sue such actions as the present, but, in practice, he merely lent his name to any person wishing to sue, if satisfied that the action was not frivolous.[4] No such practice existed in Scotland. The Lord Advo-

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interest to prevent the respondents from contravening their statute. A person cannot sue in respect of the breach of a statutory obligation conceived in favour of some other person, or for some purpose to which he himself is a stranger—*Monklands Railway Company* v. *Waddell*, (1861) 23 D. 1167; *Gorris* v. *Scott*, (1874) L. R., 9 Ex. 125. Nor can he sue in respect of the breach of a public statutory duty when the only remedy which Parliament had in view was a prosecution for a penalty—(*Institute of Patent Agents* v. *Lockwood*, (1894) 21 R. (H. L.) 61; *Atkinson* v. *Newcastle and Gateshead Waterworks Company*, (1877) 2 Ex. D. 441. Contrast *Watkins* v. *Naval Colliery Company*, [1912] A. C. 693). But a member of the public can sue for the protection of his own patrimonial interests, when these will be directly prejudiced by the breach of a public statutory duty—*Stirling County Council* v. *Falkirk Magistrates*, 1912 S. C. 1281; *Farquhar and Gill* v. *Aberdeen Magistrates*, *ibid*, p. 1294. The complainers are interested in the prosperity of the harbour of Dundee as persons who pay large sums annually for dock dues, dues on goods, &c., in respect of their own ships, and of ships consigned to them. The partners of the complainers' firm are qualified both as harbour ratepayers and also as municipal electors to vote for and to be elected as harbour trustees. But their patrimonial interest as harbour ratepayers is of a remote and indirect character. The Tay ferries being a part of the harbour undertaking, it is suggested that the harbour rates might have to be raised in the event of one of the ferry steamers being lost while upon an excursion. Also that in the case supposed claims might be made against the trustees for damages and *solatium*. There could, however, be no liability upon the part of the Harbour Trustees as a corporation in respect of the *ultra vires* acts of the individual trustees,

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[1] Guild v. Scott and Ross, Dec. 21, 1809, F. C.; Tait v. Earl of Lauderdale, (1827) 5 S. 330; Martin v. Easton, (1830) 8 S. 952; Christie v. Caledonian Railway Co., (1847) 10 D. 312; Adamson v. Edinburgh Street Tramways Co., (1872) 10 Macph. 533; Magistrates of Perth v. North British Railway Co., (1884) 11 R. 827, *affd.* 13 R. (H. L.) 37; Blackie v. Magistrates of Edinburgh, 11 R. 783, *affd.* 13 R. (H. L.) 78; and *cf.* Institute of Patent Agents v. Lockwood, (1893) 20 R. 315.

[2] Duke of Atholl v. Torrie, (1852) 1 Macq. 65, *per* Lord St Leonards, L.C., at pp. 74-5, *affirming* 12 D. 328.

[3] Beckett v. Campbell, (1864) 2 Macph. 482, *per* Lord Cowan, at p. 486; Erak. Inst. (Nicolson) i. 3, 22, note *b*, p. 71.

[4] Attorney-General v. Shrewsbury (Kingsland) Bridge Co., (1882) 21 Ch. D. 752; Attorney-General v. London County Council, [1901] 1 Ch. 781, *affd.* [1902] A. C. 165; Attorney-General v. Corporation of Leicester, [1910] 2 Ch. 359.

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cate had no title by statute to sue the present action,[1] and at common law he had no title to sue any action without a special mandate from the Crown.[2] The individual interest of the complainers was twofold; as traders, whose goodwill was being injured by the illegal action of the Trustees,[3] and as ratepayers, liable to an increase of rates in respect of any deficiency in the ferry accounts due to the risk run by the ferry steamers when employed on outside excursions. *On the merits.*—The Harbour Trustees had no power to hire out the ferry steamers for excursions. Their Act of Parliament did not contemplate such a use of the steamers, and such use could not fairly be regarded as incidental to their undertaking. The object of their undertaking was to serve the public convenience, not to earn profits, and accordingly they were not in the same position with regard to using surplus plant as a trading company. A body of trustees incorporated by statute for public purposes had no *persona* or powers at

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and the latter would be personally bound to provide the Trust with a new steamer to replace the one which had been lost while carrying on an unauthorised trade. I cannot consistently with the authorities sustain the complainers' title to sue as harbour ratepayers. But the complainers are also interested as rival traders in seeing that the respondents do not exceed their statutory powers. If it were not for the authorities I should have had no doubt that the complainers had a title and interest to enforce a restriction which, although imposed for the benefit of the public in general, directly affected the special and patrimonial interests of the complainers as persons carrying on a particular kind of trade in a particular place. It was, however, decided by Lord Westbury in the Court of Chancery so long ago as 1862 that a waterworks company had no title to restrain another similar company from making an *ultra vires* invasion of the former's territory. He said:—'The Constitution of the country has wisely entrusted the privilege with a public officer (the Attorney-General), and has not allowed it to be usurped by a private individual.'—*Stockport District Waterworks Company* v. *Mayor of Manchester*, 9 Jur. (N. S.) 266, 7 L. T. (N. S.) 545. This decision was reluctantly followed by Vice-Chancellor Malins in *Pudsey Coal Gas Company* v. *Corporation of Bradford*, (1873) L. R., 15 Eq. 167. There is a judgment to the same effect by Lord Low in the Outer House—*Clyde Steam Packet Company* v. *Glasgow and South-Western Railway Company*, (1897) 4 S. L. T. 327. The report is a short one, but it cites the *Stockport* case and states that by running steamers the railway company did not invade any public or private right belonging to the complainers. If a public or private right which exists antecedently to and independently of the incorporating statute is infringed by a corporation, the injured party has an undoubted title to sue unless the right has been excluded by the statute, but that consideration does not seem to have any bearing upon the question whether a rival trader has a sufficient title and interest to restrain by interdict trading which is expressly or impliedly forbidden to a corporation by its statute. So far as appears from the report, it was not pointed out to Lord Low that Lord Westbury's judgment proceeded upon the ground that according to English practice there was a recognised form of action of which the plaintiffs ought to have availed themselves, viz., an action in name of the Attorney-General suing on the relation of the rival trader. Such actions seem not to be conducted by Crown counsel. In a recent case it was argued that the Attorney-General ought not to have lent his name

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[1] Crown Suits (Scotland) Act, 1857 (20 and 21 Vict. cap. 44).

[2] King's Advocate v. Lord Dunglas, (1836) 15 S. 314, *per* Lord Medwyn, at p. 324 *et seq.*

[3] *Cf.* Haining v. Commissioners of Police for Dumfries, 23 D. 755.

common law, it depended solely on its statute, and could do nothing that the statute did not expressly or by necessary implication empower it to do.[1]

At advising on 20th February 1914,—

Lord Salvesen.—Two questions are raised in this case both important and difficult of solution. The first is whether the complainers have a title to sue; the second whether the respondents are contravening the statute under which they are constituted. I shall deal with these in their order.

The complainers rest their title upon two considerations:—(1) that part of their business consists in running excursion steamers from Dundee, and that the respondents are competing with them in this business, although impliedly prohibited from doing so by their incorporating

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to an action which was brought in the interest of rival omnibus proprietors who sought to restrain the London County Council from doing something which, according to Rigby, L.J., might be 'very reasonable, very proper, and very beneficial to the public if only it is within their power under the statutes.' The House of Lords laid it down that the jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute—*Attorney-General* v. *London County Council*, [1901] 1 Ch. 781, *affd.* [1902] A. C. 165. Lord Halsbury indicated that as a matter of discretion the Attorney-General might refuse 'to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter.' The whole subject of the duty and functions of the Attorney-General in such cases seems to me to be a technical one, and there was a difference of opinion in regard to it in the Court of Appeal in *Attorney-General* v. *Great Eastern Railway Company*, (1879) 11 Ch. D. 449, (1880) 5 App. Cas., p. 477, note. In *Attorney-General* v. *Mersey Railway*, [1907] A. C. 415, the relators were not rival traders but a municipal corporation. There is no similar practice in Scotland, but I do not doubt that the Lord Advocate could and would bring a civil action of interdict in any case where he considered the public interest to be involved. On principle it seems to me that the Lord Advocate has as little title to sue in the private interest of the complainers as the latter have to sue in the public interest. Accordingly I agree with the respondents' counsel that the complainers could not, according to the practice of our civil Courts, institute and prosecute an action of interdict in name of the Lord Advocate, even if they were expressly authorised by him to do so. It follows, in my opinion, that the complainers are entitled to protect themselves in the ordinary way, and by an action in their own names, against an abuse of statutory power which is directly injurious to their individual and patrimonial interests by exposing them to artificial and illegal competition. —See *Haining* v. *Dumfries Commissioners*, (1861) 23 D. 755. The validity of the complainers' title to sue is emphasised and illustrated by the English practice which has made it necessary to invoke what looks like a legal fiction rather than to tolerate a manifest injustice. Upon the evidence I am satisfied that the running of excursion steamers by the respondents is calculated seriously to prejudice the complainers in their business. I shall therefore interdict the respondents from carrying passengers by means of the Tay Ferries' steamers from and to places outwith the boundaries of the ferries as defined in their Act."

[1] London County Council v. Attorney-General, [1902] A. C. 165, *affirming* [1901] 1 Ch. 781; Ashbury Railway Carriage and Iron Co. v. Riche, (1875) L. R., 7 H. L. 653; Attorney-General v. Great Eastern Railway Co., (1880) 5 App. Cas. 473.

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statute; and (2) that as shipowners who regularly use the harbour of Dundee they pay dues for the use of the harbour and have an interest in seeing that the funds under the control of the respondents, which consist of harbour dues and rates on shipping and goods, are applied strictly to the purposes for which the respondents obtained statutory authority. The Lord Ordinary has upheld their title on the first head, but has repelled it on the second. A strenuous argument was maintained by the respondents to the effect that the decision of the Lord Ordinary in sustaining the title of the complainers as rival traders was erroneous; and on the other hand, the complainers contended that he was equally wrong in repelling their title as ratepayers; although, of course, if their title is sustained upon any ground they have no interest to quarrel the judgment. In my opinion the complainers have a good title on both heads; and I should have thought this reasonably clear on principle but for the authorities which have been cited.

If this action had been raised by the complainers simply as members of the public I should have agreed that, however grave a contravention of the statute the respondents had committed, their title could not have been sustained. Such an action would have been a proper *actio popularis* which, with the apparent exception of a declarator of right of way, is unknown in our law. Even a declarator of right of way, I take it, is not a real exception to the general rule; because every inhabitant in Scotland has a right to use, and may have occasion to use, any public right of way. He has therefore an interest to pursue such an action, the interest being greater or less according to its actual or possible use. Such an interest is entirely absent where the question is whether a statutory body of trustees having a limited jurisdiction are or are not expending the trust funds under their charge in terms of the authority conferred upon them by Parliament. In order to maintain an action the pursuer must not merely have a title but an interest in the subject-matter of the suit. Even an inhabitant of Dundee, who is more or less interested in the maintenance of the harbour and ferries which primarily serve the public of that seaport, might have no interest in preventing the running of excursion steamers by the respondents. As such inhabitant he might rather be expected to favour the increase of facilities for summer outings, more especially if the fares charged were less than those that were exacted by excursion steamers run upon commercial lines. To such a person it would be a matter of indifference whether the steamers were run at a profit or at a loss; for he would neither share in the profit nor have to contribute to the loss.

An entirely different question is raised, however, when it is alleged that the acts sought to be interdicted constitute an invasion of patrimonial rights. In such a case any person aggrieved has a clear interest in having the illegal actings restrained, and the Lord Ordinary has held that the complainers of this action have established such an interest. The excursion traffic from Dundee to places up the Tay is of a limited nature, for it appears that in the last year referred to in the proof there were only ten excursions. Of these seven were secured for the "Newport," one of the ferry-boats belonging to the respondents, the remaining three being run by the "Marchioness of Bute," a passenger steamer belonging

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to the complainers. It is a fair inference that, but for the competition of the respondents, some if not all of these seven excursions would have been obtained by the complainers and would have yielded them substantial profit. The goodwill of the complainers' business in passenger traffic has thus been invaded, and their probable profits reduced by the competition to which they have been exposed. Their interest as shipowners to sue is therefore undoubted, and I think it was not seriously disputed.

It is, however, not sufficient for the complainers to qualify an interest; they must also have a title. If the respondents here had been a private partnership who were prohibited by their contract of copartnery from engaging in excursion traffic, while the complainers' interest to restrain such traffic would be the same, they would have had no title to sue. The reason is that only the parties to a contract can enforce a contractual obligation. A stranger to the contract has no right to inquire into its terms; and, if the thing done is not illegal in itself, it does not concern such a stranger whether it is in breach of the contract of copartnery. The same is, of course, true of a limited liability company incorporated under the Companies Acts. The contract between the company and its members is usually embodied in a memorandum and articles of association. Any member of the company is entitled to complain of a violation of the contract, but no one outside the company can challenge its administration. The rule would seem also to apply to companies formed for profit, such as railway companies, which cannot be incorporated except under statutory authority because of the necessity of their being armed with powers for the compulsory acquisition of the land necessary for the purposes of their undertaking.

In my opinion the same considerations do not apply as between a statutory body such as the respondents, who are incorporated by Act of Parliament to serve the public interests of a particular community, and one of the members of that community. Had the bill which resulted in the Act of 1911, under which the respondents are now incorporated, proposed to take powers to run steamers for profit, whether by carrying goods or passengers, I do not think it doubtful that the complainers would have been entitled to oppose in Parliament the granting of such powers as prejudicial to their interests. A successful opposition would be of no value if the respondents could immediately thereafter proceed to do the very thing which they had been refused authority to do without being liable to be called in question by the persons at whose instance the powers had been refused; yet, if the respondents' argument is sound, that would be exactly their position, subject only to the suggestion that the Lord Advocate might intervene on their behalf, a suggestion which I shall afterwards consider. No Scottish decision was cited in support of this somewhat startling proposition which would result in the denial of justice to an individual whose business or property was being injuriously affected by an illegal act. On the contrary, there are authorities which appear to be precisely in point. In the case of *Adamson*[1] two omnibus

[1] 10 Macph. 533.

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and cab proprietors in Edinburgh were held entitled to complain of the breach of an obligation in the Edinburgh Tramways Act, by which it was provided that where, in any road in which a double line of rails was laid, there should be less width between the footpath and the nearest rails than 9 feet 6 inches the company should construct a passing place. The pursuers of that action had occasion to use the street in question, and this was held sufficient to entitle them to enforce the statutory obligation. The case is all the more striking because by the Act the local authority were expressly authorised to take action, and perhaps might do so to the exclusion of those members of the public whose patrimonial interests were not affected. So also in the case of *Guild* v. *Scott*[1] an action was sustained at the instance of certain persons, who had occasion to travel a turnpike road, calling upon the trustees to put the road in repair or to remove the toll-bars.

The patrimonial interest of the complainers as harbour ratepayers to maintain this action is of a less direct character. The Lord Ordinary has held it to be too remote and indirect to support their title. I cannot assent to this view. A contingent interest is in my opinion sufficient. If in any year the ferries are run at a loss the deficiency falls to be made up out of increased dues levied upon shipowners and merchants. If the risk of such a deficiency is increased by the illegal use of the respondents' ferry boats complained of, I think a Dundee shipowner is entitled to invoke the jurisdiction of the Courts to protect him against this. It appears that in the summer time two ferry boats are required in order to maintain a proper service across the Tay. A third boat was built for the express purpose of taking the place of one of these if it should happen to be laid aside by accident or was undergoing repair. If the third vessel were simultaneously employed in excursion traffic and met with damage, it might well happen that only one boat would be available for the public traffic; and, as the respondents run their vessels uninsured, the loss occasioned by any perils of navigation would have to be made up out of the rates. The respondents might of course obviate this latter objection by insuring their boats; but, while this would prevent the ultimate loss falling upon the rates, it would not obviate the objection arising from a possible interruption of a proper service for ferry purposes. If a boat is kept in reserve to take the place of one of the two regularly employed, it is not exposed to accident; if, on the other hand, it is employed in excursion traffic up the Tay, it might easily meet with such a casualty as would temporarily disable it from serving the very purpose for which it was constructed. I incline to think that an inhabitant of Dundee would have a sufficient title and interest to prevent such a misuse of the respondents' property, although he did not in fact pay rates or dues to the respondents and had never done so. As such inhabitant he might be interested in a regular service being maintained at the ferry, and entitled to protest against any actings of the respondents by which they diverted the steamers —which they were only authorised to acquire for ferry purposes—to other uses, and so endangered the regularity of the service. But a

[1] Dec. 21, 1809, F. C.

ratepayer who, in addition to this public interest, may be called upon to pay increased rates would have this added interest to support his title. It might indeed happen that the only private persons who could challenge the respondents' actings would be inhabitants of Dundee or persons who paid harbour rates there. This would be the case if there were no shipowners who were engaged in the excursion traffic and nobody therefore whose individual patrimonial rights were prejudiced. Assuming a clear abuse of their statutory powers by the respondents, it would be an odd thing if no one was entitled to call them to account.

Recognising this difficulty the respondents argued that the Lord Advocate might bring an action in the public interest. They were unable, however, to cite a single case where the Lord Advocate had intervened for the purpose of vindicating either public or private rights; although, in the case of the former, the Lord Ordinary seemed to think he might do so. Some support for the Lord Ordinary's view may perhaps be derived from a passage in Lord Kyllachy's opinion in the case of *Kesson*.[1] Referring to the case of *Ewing and Others*,[2] which I shall afterwards notice, he says "the doctrine of these cases is that an individual corporator cannot merely as such complain of misapplication of the corporate property; the title so to complain being in general confined to the Crown." For this latter statement he quotes as his authority the case of *Muir* v. *Rodger*.[3] On referring to that case I find nothing in the decision to support it; and only a tentative suggestion by Lord Deas that possibly the law officers of the Crown might interfere if the existing members of an incorporation proposed to distribute the funds among themselves. It is true that it is settled law that a citizen as such is not entitled to complain of the manner in which the common good of a burgh is administered by the town-council; but the reason of this is explained by Lord Kyllachy in the case of *Conn*.[4] The common good of a burgh is corporate property which falls as such to be administered by the town-council as the executive of the corporation; and, provided they apply it for public purposes, the absolute discretion with which they are vested cannot be challenged. I do not think, however, it has ever been held that, if they were proposing to divide it among themselves, an individual citizen might not challenge their proceedings; and that on the assumption that the Crown from whom the corporate property has originally been derived might also intervene. No such case as I have figured has ever been dismissed on the ground of want of title; nor is there any instance of the Crown having taken action to prevent acts of malversation on the part of magistrates in relation to the common good. The distinction, however, between corporate property which is held under no specific trust title, but which may be employed for the benefit of the community in the discretion of its then administrators, and property which is the product of rates contributed by the community, and which must be administered in accordance with the same statute as authorises the collection of the rates, is too obvious to need comment. A decision

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[1] 1 F. 36.
[2] 15 S. 389, M'L. & R. 847.
[3] 9 R. 149.
[4] 8 F. 905.

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which has more bearing, and which, indeed, was the sheet anchor of the respondents' argument on this head, was that of the House of Lords affirming the judgment of the Court of Session in the case of *Ewing* v. *Glasgow Commissioners of Police*.[1] When that case is examined it is found to have proceeded upon entirely technical grounds. It did not lay down the proposition that an individual ratepayer who was illegally assessed was not entitled to challenge the assessment. As Lord Kyllachy pointed out in the case of *Conn*[2] it was an extension to police funds of the principle which had been applied to the common good; and I think its true bearing was correctly interpreted by Lord Mackenzie in the case of the *Stirling County Council*.[3] It is further to be noted that the pursuers there were not without a remedy; for any person aggrieved by any order or other proceeding of the Commissioners was entitled to appeal to the Circuit Court of Justiciary at Glasgow; and it was also made competent to certain corporate bodies to bring actions against the Commissioners before the Court of Session or Court of Exchequer for misapplying their funds. Where specific legislative provision is made there is a presumption that it is so because no common law remedy exists; but this consideration is absent from the present case where the only possible remedy is one at common law.

Could, then, the Lord Advocate on behalf of the Crown or in the public interest have instituted this action? We were referred to no statute which confers the right upon him; and a common law right can scarcely be predicated for a power which has never in fact been exercised since the office of Lord Advocate was instituted. It is unnecessary to trace in detail the origin of the official who now plays so important a part in the administration of the law in Scotland. That was done by Lord Medwyn in the case of the *King's Advocate* v. *Lord Dunglas*,[4] where that learned Judge conclusively shows that all the functions which he exercises either on behalf of the Crown or in the public interest are of statutory origin, and that at common law he has no rights or duties beyond those of an ordinary citizen. In the early days, where he acted on behalf of the Crown, he was authorised so to act by a warrant under the sign-manual. He was in fact merely, as his original designation indicates, a counsel whom the Crown selected for advice in legal matters or for the conduct of litigations which it found necessary to institute. Instead of the special warrant which formerly used to be granted under the sign-manual in order that the King's Advocate might sue an action in the interest of the Crown, there are now a number of statutes which serve the same purpose as regards the matters to which they relate. It is not contended that any of these applies to a case such as the present. I am, therefore, of opinion that the Lord Advocate would not be in *titulo* to sue the present action.

If this latter conclusion is well founded it seems to establish the title of the present complainers beyond doubt; for there is no illegality which can be committed by persons in Scotland which cannot be restrained at

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[1] 15 S. 389, M'L. & R. 847.
[2] 8 F. 905.
[3] 1912 S. C. 1281.
[4] 15 S. 314.

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the instance of some party interested, and the respondents were not able to indicate any person with a higher interest or a better title than the present complainers. The idea that a special Act of Parliament would require to be passed in order to secure the enforcement of a statutory prohibition already made is, I think, entirely out of the question; nor can I hold that the officers of State, who used at one time to sue and be sued as representing the Crown in its patrimonial interest, have a title as such to represent the public of a given community, still less the interests of private individuals.

The point which I have been stating is one of purely Scots law, and no useful light is to be obtained from the decisions of Courts which administer an entirely different system. It has been decided in England in the case of *Stockport District Water Works Company*[1] and *Pudsey Coal Gas Company*[2] that such an injury as the pursuers here allege did not entitle the injured parties to maintain a similar suit. The reason of this judgment is to be found in the passage quoted by the Lord Ordinary from the opinion of Lord Westbury, namely, "that the constitution of the country has wisely entrusted the privilege with the public officer (Attorney-General) and has not allowed it to be usurped by a private individual." The later authorities show that the law and practice of England differ radically in this matter from those of Scotland. It appears that the Attorney-General is in the habit of lending his name at the instance of "relators" who bear the costs, and have the entire control of the suit. In this way any person who can satisfy the Attorney-General that his action is not frivolous may pursue his remedy in name of that public officer. We have no similar law or practice in Scotland, and it is unsafe to quote English authorities on a question of essentially Scotch procedure. It may be that the system there is better than our own, but we have no right to import it into our Scotch jurisprudence. The one advantage that it seems to possess, viz., that it tends to restrain the abuse of actions at law at the instance of private persons against public incorporations, is more theoretical than practical, for there is no instance of a private right of this kind having been abused in our Courts.

The only other question is whether the respondents have an implied power to run excursion steamers to points outside the ferry limits. On this point I adopt the reasoning of the Lord Ordinary. At first sight there is a good deal to be said for the view that it is not against the public interest that the respondents should employ one of their steamers for such trips during her spare time; and that such use must be regarded as incidental to their right of ownership. The case could not be more plausibly put than it is by the Master of the Rolls, Sir John Romilly, when deciding the case of *Forrest*[3]; but his views on the merits were apparently not in accordance with those of Lord Westbury, L.C., and in any case were applied to somewhat different facts. The respondents have satisfied the Lord Ordinary that the "Newport" was built in order that they might suitably maintain the public ferry, which was one of

[1] 7 L. T. (N. S.) 545. [2] L. R., 15 Eq. 167.
[3] 30 Beav., p. 40, *affd.* 4 D. F. & J. 126.

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the purposes for which they were incorporated, although they employ this boat in excursion traffic at the very time when their two other boats are required for ferry purposes, and when she ought to be available as a reserve boat. But the respondents do not limit their claim to the use which they have in the past made of the "Newport." As I understand they maintain their right to employ her in such general trading as she is fit for; and, although under her present certificate she cannot leave the Tay, their case would be the same if she obtained a certificate enabling her to engage in general coasting traffic. I do not think this right can be conceded, for it is not within the authority conferred upon the respondents to employ the boat which they have acquired for ferry purposes in conveying goods or passengers for profit outside their ferry limits. Within these limits they have a monopoly; outwith them they are not entitled in my opinion to run a boat at all, unless such running be strictly incidental to the use of the boats as ferry boats. I think this disability applies as much to a demise of the ships as to the use of them while retaining possession and control of the crews, although the Lord Ordinary seems to doubt this proposition. The respondents founded upon the rates stated in schedule "J" of their Act as justifying what they have done and the charges they have made. So far from this schedule aiding their argument it shows that the statute did not contemplate that they should employ a ferry boat beyond the ferry limits; for the only rates enumerated are ferry rates; and if their claim is valid they may fix the rates both for passengers and goods at their discretion. I have accordingly come to the conclusion that, on this part of the case also, the Lord Ordinary is right; and that his interlocutor should be affirmed.

Lord Guthrie.—I agree with the Lord Ordinary that the action of the reclaimers, in carrying passengers by means of their ferry steamers from and to places outwith the statutory boundaries of the ferries under their charge, is not authorised by their statute of 1911, either expressly or by implication, and is not incidental to their statutory undertaking. I also agree with him that the complainers have shown sufficient title and interest, as traders, to raise the question of the reclaimers' right to run these excursion steamers. But I am also prepared, differing from him, to sustain their title as harbour ratepayers.

It was admitted that the reclaimers' statute of 1911 does not expressly authorise them to run excursion traffic. Their argument for authority by implication was founded on the first two items in Schedule J of their Act, namely, "Hire of a steamboat—each, £15 per day. Hire of a steamboat—each, £10 per half day." The Lord Ordinary, dealing with this point, says: "The respondents are entitled to found upon these rates as a guide to what they ought to charge when they hire out a steamboat for excursion purposes; but the schedule refers to the hire of a steamboat for ferry purposes only." I agree with the Lord Ordinary's conclusion, but it seems to me, in view of the different conditions in the two cases, that the sums stated in the schedule for ferry traffic could afford no standard for an excursion rate.

But the reclaimers maintained that the employment of their steamers

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for excursions, when not required for ferry purposes, was a purpose fairly incidental to the necessity, which their undertaking is under, of keeping a margin of carrying power in the shape of surplus boats. Instead of excursion traffic being in its nature incidental to ferry traffic, it seems to me to be different in essential particulars, including the original construction of the boats, the number and class of men employed, and the character of the weather risks and other risks run. The loss of, or a disabling accident to, a ferry boat, when being used for excursion purposes, would involve interruption of ferry traffic, unless indeed carrying power is to be provided supplementary not only to ferry but also to excursion traffic.

If excursion traffic run by the reclaimers is authorised neither expressly nor by necessary implication, and is not a mere incident of their main business, I agree with the Lord Ordinary that the principle stated by Lord Watson in *Attorney-General* v. *Great Eastern Railway Company*[1] is fatal to their contention.

The complainers' interest, at all events as traders, is clear enough, whether the reclaimers' ferry boats are run for excursion purposes gratuitously or for a charge. The question of the complainers' title is more difficult. As traders, the only difficulty arises from the *Stockport* case[2] in England, followed in Scotland by Lord Low in the *Clyde Steam Packet Company* case.[3] But I agree with Lord Salvesen that the ratio of the English judgment depended on rights and duties, or in Lord Westbury's phrase, "privileges," possessed by the Attorney-General, which have no parallel in Scottish jurisprudence, under which the Lord Advocate only acts on the express mandate of the Sovereign or of one of the State Departments, or under statutory authority.

The reclaimers' argument implies that a remedy which, through the medium of the Attorney-General acting for the public interest, would be open to traders in England is denied to traders in an identical position in Scotland, a result not lightly to be reached. It also involves another extraordinary result, namely, that, while the complainers would have had a Parliamentary locus to oppose a clause in a bill promoted by the reclaimers authorising the excursion traffic now in question, they would, in the event of such a power being refused and the clause struck out, have no title to complain if the reclaimers proceeded to run excursion traffic in defiance of what had passed in Committee in Parliament.

As to the complainers' position as ratepayers, I differ from the Lord Ordinary. He says "their patrimonial interest as harbour ratepayers is of a remote and indirect character." This seems to me not to give sufficient weight to the financial dependence of the ferries on the harbour. The reclaimers aver in Answer 1: "The complainers do not contribute either directly or indirectly to the undertaking of the Tay ferries, and have no interest whatever in its finances." But, if it be the fact that any deficiency in the ferries is charged on the harbour, harbour

[1] 5 App. Cas., at p. 486.
[2] 9 Jur. (N. S.) 266, 7 L. T. (N. S.) 545.
[3] 4 S. L. T. 327.

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ratepayers have necessarily a substantial interest in the ferry finances. The Lord Ordinary points out that loss incurred in *ultra vires* excursion traffic could not be charged on the harbour rates in which the complainers are directly interested. But such loss would be so charged, unless the complainers or others similarly interested chose to raise the question of *ultra vires*. It seems difficult to hold that, if they would have a title as harbour ratepayers to challenge the results of the reclaimers' *ultra vires* excursion traffic, they have no title to raise the question at an earlier stage so as to prevent the emergence of any such questions.

Lord Dewar.—The complainers are shipowners in Dundee, and the respondents are the Dundee Harbour Trustees, who are vested with powers, under the Act 1 and 2 Geo. V. cap. lxxx., and have the duty imposed upon them of carrying on the Tay ferries within a defined area in the neighbourhood of Dundee. The complainers have brought this note of suspension and interdict with a view to restraining the respondents from engaging in what is alleged to be illegal trading. The alleged illegality consists in occasionally using the ferry boats—when they are not required for ferry purposes—to carry excursion passengers to points outwith the ferry area. The boats were so used on seven occasions last year. Such use is said to be in contravention of the respondents' statutory powers; and the complainers claim the right to stop it on the ground that it subjects them to competition in their business. The respondents' defence is (1) that their actings are not in the circumstances *ultra vires*, and (2) that, in any event, the complainers have no title to sue. I am of opinion that they are right on both points.

I agree that the respondents have no express power to use their vessels for excursion purposes. I think Schedule "J" clearly refers to the hire of steamboats for ferry purposes only. The question therefore comes to be whether they have implied powers. I think they have. In the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche*,[1] it was decided that, where an Act of Parliament creates a corporation for a particular purpose and gives it powers for that purpose, what it does not expressly or impliedly authorise is to be taken as having been prohibited. And in the later case of *Attorney-General* v. *Great Eastern Railway Company*[2] the Lord Chancellor, commenting on that decision, said: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." Applying that law to the circumstances of this case, I am of opinion that the occasional use to which the respondents put the ferry steamboats, to prevent loss to the ferry business, may fairly be regarded as incidental to that business which they were authorised to carry on.

The case which the complainers presented on record, and attempted to prove in evidence, was that the respondents had purchased a steamer,

[1] L. R., 7 H. L. 653.

[2] 5 App. Cas. 473.

ostensibly for ferry purposes, but really to carry on the business of conducting excursion traffic—and had applied capital moneys, and rates and revenues of the harbour and ferries, to the maintenance and equipment of a vessel for excursion purposes. If that had been proved I should have had no difficulty in holding that it was *ultra vires*. But the Lord Ordinary has held that it is disproved, and his judgment on that matter is not challenged. It is therefore established that they have not misapplied their funds by establishing an unauthorised business. All their capital is employed, and all their vessels are required, to carry on the ferries efficiently. The ferry business does not suffer on account of the excursion traffic; on the contrary it gains, because the vessels have been used in the interests of that business to prevent loss through its plant lying idle. The respondents have really no interest in the excursion traffic except in so far as it is beneficial to the ferry. It is because they have discovered in the course of their administration and management that the ferry cannot be efficiently and economically conducted unless the vessels, when available, are put to a profitable use, that they have engaged in this traffic at all. It is a mere incident in the course of management, and they have very wide powers in the matter of management. By section 189 they are empowered to "purchase, build, hire, keep, and maintain a sufficient number of vessels of such construction and description as they may deem expedient" to carry on the Tay ferries. The Legislature presumably knew that it was impossible to conduct an efficient service without having reserve vessels. What were the respondents expected to do with them when they were not required for ferry purposes? They get no directions against putting them to a profitable use. The only instructions they receive as to the manner in which the business is to be conducted are contained in section 90, which provides that they shall "work the ferries . . . so that there shall be at least sixteen trips each lawful day and five trips each Sunday . . ." Everything else, all details of management, are left to their own discretion. They are to work the ferries, and I presume that the Legislature intended that they should work them, like prudent business men, to the best advantage. But no prudent business man would dream of permitting a vessel to lie idle when he could put it incidentally to a profitable use, and I do not see any reason to suppose that the respondents were expected to manage on a different principle. To interfere with their management and restrain them from putting their vessels incidentally to a profitable use will result in a needless waste of public money. I cannot believe that this was the intention of Parliament, and I know of no principle or authority which compels me, in construing the Act, to assume that it was. I think their wide power of management implies authority to use the plant as they shall deem expedient, so long as it is used, directly or incidentally, to promote the efficient and economical conduct of the ferry.

Authority is not of much assistance in a question of this kind where so much depends upon fact. But the case of *Forrest*,[1] to which the Lord Ordinary refers, is, in many respects, similar to this, and it was

[1] 30 Beav. 40, *affd.* 4 D. F. & J. 126.

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there held by the Master of the Rolls that it was within the implied Parliamentary powers of a company to employ steamers, when not required for their statutory purpose, in excursion traffic. It is true that Lord Westbury decided the case on other grounds; but he did not dissent from the doctrine laid down by the Master of the Rolls, and although, as I read the report, he probably thought it too wide for general application, he appears to have regarded it as applicable to the particular facts of that case. I am of opinion that it also applies here.

The next question is, assuming *ultra vires*, whether the complainers have a title to sue. I agree with the Lord Ordinary in thinking that they have no title as ratepayers, and I adopt his argument on that matter. Indeed, the complainers do not pretend to appear as ratepayers anxious to see that public money is properly applied. That is not their case at all, and they are quite frank about it. Mr Nicol, at page 23 of the proof, says: "Our real reason for raising this case is because we consider that we have lost a good many trips through the action of the Harbour Trustees. . . . It is unfair competition that we complain of. . . ." They do not profess to have any interest as ratepayers. On the contrary, their complaint is that the ratepayers' plant is being profitably employed—to their disadvantage in business. The real question, therefore, is—whether they have a good title to sue as rival traders. I am of opinion that they have not.

The complainers say that competition is injurious to their trade. I doubt whether that can be assumed. There is probably a good deal of truth in the business maxim that "competition is the life of trade." It certainly encourages enterprise and makes for efficiency; and enterprise and efficiency generally result in success. But I shall assume that if this particular competition is stopped it will enable the complainers to exact higher rates and make large profits. To that extent they have an interest to restrain it. But such an interest is not sufficient to give them a title to sue. They have no monopoly of excursion traffic on the Tay, and they cannot, in my opinion, prevent competition —which is not wrong in itself—unless they can show either (1) that some private right belonging to them has been invaded, or (2) that some duty owing to them by the respondents has been violated. I can conceive no other ground upon which the Court can reasonably be asked to restrain a trade rival from doing that which is in itself lawful. These are the grounds upon which Lord Low decided the case of the *Clyde Steam Packet Company, Limited*, v. *Glasgow and South-Western Railway Company*,[1] and I respectfully think that sufficient attention has not been given to that decision. It is an Outer House case, and the report is short, but it is exactly in point, and, in my opinion, the judgment is sound. The facts were these,—The Steam Packet Company, on the narrative that part of their business consisted in employing vessels in excursion traffic on the Clyde, brought an action against the Glasgow and South-Western Railway Company to have them interdicted from

[1] 4 S. L. T. 327.

making certain alleged *ultra vires* uses of the steamers owned by the Company under powers conferred upon them by Act of Parliament, and they pleaded that these *ultra vires* actings were interfering with their legitimate trade. Lord Low held that the complainers had no title to sue: that "mere trade competition gives no right to sue for restraint of *ultra vires* actings. The Firth of Clyde is public water on which any one is entitled to have ships and trade. Therefore no private right is invaded by the actings of the respondents."

In the present case the complainers argued that the goodwill of their business was being invaded. But that is just another way of saying that they are being subjected to competition. From any other source competition would have precisely the same effect on the goodwill of their business, yet they could not prevent it. Then it is said that the competition is unfair in respect that the respondents use vessels built with public money. But I do not think that we can take that into consideration. If the respondents have exceeded their Parliamentary authority they will be restrained at the instance of the proper party, not to enable the complainers to make a larger profit, but because they have misapplied public funds contrary to the interests of those whom the Act intended to benefit. Unfair trading only means that one of the traders is in the stronger position to compete. The Court does not concern itself with that. A wealthy firm may compete with a poor one. A powerful company may, and sometimes does, compete in such a way that weak rivals are crushed out of existence; yet the law does not interfere unless it can be shown that some private right has been invaded or a duty owing violated, and, in my opinion, no private right of the complainers has been invaded here. The fact that they happen to be shipowners may give them an interest, but it cannot give them a right which other citizens do not enjoy. Shipowning has no more rights or privileges under the Act than any other trade. Nor do I think that any duty owing to the complainers by the respondents has been violated. If A contracts with B that he will not compete in trade within a limited area, B may restrain him if he violates his obligation. But C cannot interfere, because he was not a party to the contract, and A accordingly owes no duty to him. So, if a limited company trades beyond its powers under the articles of association, a shareholder may call it to account, but a rival trader cannot, because the company, although in a sense acting illegally, owes no duty to him. It appears to me that the complainers stand in a very similar position. As private shipowners they have no rights under the Act, and the respondents owe no duty to them. The Act was not passed to protect their business. Its purpose was to provide an efficient ferry service in the public interests. The parties to it were the Legislature and the respondents acting on behalf of the public who might require to use the ferry. I can understand that a member of the public who uses the ferry may have a right to complain if he does not receive the services provided for him under the Act, because he is a creditor in the obligation to provide a certain service at a fixed price. But the complainers cannot invoke the Act to protect their trade, because they have no

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trade protection under it. If they had followed the familiar course of opposing the Bill, and had a clause inserted in the Act protecting them against competition, they would have secured private rights. And if an attempt had been made to invade such rights, they would have had a good title to sue for interdict. But as matters stand, it appears to me that they have no protective rights under the Act at all. I do not think that the case of *Adamson*[1] helps them. In that case cab proprietors were held entitled to interdict the Edinburgh Street Tramway Company from encroaching on the public street, which the complainers had the right to use, to a greater extent than the Act of Parliament warranted. The restriction was placed on the Tramway Company for the protection of those who had a right to use the street. The complainers were creditors in this restriction, and the Tramway Company owed a duty to them not to encroach on the street to a greater extent than the Act permitted, and it was because they violated this duty and invaded the complainers' rights that interdict was granted. The case here is entirely different, because, as I have said, no restriction was placed upon the respondents for the protection of the complainers' business. What they are attempting to do is to sue in respect of the breach of a statutory obligation which was not conceived in their favour. It is settled by authority that that is not permissible—*Monklands Railway Company* v. *Waddell*[2]; *Gorris* v. *Scott*.[3]

We have had a great many authorities quoted to us, but none of them, so far as I can see, supports the claim which the complainers now make. The only occasion upon which a similar claim was presented was in the *Clyde Steam Packet Company*[4] case to which I have already referred, and it was rejected. The law of Scotland, therefore, has never recognised the claim. And it has been authoritatively settled in England in the case of the *Stockport Waterworks Company* v. *The Mayor of Manchester*[5] that, although a corporation may exceed its Parliamentary powers, the Court will not restrain it at the instance of a private trader who complains that he is being deprived of profits by illegal competition. In delivering judgment, the Lord Chancellor said: "The only arguments which I am disposed to accept . . . are arguments founded upon the public interest, and the general advantage of restraining an incorporated company within its proper sphere of action. But in the present case the transgression of those limits inflicts no private wrong upon these plaintiffs, and although the plaintiffs in common with the rest of the public might be interested in the larger view of the question, yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by a private individual." It appears from this that two points were decided:—(1) That the plaintiffs had no title to sue in their own private interests, because no private wrong had been inflicted upon them; and (2) that it would be contrary to public policy to permit them to appear in the public interests. It is said that this decision, which has settled the

[1] 10 Macph. 533. [2] 23 D. 1167. [3] L. R., 9 Ex. 125.
[4] 4 S. L. T. 327. [5] 7 L. T. (N. S.) 545.

law in England, should not be followed here because the Attorney-General may intervene in England in the public interests, whereas the Lord Advocate in Scotland has no such power, or at all events never exercises such power, and consequently if we applied the English rule there would be no one entitled in a case such as this to call public bodies to account when they transgressed their Parliamentary powers. That is to say, it is proposed to permit the complainers to sue, not because they have a good title of their own, but because the Lord Advocate has no title at all. I cannot assent to that view. If it be true that public bodies require further control in the public interests, and that the Lord Advocate has at present no power to control them, that matter can easily be remedied by the Legislature. But I am of opinion that it would be contrary to public policy to permit the complainers, upon whom no private wrong has been inflicted, and who have a private purpose of their own to serve, which may be, and I think is, contrary to the public interests, to appear on behalf of the public. It is just as important in Scotland as it is in England that the control of public interests should be entrusted to a public officer, and that this privilege should not be usurped by a private individual.

I am accordingly of opinion that the complainers have failed to establish their case, and that the note should be dismissed.

THE COURT adhered.

MAXWELL, GILL, & PRINGLE, W.S.—J. K. & W. P. LINDSAY, W.S.—Agents.

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Wood v. Clydesdale Bank, Limited.

DAVID WOOD, Pursuer (Respondent).—*Moncrieff, K.C.—T. G. Robertson.*
THE CLYDESDALE BANK, LIMITED, Defenders (Reclaimers).—*Sandeman, K.C.—C. H. Brown.*

Bank—Deposit-receipt—Payment to wrong person induced by fraud—Liability to make repayment to depositor—Special endorsement.

A, who had placed £100 on deposit-receipt with a Scottish bank, wrote from abroad to the bank requesting them to pay £60 out of the £100 to his brother (who was unknown to the bank) on presentation of the endorsed receipt. At the same time A wrote to his brother, enclosing the endorsed receipt, and also enclosing a letter addressed to the bank in similar terms to the letter sent direct to them. The letter sent to the bank was duly delivered, but the letter to the brother was stolen in the course of post. Thereafter a person, pretending to be the brother, presented the endorsed receipt and letter to the bank, and after having been required to endorse the receipt himself, which he did in the brother's name, received payment of the money.

A having brought an action against the bank for payment of the amount to himself, the defenders pleaded that, having paid the sum to the person having A's authority to receive it, they were not liable.

Held that the bank, being authorised to pay the money only to A's brother, and having in fact paid it to someone else, must bear the loss; and decree *granted*.

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EXTRA DIVISION. Lord Hunter.

ON 7th April 1913 David Wood brought an action against the Clydesdale Bank, Limited, for payment of £100, with interest from 16th August 1911 at deposit-receipt rates.

The averments of the parties were thus narrated in the opinion of the Lord Ordinary :—

"The pursuer, who is an engineer residing in Cuba, sues the Clydesdale Bank, Limited, for repayment of £100 deposited by him with them. The Bank maintain that they have already paid £60 to a person having the pursuer's authority to receive the money, and that their liability is therefore restricted to payment of the balance. The circumstances out of which the action has arisen are peculiar.

"On 16th August 1911 the pursuer, at a time when he was resident in this country, deposited the sum of £100 with the defenders at their Lauriston Branch in Glasgow, and received a deposit-receipt for the money. On 9th May 1912 the pursuer dispatched from Cuba to his brother, John Stuart Wood, then of Brown Street, Renfrew, a registered packet containing (1) the deposit-receipt endorsed by the pursuer; (2) a note written by the pursuer, dated 8th May 1912, and addressed to the defenders at their said branch office, requesting them 'to pay to my brother, John Stuart Wood, the sum of £60'; and (3) a private letter written by the pursuer to his said brother and relating to family affairs. On or about the same date the pursuer dispatched from the said post-office a separate letter addressed to the defenders at their said branch office requesting them, in similar terms, to pay to his brother, John Stuart Wood, £60 out of the said £100.

"The pursuer in Condescendence 4 says:—'The letter addressed to the defenders reached them in due course of post. The said registered packet addressed to the pursuer's brother was never delivered to him. A postman's bag containing, *inter alia*, the said registered packet, was stolen in Renfrew on 25th May 1912. The postman in charge of the said bag was, on 6th August 1912, convicted of a contravention of the Post Office Act, 1908, section 75, by negligently leaving the said bag on a common stair in Renfrew, and was fined.'

"The defenders explained that the postman's bag was not stolen but only certain of its contents, including the pursuer's registered packet. Otherwise the statements of the pursuer were accepted as accurate. The letter of authority addressed by the pursuer to the defenders was in these terms:—'Please hand over to my brother, Mr John Stuart Wood, the sum of £60 sterling on presenting withdrawal-note for that amount bearing my signature, and oblige.'

"On 27th May 1912, a man, who was either the thief who stole the packet or an accomplice, called at the defenders' Lauriston Branch, presented the said deposit-receipt to the defenders, along with the letter of request contained in the said registered packet, and requested the defenders to make payment to him of £60, and to give him a deposit-receipt for the balance of the said £100. The defenders say that the man to whom they made payment alleged that he was John Stuart Wood. They add that 'in accordance with the usual custom, the defenders' teller at the said branch asked the said person to endorse the said deposit-receipt in order to retain evidence of the person to whom the payment was made, and the said person having endorsed it, "John Stuart Wood," the teller handed him £60 and a deposit-receipt in name of the pursuer for the balance of £40 and interest, amounting together to £41, 13s. 6d. The defenders' teller

in so doing relied solely on the endorsement by the pursuer of the said deposit-receipt, which endorsement was found to be in order, on the said letter from the pursuer to the defenders of 8th May 1912, and on the letter by the pursuer to the defenders in identical terms therewith produced by the said person.' "

The defenders further explained that "the £60 was paid, and the deposit-receipt for £41, 13s. 6d. was handed by the defenders to the person representing himself as the pursuer's said brother, in reliance upon the pursuer's endorsement of the deposit-receipt for £100, and the production by said person of the necessary authority from the pursuer authorising the defenders to make the said payment to him, in conformity with the letter in similar terms which the defenders had received from the pursuer."

The pursuer pleaded;—(1) The defenders being due and resting owing to the pursuer the sum of £100 with interest, decree should be granted therefor as concluded for. (2) The defences being irrelevant, decree should be granted *de plano.*

The defenders pleaded, *inter alia;*—(3) The defenders having paid the £60 and handed the deposit-receipt for £41, 13s. 6d. to the person having the pursuer's authority to receive them, absolvitor should be granted, with expenses.

On 19th June 1913 the Lord Ordinary (Hunter) repelled the defences as irrelevant, and decerned in terms of the conclusions of the summons.*

The defenders reclaimed, and the case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 27th February 1914.

Argued for the reclaimers;—A bank was liable for having paid

* "OPINION.—[After the narrative quoted *supra*]—The real question in the case is whether the defenders can rely on the payment so made as *pro tanto* discharging them of their liability under the deposit-receipt. A deposit-receipt is not a negotiable instrument. The obligation imposed upon a bank by such a document is to pay to the person named therein or in accordance with his instructions. A person in possession of an endorsed deposit-receipt has not necessarily right to receive payment of the amount deposited, and a bank paying to such a person may be called upon to pay over again to the depositor, not only where the signature has been forged, but also where the signature is genuine, if it is established that the holder of the document is not in fact authorised to receive payment. This rule is subject to the exception that a depositor might be precluded from maintaining an action against the bank if payment had, owing to his own negligence, been made by the bank to one not authorised to receive payment. In the present case I do not think that there is room for the suggestion that the pursuer was in any way negligent. It appears to me, therefore, that the bank can only successfully maintain their defence if they establish that the person to whom they made payment was in fact the brother of the pursuer. They do not make an averment to that effect, and therefore I think that the defences must be repelled as irrelevant. I do not of course suggest that there was any negligence on the part of the bank who made payment in ordinary course and after taking what are the customary precautions; but the risk that the person receiving payment was not authorised to do so was with them. This is just a case where one or other of two innocent parties must suffer for the fraud of a third party; but Mr Robertson for the pursuer appeared to me to put the position rightly when he said that the thief had stolen the deposit-receipt from the pursuer and the money from the defenders."

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money to a wrong person only if they had shown want of *bona fides*.[1] In the present case it was admitted that the Bank were perfectly innocent, and they had taken every reasonable precaution to establish the payee's identity. They could only have refused to pay by imputing dishonesty to him, and they were entitled to assume that a crime had not been committed.[2] The pursuer had made the crime possible by furnishing the payee with a letter which guaranteed his identity, and accordingly the dictum of A. L. Smith, M.R., in *Farquharson Brothers* v. *King & Company*[3] applied—"He who has enabled such third party to occasion the loss must sustain it."[4]

Argued for the respondent;—The Bank had made their inquiries for their own protection; they chose to consider them sufficient, and, taking the risk, had in fact paid the money contrary to the creditor's instructions. By asking the payee to endorse the deposit-receipt, they had recognised that the onus was on them. Admittedly they would have been liable if the creditor's endorsement on the deposit-receipt had been forged, and personation was in this respect equivalent to forgery.[5] The authorities relied on by the defenders were cases as to the liability of banks and other employers for the default of their servants in dealing with third parties, and were irrelevant to the present question. Where two innocent parties were defrauded the one who was actually deceived—in this case the defenders—must bear the loss. The pursuer could not be held to have occasioned the fraud by his endorsement and dispatch of the deposit-receipt along with the letter. These were merely incidents in a train of events, and were in no proper sense the cause of the theft.

Lord Dundas.—The sum here at stake is not large, but the case is one of some importance; and if any of us had been doubtful as to the result at which we ought to arrive, we should probably have taken time to consider it. But we are all of opinion that the interlocutor reclaimed against is right. The Lord Ordinary has stated the facts in a manner to which neither party can take any exception; and I have come to the conclusion that his lordship is also right in the legal result at which he has arrived.

This is one of those painful cases where the Court has to determine which of two innocent third parties must bear the loss occasioned by the fraud of another. We were referred to authorities on that matter, and especially to the opinion of the Master of the Rolls (A. L. Smith) in the case of *Farquharson Brothers & Company* v. *King & Company*.[3] His lordship begins by quoting a sentence from an opinion of his own in the

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[1] Bell's Prin., sec. 561; Stewart v. Central Bank of Scotland, (1859) 21 D. 1180; Evans v. National Provincial Bank of England, (1897) 13 T. L. R. 429; Forbes's Executors v. Western Bank of Scotland, (1854) 16 D. 807; Heber Hart, Law of Banking, (2nd ed.) p. 563.

[2] Baxendale v. Bennett, (1878) 3 Q. B. D. 525, *per* Bramwell, L.J., at p. 530.

[3] [1901] 2 K. B. 697, at p. 708.

[4] Brocklesby v. Temperance Building Society, [1895] A. C. 173; International Sponge Importers, Limited, v. Watt & Sons, 1911 S. C. (H. L.) 57, were also referred to.

[5] Moore v. Ulster Bank, (1877) 11 Ir. R., C. L. 512; Wallace & M'Neill, Banking Law, (4th ed.) p. 36; Heber Hart, Law of Banking, (2nd ed.) p. 563; Forbes's Executors v. Western Bank of Scotland, 16 D. 807.

case of *Nash* v. *De Freville*,[1] where he had said:—"It is a well-known principle of law that, whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it." The Master of the Rolls then proceeds to say:—"I think that these words are substantially a sound expression of the law, subject to the qualification that the act which is relied upon as having enabled the third person to occasion the loss must, no doubt, be an act so far connected with the fraud which has caused the loss that it may reasonably be looked upon as bringing about that fraud. I think that, if one of the two innocent persons has done such an act, he must bear the loss thereby occasioned, and not the other person who has done nothing which led to the fraud being committed." I think the general statement of the law thus laid down is unexceptionable, and similar to that which could be cited from other sources. But I really do not think it helps us here; because I cannot hold that either of these parties acted negligently, or that either of them can be said to have done an act which enabled the fraud to be committed. It was suggested, rather than argued, that the pursuer had committed such an act, because he posted—be it by registered cover—this deposit-receipt, and sent it upon its long postal voyage, and thereby in a sense may be said to have made it possible for somebody to steal it while it was in transit. I must say I think that is a very fanciful idea, because posting the letter certainly did not, to my mind, in any reasonable sense afford facility for the fraud to be committed, or bring about the fraud. On the other hand one must bear in mind that the Bank was in fact the one of the two innocent third parties who paid away money to this fraudulent presenter. I am disposed to decide the case upon the terms of the letter which the pursuer wrote to the Bank, and upon the very peculiar and specific mandate which it contained. It was not a general instruction to them to pay so much of his deposited money to anyone who produced the endorsed receipt. It was in these terms:—"Please hand over to my brother, Mr John Stuart Wood, the sum of £60 sterling on presenting withdrawal note for that amount bearing my signature." Now, I think that on the presentment of the endorsed deposit-receipt the Bank might very well have said to the presenter,—"No, we cannot hand the money over to you; we cannot take the risk; we do not know who you are," and might have declined to pay unless and until the presenter could satisfy them that he was in fact Mr John Stuart Wood. They did not do that. They chose to accept the risk; they paid the money; they were deceived by a rogue; and I am afraid they must suffer.

The case is a hard one, such cases always are; but in point of law it seems to me that the Lord Ordinary has rightly decided which of these two innocent third parties must suffer, and I move your Lordships to adhere to his interlocutor.

Lord Mackenzie.—I am of the same opinion. The pursuer, who is asking the Bank to pay the money over again, is not himself affected by

[1] [1900] 2 Q. B. 72.

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having done anything that he should not have done. Indeed, he took extra precautions. Instead of merely sending through the post the deposit-receipt, duly endorsed by himself, to his brother, leaving it to him to get the money, he wrote a letter to the bank instructing them to "hand over to my brother, Mr John Stuart Wood, the sum of £60 sterling on presenting withdrawal note for that amount bearing my signature." He also enclosed a letter in similar terms along with the deposit-receipt which he sent to his brother, John Stuart Wood.

This makes the present a special case. By writing these two letters the pursuer in effect made the endorsement, which he put on the back of the deposit-receipt, a special endorsement; that is to say, the instruction to the Bank was to pay to A B, and to A B only. In these circumstances I think it is clear that, while the Bank might have refused to pay until they had satisfied themselves of the identity of the presenter, a duty was placed on them to make sure that the person to whom they paid the £60 was A B, as designed in the letter, and no other. That duty they appear themselves to have recognised, because in answer 5 it is set out:—"In accordance with the usual custom"—that is to say, I suppose, in accordance with the custom where the person asking cash is a stranger—"the defenders' teller at the said branch asked the said person"—either the thief or an accomplice—"to endorse the said deposit-receipt in order to retain evidence of the person to whom the payment was made." The person asking for the cash wrote the name "John Stuart Wood," which was a forgery; and thereupon the teller handed him the £60. Then in their answer the defenders go on to say:—"The defenders' teller in doing so relied solely on the endorsement by the pursuer of the said deposit-receipt, which endorsement was found to be in order, on the said letter from the pursuer to the defenders of 8th May 1912, and on the letter by the pursuer to the defenders in identical terms therewith produced by the said person."

I am unable to accept that view of the case. I think that the one of these statements really contradicts the other. It appears to me that the Bank, recognising their duty to ascertain the identity of the person, took the steps that were in their opinion sufficient; and that it was in reliance on the truth of the representations made by the person asking the cash that he was the brother, and in reliance on the forged signature being genuine, that the teller complied with the request in the letter.

The question then arises—who was it that was deceived? There can be no answer to that but one; it was the Bank. It was the Bank who was deceived by the impersonation and by the forgery; and nothing that the pursuer did contributed to that result. The cases that were cited by Mr Sandeman for the defenders appear to me to be of a totally different character—where one party by his conduct puts it in the power of another to commit a fraud, he will, as a general rule, be held responsible. Here it cannot possibly be said that the fraud was the consequence of any act on the part of the pursuer.

I do not decide this case upon any view of the law as to what would have been the liability of the Bank if there had been no letters. If a deposit-receipt bearing a genuine endorsement is presented to a bank, say

by a stranger, there is no absolute rule in regard to the liability of the bank to pay over again if it be ascertained that the person asking for the payment had not the authority of the true holder. In many, if not in all cases, that must depend upon the particular circumstances; and, therefore, I put my judgment upon the specialties of this case—upon the letters, the personation, the forgery, and the fact that the Bank was deceived.

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LORD CULLEN.—I concur, and I rest my opinion on the simple ground that, as the Bank chose to undertake the duty of acting upon the pursuer's instructions, they were bound to act upon them according to their terms, and so to pay the money to John Stuart Wood and to no one else.

THE COURT adhered.

HYSLOP & SHAW, W.S.—RONALD & RITCHIE, W.S.—Agents.

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Cochrane's Trustees v. Cochrane.

ARCHIBALD COCHRANE AND OTHERS (Mrs Janet Lees or Cochrane's Trustees), First Parties.—*D. M. Wilson.*
ARCHIBALD COCHRANE AND OTHERS, Second Parties.—*Chree, K.C.*—*A. M. Mackay.*
JOHN CHAPMAN AND OTHERS (Adam Lees Cochrane's Trustees) AND OTHERS, Third Parties.—*Constable, K.C.*—*Milne.*

Succession—Accretion—Joint or several bequest—Direction to pay and divide in certain proportions to parties named.

A testatrix directed her trustees to pay to each of three daughters, whom she named, the annual produce of one-third of the residue of her estate, and upon the death of each to pay, divide, and convey the principal of the one-third part of the residue so liferented "in the proportions following," viz., to four sons and another daughter (each of whom she named) "each two shares," and to a granddaughter (also named) "one share," with a provision that, in the event of any of them dying before the period of payment leaving issue, such issue should take their parent's share. There then followed declarations that the interests of the residuary legatees should not vest until the terms of payment, and that the interests "conferred on or accruing" to females should belong to them exclusive of the *jus mariti*. There was no clause of survivorship. One of the liferentrices having died predeceased by certain of the residuary legatees who left no issue—

Held (by a Court of seven Judges, *diss.* Lord Mackenzie) that the testatrix had made a series of separate bequests to individuals, and not a joint bequest, and that consequently the shares of the predeceasers did not accresce to the survivors, but fell into intestacy.

Paxton's Trustees v. *Cowie*, (1886) 13 R. 1191, *followed.*

1ST DIVISION with three consulted Judges.

MRS JANET LEES OR COCHRANE, who died in 1877, left a trust-disposition and settlement whereby she provided, *inter alia*, as follows:—"(Fifth) With regard to the free residue and remainder of my means and estate hereby conveyed, my said trustees and executors shall pay over to each of my said three daughters, Jane, Mary, and Jessie respectively, the annual produce of one-third part of the said residue of my means and estate during all the days and years of their respective lives: Declaring that it shall be lawful to, and in the power of my said trustees and executors, to pay to any one of my said three

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daughters, when needed by her from time to time as they may think fit, such portion not exceeding one-ninth to each of the whole of the principal of said residue as they may think fit, and on the death of each of my said daughters, Jane, Mary, and Jessie, my said trustees shall at the first term of Whitsunday or Martinmas, which shall happen six months thereafter, pay, divide, and convey the one-third part of the principal of the residue of my said means and estate of which she received the annual produce (under deduction of any sum or sums which may have been paid to her out of the principal in virtue of the power above given) in the proportions following, *videlicet*:—To my said sons, Adam Lees Cochrane, John Cochrane, Archibald Cochrane, and Walter Cochrane, and to my daughter, Mrs Agnes Cochrane or Roberts, spouse of William Roberts, manufacturer, Galashiels, each two shares, and to my granddaughter, Jessie Roberts, one share: And in the event of any of the said Adam, John, Archibald, or Walter Cochrane, or Mrs Agnes Cochrane or Roberts, or Jessie Roberts, dying before the said period of payment, leaving lawful issue, such issue shall be entitled equally among them to the share to which their parent would have been entitled if in life: And I declare that the interests of the said Adam, John, Archibald, and Walter Cochrane, and Mrs Agnes Cochrane or Roberts, and Jessie Roberts, in the said residue shall vest in them at and only upon the arrival of the terms at which their shares of the residue of my said means and estate respectively become payable: And I declare that the interests in my means and estate conferred on or accruing to females in virtue of this settlement shall belong to them exclusive of the *jus mariti* or right of administration of their husbands, and shall be dischargeable by themselves alone."

The truster was survived by her daughters, Jane, Mary, and Jessie, who each enjoyed the liferent of one-third part of the residue of her estate. On the death of Jane on 10th July 1911 the share liferented by her became available for division, and questions having arisen as to who were the persons entitled to share in it, a special case was, on 22nd November 1912, presented for the opinion of the Court.

From the case it appeared that of the persons named by the truster in her direction as to the disposal of the fee the following had predeceased the liferentrix, viz., Adam Lees Cochrane, John Cochrane, Walter Cochrane, and Mrs Agnes Cochrane or Roberts; and of these only Walter Cochrane left issue, all of whom survived the liferentrix. Archibald Cochrane and Mrs Jessie Roberts or Dickson were accordingly the only persons to whom the fee was destined who survived the liferentrix.

The *first parties* to the case were the trustees of the truster, Mrs Janet Lees or Cochrane; the *second parties* were Archibald Cochrane, the children of Walter Cochrane, and the marriage-contract trustees of Jessie Roberts or Dickson; the *third parties* were the testamentary trustees of Adam Lees Cochrane and others, as heirs *in mobilibus* of the truster as at her death.

The case set forth, *inter alia*;—"(8) Owing to the said Adam Lees Cochrane, John Cochrane, and Mrs Agnes Cochrane or Roberts, having predeceased the said Jane Cochrane without leaving issue, questions have arisen as to the distribution of said one-third share of residue, formerly liferented by the said Jane Cochrane. (10) The second parties maintain that on a sound construction of the said trust-disposition and settlement, the said one-third of the principal of

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the residue falls to be divided and conveyed to and among them in the proportions of two shares to the said Archibald Cochrane, two shares equally among the children of Walter Cochrane, and one share to the marriage-contract trustees of Mrs Jessie Roberts or Dickson. They contend that it was not the intention of the truster to direct or operate any severance of particular shares or interests before and until the period of division arrived, and that she intended the survivors and the issue of the predeceasers of those nominated under the clause dealing with division of the principal of residue, to take the whole of each third as the succession opened, dividing it in the proportions pointed out by the shares appointed to each nominee or his issue. On the assumption that the truster intended an earlier severance of the bequests, the second parties contend that the shares which would have fallen to Adam Lees Cochrane, John Cochrane, and Mrs Agnes Cochrane or Roberts have accresced to the surviving residuary legatees (namely, the second parties) in proportion to the original shares left to them under the trust-disposition and settlement. In such event, the division, as among the second parties, would be in the proportions hereinbefore stated. (11) The third parties maintain that under the said trust-disposition and settlement the respective shares of capital left to the residuary legatees were separate and distinct, and that there was no room for accretion in the event of any of them predeceasing the period of division without leaving issue. They accordingly contend that the respective shares of capital which would have fallen to the said Adam Lees Cochrane, John Cochrane, and Mrs Agnes Cochrane or Roberts, had they survived the said Jane Cochrane, lapsed by their predecease without issue, and now fall under intestacy to the heirs *in mobilibus* of the truster as at her death."

The questions of law for the opinion of the Court were:—"(1) Does the whole one-third part of the residue of the trust-estate life-rented by Miss Jane Cochrane now fall to be divided among the second parties in the proportions set forth in article 10 hereof? or, (2) (*as amended*) Does the said one-third part fall to be divided to the extent of five-elevenths thereof among the second parties under the trust-disposition and settlement, and to the extent of the remaining six-elevenths thereof as intestate moveable estate of the truster?"

The case was heard before the First Division on 9th and 10th December 1913.

On 14th January 1914 the Court appointed the cause to be heard before seven Judges.

The case was accordingly heard on 18th February 1914, before the First Division with Lord Dundas, Lord Salvesen, and Lord Guthrie.

Argued for the third parties;—The bequests of residue were a series of separate bequests and not a joint bequest, and accordingly there was no accretion to survivors where beneficiaries had predeceased the term of payment without issue, the case being governed by *Paxton's Trustees* v. *Cowie*.[1] The result was that the shares in dispute had fallen into intestacy. That the truster had not contemplated accretion was plain from the facts that (1) the beneficiaries were all named; (2) they did not belong to one class; (3) specific shares were destined to each; (4) there was conditional institution of issue to the share of

[1] (1886) 13 R. 1191.

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each; (5) the use of the word "respectively" with reference to the vesting of the share of each pointed clearly to severance; (6) there was no clause of survivorship. There was accordingly nothing to displace the rule of law established in the case of *Paxton's Trustees* v. *Cowie*.[1] At the most there was a *casus improvisus*, but that did not exclude the application of the rule. In the expression "interests conferred on or accruing to females," "accruing" did not refer to accretion in the sense here in question, but meant nothing more than "coming to" or "received by," as for example if the trustees under their discretionary powers were to pay to a liferentrix a portion of the capital of which she otherwise had the liferent only. Nor did the postponement of vesting favour accretion, the time at which a fund had to be distributed having obviously nothing to do with the question whether the bequest was joint or several. The use of the word "proportions" did not affect the question: it was simply equivalent to "shares," and had repeatedly been used in that sense by Judges,[2] and was just as apt to signify severance as the direction to divide in the case of *Paxton's Trustees* v. *Cowie*.[1] That case followed upon decisions in which questions as to the use of the word proportions, and as to the effect of the postponement of vesting, had arisen, and overruled Stair[3]; and all the cases in which the rule laid down in that case had been held to be inapplicable were distinguishable from the present case because in them there was a gift to an unascertained class.[4] In the present case that rule should be applied. The undernoted cases all supported the third parties' contentions.[5] In the case of *Menzies's Factor* v. *Menzies*,[6] which was a decision of three Judges, it was necessary to regard Lord Kinnear as having dissented.

Argued for the second parties;—The one-third share of residue fell to be divided among the second parties in virtue of the doctrine of accretion. When the trust-disposition was fairly read it was clear that the truster's intention was that a division should be made, in the proportions specified, between the beneficiaries surviving at the expiry of each liferent. No severance of shares took place until vesting on the expiry of each liferent, for it was only at that period that the amount of capital to be divided on the death of each liferentrix could be ascertained, since any portion up to one-ninth might under the discretionary power given to the trustees have been paid to each of them. A clause of survivorship would admittedly have involved accretion,

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[1] (1886) 13 R. 1191.

[2] *E.g.* by Lord Kinnear in Roberts' Trustees v. Roberts, (1903) 5 F. 541, at p. 544.

[3] Stair iii. 8, 27; Paterson v. Paterson, (1741) M. 8070; Stevenson v. Macintyre, (1826) 4 S. 776; Torrie v. Munsie, (1832) 10 S. 597.

[4] Muir's Trustees v. Muir, (1889) 16 R. 954; Roberts' Trustees v. Roberts, (1903) 5 F. 541, Lord Kinnear, at p. 544; Warden's Factor v. Warden and Others, (1905) 12 S. L. T. 670, Lord Stormonth-Darling; Farquharson v. Kelly, (1900) 2 F. 863, Lord President Kinross, at p. 868.

[5] Crawford's Trustees v. Crawford, (1886) 23 S. L. R. 787; Wilson's Trustees v. Wilson's Trustees, (1894) 22 R. 62; Stobie's Trustees, (1888) 15 R. 340; Stirling's Trustees v. Stirling, (1898) 1 F. 215, Lord Moncreiff, at p. 223; Graham's Trustees v. Graham, (1899) 2 F. 232; Hunter's Trustees v. Dunn, (1904) 6 F. 318; M'Laren v. M'Alpine, 1907 S. C. 1192; Macgregor's Trustees v. Macgregor, 1909 S. C. 362, Lord President Dunedin, at p. 366.

[6] (1898) 1 F. 128.

but here the clause postponing vesting was practically equivalent to a clause of survivorship, when this reason for postponement of vesting was kept in view. The fact that the division was to be made not "among" but "to" the beneficiaries named was also significant. The rule laid down in the case of *Paxton's Trustees* v. *Cowie*[1] could not be applied in the present case, for here there was no gift to a plurality of persons in equal shares, as there had been in that case. Further, the words "in the proportions following" were particularly significant, and showed that the truster's intention was that the expression "shares" should apply to the proportions to be taken by the legatees *inter se*, and should not denote definite fractions of the subject-matter of the bequest, her object being that each child should take double of what she gave her granddaughter. The words too "conferred on or accruing to females" were apt to describe a destination to survivors and clearly pointed to accretion, and indicated that in the truster's view an interest conferred was capable of expansion. The passage in Stair which was said to have been overruled proceeded on a view of Roman law which was not accepted in Scotland, but in that passage an illustration would be found[2] which was consistent with the case of *Paxton's Trustees* v. *Cowie*.[1] Further, the rule of *Paxton's Trustees*[1] had to be considered in the light of the opinions in the case of *Menzies's Factor* v. *Menzies*.[3] The cases relied on by the third parties were distinguishable in that they contained expressions which implied a severance of interests, or, where that was not so, were decided on specialties.[4]

At advising on 3rd March 1914,—

Lord President.—Stated in a single sentence, the question for our consideration in this case is whether the rule of construction laid down by a Court of seven Judges in the case of *Paxton's Trustees* v. *Cowie*[1] applies to the residue clause of the trust-disposition and settlement of Mrs Cochrane, who died in the year 1877. The rule is as follows:—"When a legacy is given to a plurality of persons named or sufficiently described for identification 'equally among them,' or 'in equal shares,' or 'share and share alike,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees." These are the words of Lord President Inglis[5] in delivering the judgment of the Court. They must, however, be taken with a note of explanation given in the case of *Roberts' Trustees* v. *Roberts*[6] by Lord Kinnear, who said,—"I rather think that in stating the condition that the persons favoured must be named or sufficiently described for identification, the Lord President meant individually named or identified. For he cannot have intended merely the condition common to all legacies and indispensable for their validity, that the legatee must be capable of identification; and, on the other hand, the purpose of his statement was to distinguish between legacies of shares to individuals, and a legacy of a common fund to a class."

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[1] 13 R. 1191.
[2] Stair, iii. 8, 27, *Thirdly.*
[3] 1 F. 128.
[4] *Reference was also made to the following cases:*—Rose v. Roses, (1782 M. 8101; Tulloch v. Welsh, (1838) 1 D. 94, Lord Ordinary Moncreiff.
[5] 13 R., at p. 1197.
[6] 5 F. 541, at p. 544.

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And further,—"It makes no difference that the conveyance is directed to be made to them 'equally among them,' because that expression does not necessarily import a separation into specific shares."

The question is whether the rule, as thus annotated, applies to the settlement before us. Have we here a joint legacy or a series of separate legacies? Did the testatrix intend a joint bequest or a series of separate bequests? I turn to the residuary clause of the settlement for an answer to these questions. By it the testatrix directed that each of her three daughters, Jane, Mary, and Jessie, should enjoy the income of one-third of the residue of her estate, and on the death of each of these daughters she directed that the capital of the sum so liferented should be divided "in the proportions following, viz.," two shares to her sons Adam, John, Archibald, and Walter, two shares to her daughter Agnes, and one share to her granddaughter Jessie Roberts. And then follows a clause by which she directs that, in the event of the predecease of any one of her children Adam, John, Archibald, Walter, or Mrs Roberts, or her grandchild Jessie Roberts, leaving issue, the issue should take their parent's share. There is no clause of survivorship. By the vesting clause she directed that vesting should be postponed until the period of payment.

Now, we have present here, I think, in the clause I have just recited, all the *indicia* of a bequest to separate individuals and not of a joint bequest. We have here a plurality of persons—four sons, a daughter, and a granddaughter. Each of these persons is separately named and identified. To each, as I read the clause, separate shares of residue are given. The bequest is not a bequest to a class in the proper sense. All the children are not included; three daughters are excluded. All the grandchildren are not included; one grandchild alone is embraced. The shares are unequal. To each child is given double the share that is given to the grandchild. This is not a bequest to a class of persons, the number of which cannot be ascertained until the date of distribution or of vesting. There is here a distinct expression of intention that predeceasers who leave children should transmit their shares to their children, but there is no clause of survivorship. Now, all these features of this residue clause seem to me to point in favour of the application of the rule of construction with which we are here concerned.

It remains, however, to examine the rest of the settlement for the purpose of seeing whether or no we can find in it any indication of an intention that the rule should not apply, but, on the contrary, that accretion should take place. I can find none. To two features mainly our attention was directed: First, it is said that the vesting clause affected the question because vesting was postponed, and did not take place *a morte*. I cannot understand the argument that, because a fund falls to be distributed at one time rather than at another, the bequest of it should be interpreted as a joint bequest and not as a separate bequest; and, therefore, I am not prepared to discuss the question.

In the second place, our attention was directed to the fact that the residue clause proper was prefaced by the words to be divided "in the following proportions," and it was said that the word "proportion" indicated an intention to make a joint bequest rather than a separate

bequest. I cannot agree. There is no magic in the word "share." The use of the word "proportion" or of the word "interest" is as clearly indicative of an intention to sever and not to conjoin as the use of the word "share." It signifies not how severance is to be effected. It may be effected by fixing proportions. It may be effected by carving out interests. It may be effected by allotting shares. It signifies nothing which of these expressions is used. And, indeed, if we substitute in the residue clause the word "share" for the word "proportion," we see that the meaning remains unchanged. An excellent illustration of the use of the word proportion in the sense I have indicated is to be found in the opinion of Lord Kinnear in the case I have just mentioned of *Roberts' Trustees*, where he says[1]: "If a legacy is given to a family jointly without naming or enumerating individuals, it must either be given equally or in specific proportions, and if it be clear, as in this case it certainly is, that the testator had no definite proportions in his mind, because he did not know how many persons might participate, it is of no consequence whether an equal division is expressed in terms or not." In that passage Lord Kinnear uses the expression "proportions" as equivalent to the expression "shares," and, in my judgment, there is no difference between the two when you are considering the question whether the testator intended a joint bequest or a series of separate bequests.

Of the authorities cited to us, with the case of *Paxton's Trustees* v. *Cowie*,[2] I regard the two cases of *Crawford's Trustees* v. *Crawford*[3] and *M'Laren* v. *M'Alpine*[4] as approaching nearest to the present case. In both of these cases, no doubt, the residue clause was prefaced by a distinct direction by the testator to his trustees to divide the residue into a specified number of parts. On that feature, however, the Court, in giving judgment in each of these cases, laid no stress. And I am not surprised; for if the bequest to individuals be clear and definite, it signifies nothing whether it is prefaced by an instruction to divide into a certain number of shares. The arithmetic is easy. The words are superfluous. They add nothing to and subtract nothing from the meaning of the expression.

If, then, it is clear, as I think it is, that a series of separate bequests and not a joint bequest was intended by the testatrix, the solution of the two questions put to us is easy. The daughter Jane died in the year 1911, and at the date of her death the capital of the share of residue liferented by her became available for division. At that date all the sons of the testatrix except Archibald had died. Her daughter Agnes had died; her grandchild Jessie Roberts survived, and four children of a deceased son, Walter. The surviving son Archibald, the four children of the deceased son Walter, and the grandchild, now Mrs Dickson, claim the whole capital of the one-third of residue which was liferented by the daughter Jane. In other words, they ask us to divide this part of the residue of the estate into five parts, whereas the testatrix directed that it should be divided into eleven parts. In my opinion, their claim cannot

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[1] 5 F., at pp. 544-5.
[2] 13 R. 1191.
[3] 23 S. L. R. 787.
[4] 1907 S. C. 1192.

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be given effect to. The shares which the predeceasers would have taken had they survived now, in my judgment, fall into intestacy; and, accordingly, I propose to your Lordships that we should answer the first question put to us in the negative and the second in the affirmative.

LORD DUNDAS.—I am of the same opinion. This case raises no question of general application or importance. We are not here reconsidering,—this Court has no power to reconsider,—the rule of construction laid down in 1886 by Lord President Inglis in the case of *Paxton's Trustees*[1] with the unanimous concurrence of six other judges, and described by him as being "settled by a series of decisions beginning in the last century, and coming down to the case of *Buchanan's Trustees*[2] in 1883." The question is whether the application of the rule to the settlement here under construction is, in the Lord President's words, "avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees." I do not find that there are here any sufficient expressions or indications of a contrary intention; and I am therefore for answering the first question put to us in the special case in the negative, and the second (as amended) in the affirmative.

LORD JOHNSTON.—When the case was heard in the First Division of the Court I felt some difficulty in the application of the leading authority of *Paxton's Trustees*,[3] not because I had any doubt about the correctness of the canon of construction there enunciated by the Lord President (Inglis), but because I had some doubt about its application to the present case, arising from the peculiarity of the somewhat complicated residue clause with which we have to deal. It seemed to me to contain one, if not more, negative notes, and at least one positive note, which made me hesitate to accept the view that the testatrix really meant in any one clause of it exactly what she said, or had, in the whole taken together, expressed completely what she meant. Now that the case has been reconsidered with the assistance of your Lordships, I am satisfied that we have to take Mrs Cochrane's settlement as it stands, and make the best of it, regardless of the fact that, while precise in each of its clauses taken separately, it does not make an entirely homogeneous whole, regarding it as, what it was intended to be, a universal settlement.

Mrs Cochrane gave each of her three unmarried daughters a life interest in one-third of the residue of her estate, and, making no provision for their issue should they marry and leave issue, she directed that, on the death of *each*, her trustees should pay, divide, and convey the corresponding one-third of the capital "in the proportions following," viz., to four sons and one daughter *nominatim* "*each* two shares," and to a granddaughter one share. This was followed by a conditional institution of the issue of those dying before the period of payment leaving lawful issue, but by no destination-over. Jane Cochrane, one of the unmarried liferentrices, died in 1911, and questions have arisen as to the disposal of

[1] 13 R., at p. 1197. [2] (1883) 20 S. L. R. 666.
[3] 13 R. 1191.

the capital of the share of residue liferented by her. She was predeceased by two of the brothers and the sister without issue, who were among those to whom the capital of the residue was destined. She was survived by one of the brothers, by the issue of the remaining brother, and by the granddaughter.

It appears to me that the keynote of the whole of the residue clause is severalty or segregation. It provides a several liferent to each unmarried daughter. It provides on the death of each for division of the share of capital effeiring to her liferent. And it divides that share in the proportions following, viz., to five persons *nominatim* each two shares, and to the sixth one share. The word "each" is predominant and permeates the whole.

All I think that we derive from *Paxton's* case[1] is that where expressions are used, in a testamentary bequest, which express that the bequest is joint there is accretion, and that where expressions are used which express severalty, unless there are indications throughout the bequest that severalty is not really intended, accretion does not take place. What the late Lord President does is, I think, merely to give an example of the expressly several bequest, as where one is made not to a class but to selected individuals, even though selected out of a class, divisible equally among them, or equally share and share alike. *A fortiori* where the division is unequal.

In the present case the one and only possible indication that severalty is not intended is the use of the words "in the proportions following." The best that can, I think, be said for consequent accretion is that the term taken by itself is indeterminate, and would be consistent with either intention. But where it is overriden by the general conception of the clause, by its collocation with the word "each," and by the fact that inequality is provided for, it cannot in my opinion turn that which without it is emphatically a several bequest into one intended nevertheless to be joint.

Following, then, *Paxton's Trustees*,[1] I think that there is no accretion here, and that the questions should be answered accordingly in favour of the parties who maintain resulting partial intestacy.

Lord Salvesen concurred with the Lord President.

Lord Mackenzie.—The question in this case is whether the rule of *Paxton's Trustees*[1] applies to the share of residue in dispute. The rule, as explained in that case, is a rule of construction only. Its effect is that "when a legacy is given to a plurality of persons named or sufficiently described for identification, 'equally among them' or 'in equal shares,' or 'share and share alike,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue or a sum of fixed amount or corporeal moveables." The Lord President who thus expressed the rule

[1] 13 R. 1191.

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adds this,—"The application of this rule may, of course, be controlled or avoided by the use of other expressions by the testator importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees." There have been a number of decisions upon this branch of the law, but it was admitted on both sides of the bar that the present case is not concluded by authority. The first condition for the application of the rule is that the persons to whom the legacy is left must either be named or sufficiently described for identification—*Muir's Trustees*.[1] This condition was not satisfied in *Roberts' Trustees*,[2] in which the bequest was in favour of an unascertained class. It is fulfilled in the present case, because the legatees are mentioned *nominatim*. It is, however, also necessary that there should be a severance of the shares—that is to say, supposing £5000 be given to five persons by name, it must be plain from the whole language of the deed that the testator meant to give £1000 to each of the legatees named. Typical illustrations of a bequest of this character are to be found in *Crawford's Trustees*,[3] where the direction by the testator was that on the death of his wife "my whole free property and estate shall be divided into seven equal portions or shares," and then certain shares were given to each member of his family named; in *Hunter's Trustees*,[4] where the testator directed his trustees to "hold the whole residue of my estate . . . for behoof of my three daughters A, B, and C, and the survivors and survivor of them equally, for their liferent use allenarly and their issue in fee"; and in *M'Laren* v *M'Alpine*,[5] where the opening words of the bequest of residue were these, "the said residue and remainder of my estate shall be divided into eight equal parts or shares," and then the testator went on to bequeath these shares to members of his family *nominatim*. In the present case I do not construe the bequest as a direction by the testatrix that the shares of residue (as the liferents fell in) are to be divided into elevenths, and that two elevenths are to be given to five individuals named, and one eleventh to another individual named. In my opinion that is not what the testatrix meant. The words which introduced that clause of bequest are that the trustees shall pay, divide, and convey the share of residue set free "in the proportions following *videlicet*." These words seem to me to furnish the key to the meaning of those that follow—"To my said sons Adam Lees Cochrane, John Cochrane, Archibald Cochrane, and Walter Cochrane, and to my daughter, Mrs Agnes Cochrane or Roberts, spouse of William Roberts, manufacturer, Galashiels, each two shares, and to my granddaughter, Jessie Roberts, one share." The use of the words "In the proportions following" shows that the testatrix intended the expression "shares" to apply to the proportions to be taken by the legatees *inter se*, and not to denote ascertained fractions of the subject-matter of the bequest. In other words that she meant her children each to take double of what she gives to her granddaughter. It is evident that the testatrix had in contemplation three periods of distribution, for the bequest applies to three shares, each of one-third, liferented by her three daughters. The declaration that the

[1] 16 R. 954, at p. 958. [2] 5 F. 541. [3] 23 S. L. R. 787.
[4] 6 F. 318. [5] 1907 S. C. 1192.

"interests" of the legatees named in the fee of the residue should vest only at the terms at which their shares of residue respectively become payable is consistent with the construction I have put upon the words of bequest, according to which the class is not to be ascertained until the period of division arrives. It is evident the testatrix contemplated the possibility of some of the beneficiaries predeceasing the terms of payment, and accordingly makes provision for the issue getting the parent's share. Further, in excluding the *jus mariti* as regards the interest given to females these are described as "conferred on or accruing to," which indicates that in the view of the testatrix an interest conferred was capable of expansion. I may here remark that in considering whether the rule of *Paxton's Trustees*[1] should be applied, though I do not think that in principle there is much difference between cases of immediate distribution and postponed vesting, yet from the practical point of view there is this distinction, that while in the one case the testator may be presumed to have known what the state of matters is at the date of his death, he cannot be presumed to know what the state of matters is going to be at a period subsequent thereto. There is no doubt one notable omission in the deed because, although the issue of residuary legatees dying before the period of payment are instituted to their parents, no provision is made for the case of any of the three daughters of the testatrix having children. Such children, if there were any, take nothing. This, however, does not supply any argument to support the view that in the circumstances which have arisen there is intestacy. For the reasons above stated I am of opinion that the rule of *Paxton's Trustees*[1] does not apply to the present case, and that there is accretion.

Lord Guthrie.—I agree with your Lordship in the chair. As has been already said, the question is whether the rule, laid down unanimously by a bench of seven Judges in 1886 in the case of *Paxton's Trustees* v. *Cowie*,[1] applies to the question which has arisen under Mrs Cochrane's trust-disposition and settlement. It is no doubt true that the statement of the rule by Lord President Inglis, who gave the only opinion, involves expressions which do not occur in Mrs Cochrane's deed, namely, "equally among them," "in equal shares," and "share and share alike"; but his Lordship adds "or in any other language of the same import." What that phrase stands for may be gathered from the same Judge's opinion in *Buchanan's Trustees*,[2] a case to which he refers in *Paxton*.[1] In *Buchanan's Trustees* he said[3]: "when a legacy of this kind in liferent or fee is given 'in equal shares' to children there is no room for accretion, while, on the other hand, if the gift is given 'jointly,' then the presumption is in favour of accretion, though that presumption may be overcome by other words in the deed." The distinction as taken in *Buchanan's Trustees*[2] and in *Paxton's Trustees*[1] may at first sight appear to be academic, but it involves, and I think was founded on, a substantial difference, namely, between shares given without express division and shares given in the lump. If that be the essence of the contrast and the foundation of the rule, it is equally present here, because

[1] 13 R. 1191. [2] 20 S. L. R. 666. [3] *Ibid*, at p. 669.

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the shares in the present case were not given jointly but to named persons in what I read as definitely stated proportions. The presumption thus established does not seem to me to be overcome by any other words in the deed. I refer particularly to the absence of a clause of survivorship.

LORD SKERRINGTON concurred with the majority of the Court.

THE COURT answered the first question in the negative and the second question in the affirmative.

KINMONT & MAXWELL, W.S.—WISHART & SANDERSON, W.S.—KINMONT & MAXWELL, W.S.—Agents.

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THE LORD ADVOCATE (on behalf of the Commissioners of Inland Revenue), Pursuer (Respondent).—*Sol.-Gen. Morison*—*R. C. Henderson.*

SIR ROBERT DRUMMOND MONCREIFFE AND OTHERS (Sir Basil and Lady Graham Montgomery's Marriage-Contract Trustees), Defenders (Reclaimers).—*Cooper, K.C.*—*J. G. Jameson.*

Revenue—Estate-duty—Succession-duty—Property reverting to disponer—"Disposition"—Husband's liferent in marriage-contract fund, forfeited to wife in consequence of decree of divorce, reverting to him on her death—Finance Act, 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 1 *and* 2 (1) (*b*)—*Finance Act*, 1896 (59 *and* 60 *Vict. cap.* 28), *sec.* 15 (1)—*Succession-Duty Act*, 1853 (16 *and* 17 *Vict. cap.* 51), *secs.* 2 *and* 12.

In consequence of the dissolution of a marriage by decree of divorce on the ground of the husband's adultery, the income of a fund—which, under the marriage-contract, was settled by the husband's father on him, and after his death on his wife, for their liferent alimentary uses respectively—was paid to the wife until her death, after which event it again became payable to the husband.

Held (*diss.* Lord Johnston) that estate and succession-duties were payable on the property passing to the husband on the wife's death, the exemptions created by sec. 15 (1) of the Finance Act, 1896, in the case of estate-duty where property reverts to the "disponer," and by sec. 12 of the Succession-Duty Act, 1853, in the case of succession-duty where a person takes a succession under a "disposition" granted by himself, being inapplicable, in respect that the wife had acquired the income as a legal consequence of the decree of divorce and not by a "disposition" from her husband.

1ST DIVISION. Lord Cullen.

ON 17th February 1913 the Lord Advocate, on behalf of the Commissioners of Inland Revenue, brought an action against the trustees acting under the antenuptial contract of marriage between Sir Basil Graham Montgomery and his wife, in which an accounting was called for and payment was claimed of estate and succession-duties in respect of an interest in the marriage-contract fund which passed to Sir Basil on the death of his wife.

The circumstances of the case, as appearing from the averments of parties on record, were as follows:—

By the marriage-contract, Sir Graham Graham Montgomery, the husband's father, conveyed to trustees a certain sum to be held by them for the following purposes:—(1) For payment of the clear

annual revenues thereof to the husband during his life, and that allenarly as an alimentary provision; (2) after his death, for payment of the clear annual revenues to the wife, in the event of her surviving him, during the remainder of her life, and that allenarly as an alimentary provision; (3) subject to the foresaid purposes, to hold the capital of the said fund in trust for the child or children of the marriage.

On 15th February 1905, the marriage, which had taken place on 26th October 1880, was dissolved by decree of divorce pronounced by the Court of Session on the ground of the adultery of Sir Basil. In consequence of the decree, the liferent of the husband's trust fund enjoyed by Sir Basil under the marriage-contract was forfeited by him; and Lady Montgomery became entitled to and received the liferent of the fund, in terms of the second purpose of the marriage-contract. Lady Montgomery died on 30th July 1910, survived by Sir Basil and the two children of the marriage. Upon her death the liferent in favour of Sir Basil revived; and the defenders thereafter held the fund as trustees for him in liferent and the issue of the marriage in fee.

It was upon the interest in the fund passing to Sir Basil on Lady Montgomery's death that duties were claimed in the present action.

The pursuer pleaded, *inter alia;*—(1) The said husband's trust fund under the said contract of marriage being property which passed on the death of the said Lady Montgomery within the meaning of the Finance Act, 1894, estate-duty is payable in respect thereof. (4) The said husband's trust fund being a succession within the meaning of the Succession-Duty Act of 1853, succession-duty is payable in respect thereof.

The defenders pleaded, *inter alia;*—(2) The husband's trust fund not being property which passed on the death of Lady Montgomery within the meaning of the Finance Act, 1894, estate-duty is not payable in respect thereof, nor are the defenders accountable therefor. (3) The said husband's trust fund . . . not being chargeable with succession-duty, the defenders are not accountable therefor, and are entitled to be assoilzied from the conclusions relative thereto.*

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* The Finance Act, 1894 (57 and 58 Vict. cap. 30), enacts:—Sec. 1. "In the case of every person dying after the commencement of this part of this Act, there shall . . . be levied and paid, upon the principal value ascertained, as hereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called 'Estate-duty' . . ." Sec. 2. (1) "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ."

The Finance Act, 1896 (59 and 60 Vict. cap. 28), enacts:—Sec. 15 (1). "Where, by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this part of this Act, the property shall not be deemed for the purpose of

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On 27th May 1913 the Lord Ordinary (Cullen) found that estate-duty and succession-duty were payable by the defenders in respect of the funds or property representing the husband's trust fund under the marriage-contract in respect of Lady Graham Montgomery's death, and ordered delivery of accounts as concluded for.*

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the principal Act to pass by reason only of its reverter to the disponer in his lifetime."

The Succession-Duty Act, 1853 (16 and 17 Vict. cap. 51), enacts:—

Sec. 2. "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person . . .; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person . . . shall be deemed to have conferred or to confer on the person entitled, by reason of any such disposition or devolution, a 'succession.'"

Sec. 12. ". . . A successor shall not in any . . . case" (other than one provided for earlier in the section) "be chargeable with duty upon a succession taken under a disposition made by himself; and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself. . . ."

* "OPINION.—[After a narrative of the facts]—In the present case the Crown claims, in the first place, estate-duty in respect of the passing of the right to said income to Sir Basil on Lady Montgomery's death. It is conceded by the defenders that under the provisions of the Finance Act, 1894, taken by themselves the claim would lie. They contend, however, that it falls under the exception enacted by section 15 (1) of the Finance Act, 1896, which is quoted in answer 6. In the application of that section to the circumstances of this case the defenders argue that the passing of the right to the income of the trust fund to Lady Montgomery consequent on the decree of divorce must be held to have taken place under a 'disposition' made by Sir Basil within the meaning of the section, and that, similarly, there was a 'reverter to the disponer' when Sir Basil's right to the income reopened on Lady Montgomery's death.

"It is no doubt true, as the defenders say, that the word 'disposition,' occurring in the section, is not there used in any technical or narrow sense. It may include any effectual act of disposal of property by a person having power so to dispose, without regard to the form which the act of disposal takes. But *esto* this is so, I am unable to see that when the right to the income of the husband's trust fund opened to Lady Montgomery as a consequence of the decree of divorce it did so by virtue of a disposition or act of disposal thereof by Sir Basil. Sir Basil committed a matrimonial offence. This did not dispose of or in itself alter the right to the income of the trust fund. His wife, however, chose to divorce him in respect of his offence. As a legal consequence of the decree of divorce Lady Montgomery became entitled to the income of the trust fund in the same way as if he had died. She took it by virtue of the settlement made by her husband's father as affected by the legal consequences of the decree of divorce which she obtained, and not by any act of disposal by her husband. I am accordingly of opinion that the case does not fall under the exception provided by section 15 (1) of the Act of 1896. And if this be so, it is not disputed by the defenders that a claim for estate-duty lies.

"The Crown further claims succession-duty in respect of the same facts. The defence here made is the same in its nature as that advanced against the claim for estate-duty. It turns on the terms of the Succession-Duty Act of 1853. The excepting words used in that Act are not identical with those used in the Finance Act of 1896. But counsel for the defenders conceded that for the purpose of the present claim there was no material difference between the two cases, and that both turned on the question whether, in the

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The defenders reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Guthrie) on 27th February 1914.

Argued for the reclaimers;—The general result of the decree of divorce was forfeiture and alienation of the husband's right in this fund, and transference thereof to the wife[1]: on her death the forfeiture ceased, and the husband's right revived, freed from the incumbrance that had so been put upon it. Property so circumstanced could not be said to "pass" upon the death of the wife in the sense of section 1 of the Finance Act, 1894, and had this section stood alone the reclaimers' case would have been clear. But section 2 (1) (*b*) was relied on by the Crown as concluding the case in its favour. Now, the latter section must be open to construction, for, taking its terms in their literal acceptation, they were wide enough to apply to any form of property passing in any way, though in many such cases it was clearly not intended that the Act should apply. Construing the section then, the term "passing" could not reasonably be applied to the process which had taken place here, viz., that of the initial radical right in the fund, which had been temporarily submerged, again coming into operation. In any event, the case was one to which the exception of section 15 (1) of the Finance Act, 1896, applied. The only difficulty in applying that section lay in the use of the word "disposition." The word, however, was not used here in any technical sense, as the Lord Ordinary had rightly decided; it referred to any transfer of property,[2] and should properly be applied to the transfer here in question. The same argument applied with regard to the claim for succession-duty.

Argued for the respondent;—Estate-duty was due, as the property had passed within the meaning of section 2 (1) (*b*) of the Finance Act, 1894. That section was intended to include certain cases which were thought to be within the spirit, though perhaps not within the letter, of the enactment in section 1.[3] The reclaimers were not entitled to the benefit of the exception contained in section 15 (1) of the Finance Act, 1896. In order to obtain its benefit they must show that there was a disposition, and that Sir Basil was the disponer. They could not establish either of these propositions. Lady Montgomery's right to the income arose in consequence of the decree of divorce, and that was the act of the Court and not of Sir Basil. Moreover, a decree of divorce did not operate as a transfer of the property, and could not, therefore, in any sense be considered a disposition. All that it effected was the extinction of an interest.[4] It

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statutory sense, Lady Montgomery took the income of the trust fund after the decree of divorce by virtue of a 'disposition' thereof made by Sir Basil. From what I have said regarding the claim for estate-duty it follows that, in my opinion, she did not; and on that footing it is conceded that a claim for succession-duty lies.

"Following these views, I shall make an order for the accounts called for."

[1] Dawson v. Smart, (1903) 5 F. (H. L.) 24, *per* Lord Robertson, at pp. 29, 30, and Lord Davey, at p. 27.

[2] Duke of Northumberland v. Attorney-General, [1905] A. C. 406, *per* Lord Macnaghten, at p. 410.

[3] Earl Cowley v. Commissioners of Inland Revenue, [1899] A. C. 198, *per* Lord Macnaghten, at p. 211.

[4] Harvey v. Farquhar, (1872) 10 Macph. (H. L.) 26, *per* Lord Westbury, at pp. 32 and 33, Lord Chancellor Hatherley, at pp. 28 and 29, and Lord

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cut off the interest in this fund given to Sir Basil by the disposition in the marriage-contract; and Lady Montgomery received the income, not because of any disposition by him, but in virtue of the disposition by his father in the marriage-contract. Sir Basil had no power, by the terms of the marriage-contract, to assign his rights thereunder, which were strictly alimentary; and he had not in fact done so. The same argument applied to the claim for succession-duty; it was admitted that if the Crown was not successful in the claim for estate-duty neither could it succeed in that for succession-duty.

At advising on 3rd March 1914,—

LORD PRESIDENT.—I am of opinion that the claim of the Lord Advocate on behalf of the Commissioners of Inland Revenue is well founded, and that the defenders must pay estate-duty.

The question in controversy is crystalised by the pursuer in article 7 of the condescendence, where it is said "The said husband's trust fund under the said marriage-contract, amounting as aforesaid to over £20,000, was property passing on the death of the said Lady Montgomery within the meaning of the Finance Act, 1894." Can that statement not of fact, but of law, be supported? I am of opinion that it can.

Lady Montgomery died on 30th July 1910, and at the date of her death she was in the enjoyment of property which is described in the summons. At her death her interest in that property ceased, and passed to Sir Basil, and estate-duty therefore became payable under section 2 (1) (*b*) of the Finance Act of 1894, which in terms applies to the case. But the defenders say the claim is excluded by the provisions of section 15 (1) of the Finance Act of 1896, which reads as follows:—[His Lordship read the section]. In interpreting this section can we say that Sir Basil Montgomery conveyed the life interest of the property in question to Lady Montgomery, and that, at her death, it reverted to him as disponer of the property? If we can the clause applies, and the claim for estate-duty is excluded. It is conceded that Sir Basil Montgomery made no such disposition, and that the property, therefore, by no possibility could revert to him as disponer. But then it is contended that, inasmuch as on the 19th February 1905 his marriage with Lady Montgomery was dissolved by decree of divorce pronounced by the Court of Session on the ground of adultery, he must be held to have disponed the property within the meaning of section 15 (1) of the statute of 1896.

Now the effect of decree of divorce is indisputable according to the law of Scotland. It is admirably stated by the defenders themselves in this case where they say that "in consequence thereof"—in consequence of the decree of divorce—"Sir Basil's liferent interest in the husband's trust fund was forfeited for the benefit of Lady Montgomery until her death on 30th July 1910." That, in the defenders' own words, is an accurate statement of the effect, by the law of Scotland, of a decree of divorce in circumstances such as we have here. And if that be so it can-

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Chelmsford, at p. 32; Dawson v. Smart, 5 F. (H. L.) 24, *per* Lord Shand, at p. 26, and Lord Davey, at p. 27. The Act 1573, cap. 55, was also referred to.

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not, I think, be maintained that it was by any disposition granted by Sir Basil that Lady Montgomery came to the enjoyment of the life interest of this trust fund. It was, I think, by no act or deed of his that that result came about, but it was solely by virtue of, and as the direct consequence of, the decree of divorce pronounced in an action in which she was the pursuer and he was the defender, which action, for aught that appears here, he may have resisted to the last.

If any authority were required in support of that proposition it will be found in the case of *Harvey* v. *Farquhar*.[1] There, as here, the husband was divorced on the ground of adultery. There, as here, it was claimed that in consequence he had forfeited his rights under the marriage-contract; and there, as here, it was contended that the result had come about by the act or deed of the erring husband who had committed the matrimonial offence. There, as here, it was pointed out that, by his marriage-contract, he was expressly forbidden to alienate the trust funds. So that the question raised was identical with the question raised in the present case. And here is the judgment of the House of Lords on that part of the case—I read from the opinion of Lord Chelmsford at page 32 of the report—"A rather extraordinary argument was addressed to us on behalf of the appellant, to prove that there was no forfeiture of his rights by the divorce. It is provided by the marriage-contract that the sums of money falling under the trust shall not be subject or liable to his 'debts or deeds or the legal diligence of his creditors.' It was said that the 'deeds' here means acts, and that the divorce was the act of the appellant, because his adultery was the cause of it. Now, though the word 'deeds' may mean every act of the appellant by which the trust monies may be transferred from him, I am at a loss to see how the divorce can be an act of this character attributable to him, since it is not his act at all, but only a consequence of his act, and the loss of his interest in the trust funds is the legal consequence, not of his adultery, but of the decree of divorce."

Every word of the opinion which I have just read is, I think, applicable in terms to the present case. The defence, in my opinion, rests upon a fundamental misconception of the law of Scotland relative to these divorce proceedings. Therefore I am for affirming the Lord Ordinary's interlocutor.

Lord Johnston.—If this question had depended on the Finance Act of 1894, I think that there would be no defence to the claim of the Revenue. I do not need to quote section 2 (1) (*b*) of that Act. Its terms leave no possible doubt on the subject. But a quite different question arises under the Finance Act of 1896. It is very much of an omnibus Act, but as regards section 15 in particular it is a relieving or remedial Act. While it may be properly said that a taxing Act has to be interpreted literally, according to its terms, without regard to the good sense of the provision or to the object and intent of the Legislature, it is I think different with a remedial Act. Section 15 of the Act of 1896 deals

[1] 10 Macph. (H. L.) 26.

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with a special case of an interest in property, which, it says, shall not be deemed for the purpose of the principal Act, *i.e.* the Act of 1894, to pass on the death of a deceased. It makes this particular case an exception from the universality of the terms of sections 1 and 2 of the Act of 1894. It subsumes a hardship, and it provides a relief. In order to determine the extent of the relief I think that we are bound to consider the hardship intended to be relieved. The hardship was that, under the main Act, if a person provided a limited interest to another for the life of such other, retaining the reversion, then, under the terms of sections 1 and 2, should the reversion return to the granter, he would be liable in estate-duty upon what had originally been and was his own property. It was felt that, as it was in no sense a case of succession, this should not be, and that the exception of section 3 of the Act of 1894 required to be extended to cover the case. Accordingly section 15 (1) of the Act of 1896 provided this remedy, that, on the death of the person in whose favour the interest had been created, "the property shall not be deemed, for the purpose of the principal Act, to pass by reason only of its reverter to the disponer in his lifetime."

Whether the defenders can avoid estate-duty on the property settled in Sir Basil Montgomery's marriage-contract—the life interest in which was forfeited by Sir Basil in 1905 on his being divorced by Lady Montgomery, and enured to Lady Montgomery and was enjoyed by her until her death in 1910, when it returned to Sir Basil, he surviving—depends on whether the provision of section 15 of the Act of 1896 applies in the circumstances. There is no doubt that the situation created by the circumstances is just such as the section sets out to remedy, viz., the reverter to the owner of the property in which another has enjoyed a temporary life interest, the radical right having remained all along in the owner. It is of no importance that Sir Basil's own interest was only a liferent, and that what enured to his wife was a life interest in that liferent, the radical right in which remained in Sir Basil. It was property in the sense of the Act. But the statute introduces the subject by presuming "a disposition" and a "disponer" thus "when by a *disposition* of any property an interest is conferred on any person other than the *disponer* for the life of such person or determinable on his death." And it is said that there is neither disposition nor disponer in the circumstances in question. Literally there is not. And if I felt myself bound to construe the statute as a taxing Act, I should admit that the objection was formidable. But that is not the situation, and I do not think that the remedy is confined to the letter of the provision, without regard to its intendment. The terms "disposition" and "disponer" are nowhere defined in the Act. I think that they are general words, used to denote something which confers an interest and some one from whom that interest flows. Had there been no alimentary condition in his marriage-contract, Sir Basil might have effected precisely the same result by a renunciation or assignation of his life interest to his wife, so long as they both lived, to return to him if he were the survivor. The statute would have applied in terms. I cannot think that it is so limited in its scope by the use of the words "disposition" and "disponer" as not to reach the case in

which precisely the same result is brought about by operation of law. The same interest is conferred by the effect of the decree of divorce and flows from Sir Basil. In the case of *Dawson* v. *Smart*[1] Lord Robertson says:—"What the decree of divorce did was simply to give back that right to the wife just as she might have got it by assignation." He was speaking of an interest in a wife's own settled property opening to her on her obtaining decree of divorce. But the same would apply to an interest in the husband's settled property opening to her, as in the present case, in the same circumstances.

I think it not inapposite here to refer to the law of England. I have always understood that, on divorce or separation in England, the offending husband may be compelled to make a settlement on his wife. He makes it under compulsion of the decree of Court. I do not pretend to know precisely how it is done, but the language used indicates that the husband is obliged to execute something, which may be properly described as a disposition of property, and which, from the nature of the case, must create a life interest with reverter to the husband. To such circumstances the words of this relieving clause, section 15 (1) of the Act of 1896, exactly apply. It would be a strange result that because the husband in England is compelled by the Court, when granting divorce, to make a provision, while in Scotland, exactly *in pari casu*, a similar provision enures by operation of law on decree of divorce being pronounced, this statute should apply in the former case, and not in the latter. I do not think that, when the statute is regarded from the point of view of the defect or hardship which it was passed to remedy, the Court, in its construction, is compelled to such a narrow view of its provisions as would bring about that result. I need not say that I entirely accept the authority of the case of *Harvey* v. *Farquhar*,[2] referred to by your Lordship. The judgment is common ground between the parties to this case. But the question still remains, whether, in applying this statute, the term "disposition" occurring in its clauses must be construed in this case as the term "deeds" occurring in Mr Harvey's marriage-contract, was construed by Lord Chelmsford in *Harvey* v. *Farquhar*.[2] Accordingly, I am of opinion that the Lord Ordinary's judgment on this point is ill-founded and ought to be recalled.

Looking to the admission of the learned Solicitor-General I shall not delay your Lordships by considering the question under the Succession-Duty Act.

Lord Guthrie.—I agree with your Lordship in the chair that the respondent's contentions, both in regard to estate-duty and in regard to succession-duty, must be sustained, in accordance with the Lord Ordinary's judgment. In regard to estate-duty it is unnecessary to consider whether the present claim is covered by section 1 of the Finance Act, 1894, because section 2 (1) (*b*) of the same statute in terms applies to the present case. The reclaimers indeed instanced a number of cases to which the first section might be applied, and argued that it was unnecessary and would be

[1] 5 F. (H. L.), at p. 30.

[2] 10 Macph. (H. L.) 26.

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dangerous to hold that it applied to the present case, because it would follow that an indefinitely large number of other cases would necessarily be included. This mode of reasoning seems to me inapplicable to a taxing statute. The only question is whether the words of the statute fit the case before the Court, and it seems to me to be clear that they do.

The strength of the reclaimers' case depends on the exception contained in section 15 of the Finance Act, 1896. When decree of divorce was pronounced in 1905, and when, by operation of the common law, the right created by the late Sir Graham Montgomery in his son's marriage-contract in favour of the late Lady Montgomery came into operation, was Sir Basil a disponer, and did the right in Lady Montgomery flow from a disposition? I assume with the Lord Ordinary that the word "disposition" is not used in any technical sense, and is open to construction, and the same may be said of the word "disponer." But it is clear that if the present case falls within the exception, the word "disponer," which is used four times in section 15, can only refer to Sir Basil. I am unable to see how he can be so described. He committed a matrimonial offence, and did nothing more. As was pointed out by Lord Chelmsford in the case of *Harvey* v. *Farquhar*,[1] the divorce was not his act, but was the act of the Court on the initiative of Lady Montgomery, and his forfeiture of his rights as in a question with her, which is not the same thing as a transfer of property, was the common law consequence of the divorce. Under the marriage-contract he had nothing to transfer, and he was debarred from affecting any of the provisions in the contract by his deeds.

But if Sir Basil was not a disponer, and if there was no reverter to a disponer—for it must be noticed that the statute provides for a reverter to a disponer, not to an owner or to an owner of a radical right—can the word "disposition" be read as referable to some transaction in which he was not the disponer, and which was not his act but only the consequence of his act? I think this would be a strained construction of the exception, and one which the words used will not reasonably bear, for the words can receive an obvious application without employing them as proposed by the reclaimers. I may add that the impression which I at first formed in the reclaimers' favour from the words used by Lord Macnaghten in the case of *Duke of Northumberland* v. *Attorney-General*,[2] was removed by Mr Candlish Henderson's reference to the words of section 2 of the Succession Duty Act, 1853. Lord Macnaghten referring to that section says,—"It is clear that the terms "disposition and devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of the law." The reclaimers' counsel claimed this statement as a definition of the word "disposition" which would include not only, as the respondent maintains, an act of a party but also an act of law such as we are considering in the present case. But, on reference to the section with which Lord Macnaghten was dealing, it appears that he had to consider two separate things, a disposition and a devolution by law. The passage on which the reclaimers relied, instead of being in their favour, seems to be in favour of

[1] 10 Macph. (H. L.), at p. 32.

[2] [1905] A. C. 410.

the respondent, because Lord Macnaghten limits the scope of the word "disposition" to an act of parties.

It was admitted that, if the reclaimers are liable in estate-duty, they cannot escape payment of succession-duty.

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THE COURT adhered.

SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—LINDSAY, HOWE, & Co., W.S.—Agents.

HENRY LAW, Appellant.—*Monorieff, K.C.—J. A. Christie.*
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—*Horne, K.C.—Russell.*

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Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (3)—*Cessation of incapacity*—"*Suitable employment*"—*Risk of future incapacity—One-eyed miner.*

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A miner was struck by a chip of coal while working at the coal face, and thereby lost the sight of one eye. His employers, after paying compensation for a time, ceased payment on the ground that he was able to resume his former occupation and to earn his former wage. The miner having applied to the Sheriff to have the compensation continued, the Sheriff dismissed the application, finding that the miner was able to resume his former occupation at the face and to earn his former wage, and that the risk, which was incidental to working at the face, of a similar accident again happening was not increased by the fact that he had lost the sight of an eye. On appeal it was contended for the miner that the Sheriff had disregarded the relevant consideration that the loss of one eye, although not increasing the risk of a similar accident occurring, would render the results of such an accident more serious, as total blindness would follow; and accordingly that, the employment of a miner working at the face not being a "suitable employment" for him, he was still entitled to compensation.

Held (*dub.* Lord Johnston) that the determination of the Sheriff, in dismissing the application, was right.

Observed that the question whether an employment was "suitable" arose only under the First Schedule (3) to the Workmen's Compensation Act when partial incapacity existed, and therefore did not arise in this case, as the workman's incapacity had ceased.

Opinions, per the Lord President and Lord Guthrie, that the consideration that the results of a future accident might be more serious to a workman who had lost one eye than to a workman who had not could not relevantly be taken into consideration in determining what was "suitable" employment: *opinion contra, per* Lord Johnston.

Dicta in *Eyre* v. *Houghton Main Colliery Company, Limited*, [1901] 1 K. B. 695, *discussed.*

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Dumbarton, between Henry Law, a miner, and William Baird & Company, Limited, his employers, the Sheriff-substitute (Macdiarmid) dismissed an application for compensation, and at the request of the workman, stated a case for appeal.

1ST DIVISION. Sheriff of Stirling, Dumbarton, and Clackmannan.

The case set forth:—"I found the following facts proved:—(1) That when on 24th April 1913, the appellant, who is a miner, was working at the face in No. 1 Gartshore Pit, Gartshore, a chip of

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coal flying from the stroke of his pick struck him on the left eye injuring the same; and that said accident admittedly arose out of and in the course of his employment with the respondents. (2) That as a result of said accident the appellant had lost the sight of his left eye. (3) That the respondents paid him the compensation to which he was entitled under said Act from the date of said accident until 12th September 1913. (4) That at the latter date they ceased to pay him compensation on the ground that he was able to resume his former occupation as a miner at the face and to earn his former wage. (5) That the appellant maintained (*a*) that he was incapable of working at the face by reason of the loss of the sight of his left eye, and (*b*) that, in any event, the risk to a one-eyed man involved in the work was such as to entitle him to refuse to resume it. (6) That the risk disclosed by the evidence was that a chip flying from the pick might strike the eye with resulting injury which might be, as in the present case, serious. (7) That, while risk of serious injury was obviously appreciable, in point of fact a miner was often struck by a flying chip without such injury resulting. (8) That the said risk was incident to employment as a miner at the face. (9) That it was not increased by the fact that the miner had lost the sight of one eye. (10) That at 12th September 1913 the appellant was able to resume his occupation as a miner at the face and to earn his former wage. In these circumstances I dismissed the application and found the appellant liable to the respondents in expenses."

The question of law for the opinion of the Court was:—"On the facts stated was I entitled to dismiss the appellant's application for compensation?"

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Guthrie) on 26th and 27th February 1914.

Argued for the appellant;—The reasoning on which the Sheriff's decision proceeded was this, that when physical capacity to work was restored, compensation must cease. The fallacy which underlay this reasoning became apparent when one considered that it was in respect of incapacity, or diminished capacity, to earn wages that the Act awarded compensation. The Sheriff had ignored the fact that there might be cases in which, though physical capacity was restored, yet, owing to some circumstance peculiar to the injured man or to his injury, the capacity to earn wages might still be impaired or absent. In a case such as the present the employer was in the position of pursuer, and must prove the restoration of wage-earning capacity. The employer here had failed to do so, the Sheriff's finding on this question amounting to nothing more than this, that a suitable employment had been offered to the workman. Further, the question of what was a "suitable employment" was a mixed question of fact and law,[1] upon which the Sheriff had misdirected himself. Incapacity to earn wages was not extinguished by an offer of employment if, owing to something personal to the injured man, the employment was not suitable; and this was the law even under the Act of 1897, in the corresponding section of which there was nothing equivalent to the words "in some suitable employment or business,"

[1] Eyre v. Houghton Main Colliery Co., Limited, [1910] 1 K. B. 695, *per* Buckley, L. J., at p. 701.

which had been introduced into the Act of 1906.[1] The relevant consideration here was that, though the risk of accident, *i.e.*, the chance of suffering injury, was no greater to a one-eyed than to a two-eyed man, yet the gravity of the consequences of such an accident was increased. This was a circumstance which the arbitrator was entitled, and was bound, to take into consideration,[2] and was one which he had not considered. It did not at all follow from this argument that no employment in which there was risk of injury to the eye would be suitable for this injured man. But the risk in question here had been found to be one specially incident to his employment as a miner working at the face, thus rendering that employment unsuitable; and in this respect the case was distinguished from that of *Howards* v. *Wharton*.[3]

Argued for the respondents;—Where the arbitrator found in fact, as he had done in this case, that incapacity had ceased, the compensation must necessarily be ended. A qualification of this rule had been admitted in two sets of circumstances only—(1) where the injured man was again able to work but it could not be said that the effects of the accident had fully developed or that they might not recur to the effect of again incapacitating him; and it was to meet this situation that the device of continuing compensation by a nominal payment had been resorted to; and (2) where capacity was restored but the man's value in the labour market had been diminished owing to the condition in which he remained as the result of the accident. The present case was in neither of these categories, and therefore fell under the general rule. The question of suitability of the employment offered did not arise for consideration on this appeal. It was only in a case of partial incapacity that the Court had any concern with that question,[4] and there was here an express finding that incapacity had ceased. This was not a case in which the man was unable, or less able, to perform his work owing to the condition in which the accident left him. The appellant contended that compensation should be continued because the result of a subsequent accident might prove more serious. This contention had expressly been denied effect in former cases.[5] The crucial question was whether wage-earning capacity was restored; in determining the answer to this question the facts of the case, not the workman's personal feelings, must rule.[6]

At advising on 6th March 1914,—

Lord President.—On 24th April 1913 an accident befell the appel-

[1] Fraser v. Great North of Scotland Railway Co., (1901) 3 F. 908, *per* Lord President Kinross, at p. 912; Ellis v. Knott, (1900) 2 Minton-Stenhouse, 116. *Cf.* Workmen's Compensation Act, 1897, First Schedule (2), and Workmen's Compensation Act, 1906, First Schedule (3).

[2] Eyre v. Houghton Main Colliery Co., Limited, [1910] 1 K. B. 695, *per* Fletcher Moulton, L.J., at p. 700; Ellis v. Knott, 2 Minton-Stenhouse, 116.

[3] (1913) 6 Butterworth's W. C. C. 614.

[4] Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (3) (quoted by the Lord President in his opinion).

[5] Hargreave v. Haughhead Coal Co., Limited, 1912 S. C. (H. L.) 70; Howards v. Wharton, 6 Butterworth's W. C. C. 614; Elliott v. Curry & Dodd, (1912) 5 Butterworth's W. C. C. 584; *cf.* Braithwaite & Kirk v. Cox, (1911) 5 Butterworth's W. C. C. 77.

[6] O'Neill v. John Brown & Co., Limited, 1913 S. C. 653.

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lant in the course of and arising out of his employment as a miner. The result of the injury which he then suffered was to deprive him of the use of his left eye. His employers admitted liability and paid him compensation down to 12th September 1913, when they ceased payment, contending that the appellant was able to resume his former occupation as a miner at the face, and to earn his former wage. Now the arbitrator found that this contention was well founded, for the 10th finding runs thus: "That at 12th September 1913 the appellant was able to resume his occupation as a miner at the face and to earn his former wage." He found further that the loss of his left eye did not render the man more liable in the future to the chance of a similar accident befalling him, and it is clearly found that his incapacity due to the injury he suffered on 24th April 1913 had absolutely ceased, and that his wage-earning capacity was unimpaired; for it was not contended to us that a miner who had lost the sight of his left eye was handicapped in the labour market. That was not maintained before us, and we were not asked to allow any inquiry upon that matter. But the miner says that, although his incapacity due to the result of the injuries he received upon 24th April 1913 has ceased, and although his wage-earning capacity is unimpaired, still if a similar accident befalls him in the future the consequence will be the total loss of his eyesight, and accordingly that the employment of a miner working at the face is no longer a suitable employment for him. Accordingly he maintains that the arbitrator did wrong when he dismissed his application for compensation.

I am of opinion that the arbitrator was right, and upon this short and simple ground, that the appellant's incapacity due to the injury resulting from the accident he suffered had ceased, and that his wage-earning capacity was wholly unimpaired. And I cannot see, having regard to the terms of the 3rd paragraph of the First Schedule to the Act, that the arbitrator could have pronounced any other finding than he did. That section runs as follows:—". . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident." It is to be observed, therefore, that the arbitrator is not to approach the consideration of the difference between the man's wage-earning capacity before and after the accident until partial incapacity due to the accident can be postulated. Now partial incapacity cannot be postulated in this case. The condition, therefore, is never fulfilled, and the arbitrator cannot approach the consideration of the question which is formulated in the 3rd paragraph. I think, therefore, that Mr Horne was quite right in his contention to us when he maintained that, partial incapacity having ceased, and capacity to earn his former wage and to work at his former employment having returned, the one and only suitable employment for the man was the employment in which he had been formerly engaged.

If the chance of a chip flying from the pick and injuring the man's eye is not increased in the future by the result of the injuries which he sustained on the 24th April 1913, then the certainty that, if such an acci-

dent occur, the results will be serious—the total loss of sight—does not render the employment unsuitable. To say otherwise would be equivalent to asserting that for a one-eyed man employment at the working face as a miner was always an unsuitable employment; at all events there is no finding to that effect here. To take into account now the chance that, in the future, an accident may befall him with all its attendant consequences would be, in effect, to find that his present employers are liable to pay compensation to him for an accident which may never take place, and for the consequences of which, if it does take place, somebody else will require to pay full compensation. In short, if an accident does occur in the future, the consequences of which are total blindness to this man, then it will be a *nova causa interveniens*. The consequence of total blindness will be attributable directly to the second accident, and there will be no causal relation between this consequence and the first accident which took place. In short, the train of causation will be entirely broken, and the serious consequences which it is figured may occur if the man is unfortunately the victim of a second accident will be attributable to that accident and to that accident alone. It will not be the result, direct or indirect, remote, improbable, unnatural even, of the first accident which occurred. It will be the result of a *nova causa* which may never emerge.

If the learned Lords Justices in the case of *Eyre* v. *Houghton Main Colliery Company, Limited*,[1] were considering a question exactly similar to that which we have now actually before us, then I have no hesitation in saying that I prefer the opinion of Lord Justice Buckley to the opinion of Lord Justice Fletcher Moulton for the reasons I have just given. It appears to me that to give effect to the view expressed by Lord Justice Fletcher Moulton would be to run counter to the principle which was laid down as far back as the year 1902 by the Master of the Rolls (Collins) in the case of *Dunham* v. *Clare*,[2] and would be entirely antagonistic to the decision recently pronounced in the Scottish appeal in the House of Lords—*Hargreave* v. *Haughhead Coal Company, Limited*,[3]—where the reasoning on which the judgment rested seems to me to apply directly to the case we have before us. Lord Atkinson in that case said: "The compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and that alone, that the workman is entitled to receive compensation. The function of the schedule"—to which I have referred—"is to supply a measure of damages for that compensation"—compensation for that accident which has actually happened—"but the man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets. If the argument of the appellant were well founded, if a man loses one eye, inasmuch as if anything happens to the other eye he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him."

Now, that reasoning appears to me to be applicable in terms to the

[1] [1910] 1 K. B. 695. [2] [1902] 2 K. B. 292.
[3] 1912 S. C. (H. L.) 70.

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present case, and I think if we were to reverse the judgment of the arbitrator here we would be, in effect, keeping open indefinitely the award of compensation in order to see whether an accident might subsequently befall the man. It would be quite otherwise if the arbitrator had found that the risk of another accident had been increased by the former accident. But he has found exactly the contrary. He has found that it is not increased by the fact that the miner has lost the sight of one eye; and therefore I am clearly of opinion that—inasmuch as the consequence which it is figured to us might result if another accident did take place cannot be attributable, directly or indirectly, to the accident which befell this man on 24th April 1913—the arbitrator has come to a right conclusion. I am, therefore, for answering the question put to us in the affirmative.

Lord Johnston.—The workman in this case, who was a miner, lost his left eye by a chip of coal striking him when working at the face. He has recovered from the injury, but is now blind of his left eye. He is physically able to return to work at the face. But he has declined to do so on the ground that, though every miner working at the face is exposed to the risk of losing an eye through a flying chip of coal striking it, and though he would be so exposed only equally with others, yet the result of such accident would be to him so abnormally serious, viz., total blindness, that he ought not to be required to face it. This in effect is the question, not raised for the first time, though not yet solved, whether mining at the face is or is not a suitable employment, in the sense of the third paragraph of the First Schedule to the Act of 1906. Upon the answer to that depends whether the Sheriff here was or was not justified in refusing compensation. I say refusing, because though the Sheriff does not tell us in what form the case came before him, I take it that compensation had been voluntarily paid and then stopped, and that the workman did not commence the proceedings by application to record a memorandum of agreement, but by a demand for arbitration.

The Sheriff has found (1) that the risk of being struck in the eye by a flying chip of coal is incident to the employment of a miner at the face; (2) that the risk is no greater to a one-eyed man than to a man with both eyes; (3) that the workman was at 12th September 1913 able to resume work at the face at his former wage; and he therefore dismissed his application. The workman has appealed,

I may first deal with two initial points, viz., (1st) I take it that when the Sheriff says that the risk is no greater to a one-eyed man than to a two-eyed man, he means simply the risk or chance of the accident occurring, and not the risk in the sense in which the word is used in the case of insurance, or the measure of the result of the accident; and (2nd) that no question is raised as to the disadvantage to the appellant in the labour market of being a one-eyed man. The case was pleaded solely on the question of the suitability of the employment.

The question was raised in *Eyre* v. *Houghton Main Colliery Company*[1]

[1] [1910] 1 K. B. 695.

in identical circumstances. But that case is distinguishable, in that the County Court Judge, differing from the Sheriff here, thought—and in this I think most men would agree with him—that a one-eyed man did, as compared with a two-eyed man, run an appreciably increased risk of injury to his remaining eye in working at the face, and taking into consideration that fact along with the absolute incapacity which might result from a second injury, he held the employment unsuitable, and awarded compensation. Cozens Hardy, M.R., held that what is suitable employment in each case is a question of fact for the arbitrator, and that there was evidence which justified the conclusion of the County Court Judge, which therefore could not be disturbed. Between Fletcher Moulton, L.J., and Buckley, L.J., there was a difference of opinion closely touching the present case. Fletcher Moulton, L.J., while holding that increased risk was certainly an element to be considered, added,—"Similarly the fact that the consequence of the risk, which is a special one in the case of mining, that is to say, injury to the other eye, would be so much more serious after the past accident, is also a consideration which the County Court Judge is justified in having regard to." Buckley, L.J., considered the question as one of mixed law and fact, and he held that the consideration that, having lost one eye, the loss of the second would be of greater import to the man in question than to any two-eyed man, was not relevant upon the question of suitability. But, as the County Court Judge had also found that there was increased risk in working at the face with only one eye, he agreed that the award could not be disturbed. Now, had the County Court Judge held with the Sheriff here, that there was no increased risk, Fletcher Moulton, L.J., would have sustained, Buckley, L.J., would have upset, the award on the ground of misdirection. I have considered very anxiously this judgment, and while I agree with Buckley, L.J., that the question is a mixed question of fact and law, I should, had I been sitting alone, have respectfully agreed with Fletcher Moulton, L.J., that the risk, in what I have called the insurance sense, or the possible result of a second accident to a man who has already lost an eye, is a relevant subject for consideration by the arbitrator, and I should have decided that the Sheriff in the present case had misdirected himself, or rather that his direction was defective, in that he had not taken that matter into consideration.

The Irish case of *Elliot*[1] is of value for the adhesion of Lord Chancellor Barry to Fletcher Moulton, L.J.'s doctrine. *Hargreave's* case,[2] though in other circumstances it might have done so, did not in fact raise the present question. Your Lordship has referred to it, and in particular to Lord Atkinson's judgment. To understand the bearing of that case upon the present, I think that it is necessary to keep in mind that the question of the right of the injured employee arises here in this form, viz., Is he, being able to resume work, bound to accept the work offered him, whether his former work or some other, because it is suitable? Whereas in other cases it takes this form, viz., though he is able to resume work, is he, in the circumstances, entitled to have his right to compensation

[1] 5 Butterworth's W. C. C. 584.

[2] 1912 S. C. (H. L.) 70.

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kept open by what in England is termed a declaration of liability? In *Hargreave's* case[1] the question partook of the latter characteristic. In the present case it falls entirely within the former category. But there is another element in this class of case which has also to be kept in mind. A man who has lost an eye and re-enters the world as a one-eyed man, is exposed to the risk of losing the other, possibly in endeavouring to carry on his former employment, possibly in a hundred other ways which have no relation to employment. *Hargreave's* case[1] was, in its circumstances, quite different from the present. The workman had lost an eye. The other was threatened by a cause which was held in fact to have no relation either to his employment, or to the original accident. What was in question was his right to continued compensation, or at least to have the matter kept open, till it could be seen whether he was to lose the other eye. To that *species facti* Lord Macnaghten's ground of judgment, and also Lord Atkinson's, are directly applicable; as where the latter says:—"Compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation." But that unquestionable proposition does not solve the question as it is raised in the present case, which is not, as in *Hargreave's* case,[1] whether the matter of compensation is to be kept open, but whether compensation is to be continued *pro tanto*, because by reason of the injury caused by the accident, the workman cannot obtain his former living in a suitable employment. That question is not solved either by Lord Macnaghten or by Lord Atkinson, for their minds and their words were not directed to it.

As I have said, had I been sitting alone, I should have adopted and applied the view presented by Fletcher Moulton, L.J., in *Eyre's* case.[2] But your Lordship, with whom I am aware Lord Guthrie agrees, has advanced cogent reasons for an opposite conclusion, and I do not feel sufficient confidence in my own opinion, notwithstanding the support to which I have referred, to justify my dissenting from the judgment which your Lordship proposes.

Lord Guthrie.—I am unable to discover in the findings of the arbitrator grounds for disturbing the result at which he has arrived. I go further, and think he has reached the right result.

In his findings the arbitrator has not referred to the fact, which is of course obvious, that if the appellant at any time in future, whether by disease or accident, loses the sight of his remaining eye, he will be incapable of any employment for which sight is required. We were told that in the argument before him the arbitrator was asked to take this fact into consideration, and, on account of the special risk of an accident to the remaining eye connected with this employment (see finding 8) to find that the appellant's former employment was not "suitable employment" in the sense of First Schedule (3), and to hold that the respondents were not entitled, as they had done, to cease to pay him compensation on the

[1] 1912 S. C. (H. L.) 70.

[2] [1910] 1 K. B. 695.

ground that he was able to resume his former occupation as a miner at the face and to earn his former wage.

In his argument the appellant assumed that he fell within the scope of First Schedule (3), and that the only question was whether the consequence of a possible accident in the future to his remaining eye, arising in this particular employment, was one of the elements that could be taken into account in the question of what is suitable employment in the sense of the statute.

But there is a prejudicial question. The matter of what is suitable employment can only arise when there is partial incapacity. But the arbitrator has found on the facts, and I think has found rightly, that the appellant is not partially incapacitated. Take the case of a one-eyed man seeking employment at an occupation not requiring two eyes. He could not be refused employment on the ground that he was partially incapacitated for such work; he will do the work as well as if he had both eyes. Incapacity and unsuitability are different things. Whether or not his former work is, on an all-round consideration of the whole circumstances, suitable for the appellant, the arbitrator's finding (No. 10) is conclusive as to the appellant's partial incapacity to do his former work having ceased. I therefore think that the appellant is not in a position to raise any question under First Schedule (3). I do not decide what the appellant's position would have been had he raised the question considered in the case of *Dempsey* v. *Caldwell & Company, Limited*,[1] as to the direct effect of his injury on his wage-earning capacity in times of dull trade. Had he done so, I am inclined to think that the point I am now dealing with would not arise.

Suppose I am wrong in thinking the appellant excluded from raising any question under First Schedule (3), it is necessary to consider whether, on account of the special conditions of his employment, the consequences of a future accident to the appellant's remaining eye, the effect of which would be to render him totally blind, can be taken into account by the arbitrator in considering the suitability of an employment. Such a consideration might occur to a prudent man; but I doubt whether it would in practice prevent any ordinary workman returning to his former employment. In any case, I am of opinion that it is not an element which can enter into the question of what is suitable employment under the statute.

Under the Workmen's Compensation Act, 1906, each accident is dealt with by itself, and full statutory compensation is given for each accident. So far as the workman's wage-earning capacity is affected by an accident, full statutory compensation is given for that accident, whether the loss of the wage-earning capacity arises from physical or from other causes. If another accident arises, the same process will be repeated. If this appellant should unfortunately in the future lose the sight of his remaining eye by another accident, and become in that case totally incapacitated for life, he will receive full statutory compensation on the basis of total incapacity, and his then employer will not be entitled to plead that, but for the earlier accident, his liability would have been for partial incapacity only. But if the appellant's contention were to be sustained, he

[1] *Supra*, p. 28.

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would now be obtaining an advantage on account of an injury which may never occur, and for which, if it does ever occur, he will receive full statutory compensation. The appellant limits his argument to a case like the present, where the particular employment involves a special risk to the remaining eye. I confess I do not see how the contention can be so limited. It seems to me that the logical result of the appellant's position would be to unfit him for any future employment of any kind, because every employment open to the appellant involves some risk of accident to the remaining eye, with the result of total blindness if an accident happens. Therefore (assuming that the question can be considered, in view of the finding of the arbitrator that partial incapacity has ceased), I am of opinion that the view expressed by Lord Justice Buckley in the case of *Eyre*[1] is right. I venture to think that the illustration given by Lord Justice Fletcher Moulton, who took the opposite view in that case, is not applicable to the question now under consideration. He took the case of a man so damaged by the results of an accident that exposure to cold would kill him in circumstances which, but for the accident, would have been harmless. That seems to me to be a case in which an employment might be unsuitable from a risk directly due to the accident. The man would be physically incapacitated by the accident from encountering a risk of an ordinary incident in every out-of-door occupation. On the other hand, what we are now considering is not a risk directly and certainly arising out of the accident, but a question of remote and hypothetical consequences, which may never occur and for which, if they do occur, a remedy will be available.

THE COURT answered the question of law in the affirmative.

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNESS, W.S.—Agents.

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HUGH CLARK, Appellant.—*Moncrieff, K.C.—A. M. Stuart.*
GEORGE TAYLOR & COMPANY, Respondents.—*Horne, K.C.—Fenton.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (1) (*b*)—*Where incapacity "results from the injury"—Natural tendency to obesity increased by enforced inactivity following injury.*

A miner, aged sixty, received injuries by an accident arising out of and in the course of his employment, which for a time totally incapacitated him for active work. Three years after the accident he had recovered from the direct effects of it, but had become unfit for any except sedentary work. This partial incapacity for work was due to age and obesity; and the obesity was the result of a natural tendency increased by the enforced inactivity following on the accident.

Held (*diss.* Lord Johnston) that the partial incapacity resulted from the accident.

1ST DIVISION. Sheriff of Ayr.

IN an application under the Workmen's Compensation Act, 1906, by George Taylor & Company to end or diminish as at 11th July 1913 weekly payments claimed by Hugh Clark during incapacity from work resulting from injuries sustained by an accident arising out of and in the course of his employment with them, the interim Sheriff-

[1] [1910] 1 K. B. 695.

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substitute (Valentine) ended the compensation, and at the request of Clark stated a case for appeal.

The case set forth that weekly payments were "claimed by the said Hugh Clark from the said George Taylor & Company, from the said 11th day of July 1913 during the total incapacity for work of the said Hugh Clark resulting from his bodily injuries, caused by his having been, on 7th October 1910, when he was employed by the said George Taylor & Company as a coal miner in Drumley Pit, Ayr Colliery, Annbank, accidentally crushed by a fall of coal at the coal face in said pit, the said accident having arisen out of and in the course of his said employment.

"The following facts were admitted, namely, that the said George Taylor & Company admitted liability to pay compensation in terms of said Act to the said Hugh Clark, and made an agreement with him to pay him compensation at the rate of 12s. 11d. weekly; that they paid him said sum per week from the date of said accident (7th October 1910) till the said 11th day of July 1913, when they ceased payment, alleging that the said Hugh Clark had then recovered from the effects of said injuries, and was no longer incapacitated for work in consequence thereof; that, on 14th August 1913, the law-agent of the said Hugh Clark sent a memorandum of an alleged agreement made by him with the said George Taylor & Company to the Sheriff-clerk of Ayrshire, in order that the memorandum might be recorded by the Sheriff-clerk in the special register of the Sheriff Court of Ayrshire at Ayr, and the Sheriff-clerk, on the last-mentioned date, sent a copy of the memorandum to the said George Taylor & Company in terms of paragraph 11 (1) of the Act of Sederunt dated 26th June 1907; that, on 22nd August 1913, the said George Taylor & Company sent notice to the Sheriff-clerk that they objected to the recording of the memorandum in the special register on the grounds set forth in their notice; that, on 29th August 1913, the said Hugh Clark lodged a minute craving the Court for a warrant to the Sheriff-clerk to record the said memorandum in the special register, a copy of which minute was duly served on the said George Taylor & Company, who, on 12th September thereafter, presented an application for review of the weekly payments by them to the said Hugh Clark as mentioned at the beginning of this stated case; that on the motion of parties the said proceedings for warrant to record the said memorandum were sisted till the issue of the said application for review of the said weekly payments; that in this application a remit, on the motion of parties, was, on 2nd October 1913, made to Dr A. Ernest Maylard, No. 12 Blythswood Square, Glasgow, to examine the said Hugh Clark, and to report to the Court—'(1) Whether the defender' (Hugh Clark) 'has recovered from the effects of the injury to his body on 7th October 1910? (2) Whether the defender' (Hugh Clark) 'is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages? (3) If not, whether he is fit for the work of a labourer on the surface, or for any other employment?' That, on 8th October 1913, Dr Maylard examined the said Hugh Clark, and reported to the Court as follows:—'In reply to the questions contained in the joint minute—(1) The defender' (Hugh Clark) 'has recovered from the direct effects of his injury, but not from the indirect. (The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity, have told against him, so that, from lack of continuity of activity, he has become less and

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less fit for labour of any kind.) (3) He is not fitted to undertake any work other than that of a more or less sedentary character; for example, a watchman'; that parties' agents were on 6th November 1913 heard on Dr Maylard's report, and on 11th November 1913 I issued an interlocutor and note stating that the exact meaning of Dr Maylard's first answer was not clear to my mind. From the report I could not determine whether Dr Maylard meant that Clark was now incapacitated for work other than that mentioned in the answer to question 3 by age and obesity, his obesity having increased on account of the fact that he had been doing no hard work during the last three years; or whether Dr Maylard meant something more than that, viz., that Clark had made so slow a recovery and had for so long a period been incapable of any active exertion that the natural vigour of his system had become impaired by his long illness and weakness—with the result that he was now incapable of work other than that mentioned in the answer to question 3; and that thereafter, in reply to a letter, dated 14th November 1913, from the law-agents of the said George Taylor & Company, written by joint consent of the parties, Dr Maylard, on 15th November 1913, wrote them as follows:—'In reply to your letter of the 14th inst. the correct interpretation of my statement is embraced in an affirmative answer to the Sheriff's first question—that the man's incapacity for work has arisen from the fact that he has been doing no hard work during the last three years.' It was admitted at the bar that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910.

"After hearing parties' agents on Dr Maylard's report and explanatory letter, I, on 2nd December 1913, in respect of the said answers of Dr Maylard and the admissions of the parties, found in fact that the said Hugh Clark on 8th October 1913 was still affected with partial incapacity for work; that his said partial incapacity for work was due to age and obesity; that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910; that the said Hugh Clark had a natural disposition to obesity; and that his obesity had increased between 7th October 1910 and 8th October 1913 owing to his having been doing no hard work; found that his partial incapacity on 8th October 1913 did not result from the injuries sustained by him on 7th October 1910; I therefore found that the incapacity for work of the said Hugh Clark, resulting from the injuries sustained by him on 7th October 1910, had ceased by 8th October 1913, and I accordingly ended the compensation payable by the said George Taylor & Company to him as at said date. I also found the said Hugh Clark liable to the said George Taylor & Company in £6, 6s. sterling of modified expenses."

The question of law for the opinion of the Court was:—"Was I entitled on the facts to find that the said Hugh Clark's incapacity for work, resulting from the bodily injuries sustained by him on the 7th day of October 1910, had ceased on the 8th day of October 1913, and to end, as at the last-mentioned date, the compensation payable to him by the said George Taylor & Company in respect of said injuries?"

The case was heard before the First Division (without Lord Mackenzie) on 7th and 19th February 1914.

Argued for the appellant;—Where, as here, there had been an admission by the employers that the workman had been incapacitated

by the accident, and an agreement to pay, and a payment of, compensation, the *onus* was on the employers to prove recovery[1]; unless they could produce a finding by a medical referee that the workman had completely recovered,[2] or unless the workman was claiming in respect of supervening incapacity.[3] Neither of these latter conditions was present here, the medical report that there had been recovery from the *direct* consequences of the accident being quite insufficient and irrelevant in an inquiry the scope of which was whether there had been recovery from *all* the consequences. The employers had failed to discharge this onus. The appellant, on the contrary, had fully proved his right to a continuation of compensation. It was not necessary that his incapacity should be the direct, or the immediate, or the natural, result of the accident; it was sufficient if it was *de facto* due in whole or in part to the accident, and not to some *nova causa interveniens* (*e.g.*, some act of commission or omission on his part[4]), and, so long as the chain of cause and effect between the accident and the incapacity was unbroken, the remoteness or improbability of the effect did not detract from his rights. This principle had been recognised and acted upon in a long series of decisions.[5] The chain here was quite complete, viz., injuries, total incapacity, enforced inactivity, obesity increased by enforced inactivity, partial incapacity due to obesity. The fact that the obesity was also partially due to a natural tendency, and also to age, was immaterial in respect of the fact that it would not have attained to the degree to which it had attained, and which prevented the appellant from working, had it not been for the accident. Accordingly the Sheriff-substitute's finding that incapacity resulting from the accident had ceased by 8th October 1913 was a *non sequitur* upon the findings in fact which preceded it, and his decision was not warranted. It was unnecessary, and indeed too late, to remit the case for further probation.

Argued for the respondents;—The onus was on the appellant to prove that his incapacity was the result of the accident, there being a distinct finding by the doctor that he had recovered from the direct effects of his injury.[6] It was only when compensation had been paid in terms of an award or a memorandum of agreement that the

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[1] M'Callum v. Quinn, 1909 S. C. 227, *per* Lord M'Laren, at p. 228, Lord Dundas, at p. 230.

[2] Darroll v. Glasgow Iron and Steel Co., Limited, 1913 S. C. 387, Lord Dundas, at p. 391.

[3] M'Ghee v. Summerlee Iron Co., Limited, 1911 S. C. 870.

[4] The Upper Forest and Worcester Steel and Tinplate Co. Limited, v. Grey, (1910) 3 Butterworth's W. C. C. 424; Holt v. Yates & Thom, (1909) 3 Butterworth's W. C. C. 75.

[5] Dunham v. Clare, [1902] 2 K. B. 292; Fenton v. Thorley & Co., Limited, [1903] A. C. 443, Lord Lindley, at pp. 454-5; Ystradowen Colliery Co., Limited, v. Griffiths, [1909] 2 K. B. 533, Cozens-Hardy, M.R., at p. 535; Clover, Clayton & Co., Limited, v. Hughes, [1910] A. C. 242, Lord Loreburn, L.C., at p. 245; Garnant Anthracite Collieries, Limited, v. Rees, (1912) 5 Butterworth's W. C. C. 694; Brown v. George Kent, Limited, [1913] 3 K. B. 624; Golder v. Caledonian Railway Co., (1902) 5 F. 123; Malone v. Cayzer, Irvine, & Co., 1908 S. C. 479; Jackson v. Scotstoun Estate Co., 1911 S. C. 564; Dunnigan v. Cavan & Lind, 1911 S. C. 579; Drylie v. Alloa Coal Co., Limited, 1913 S. C. 549, Lord Dundas, at p. 554; Euman v. Dalziel & Co., 1913 S. C. 246.

[6] Darroll v. Glasgow Iron and Steel Co., Limited, 1913 S. C. 387.

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onus of proof lay upon an employer seeking to have compensation diminished or ended.[1] The appellant had not discharged the onus that lay on him here. It was not enough for him to show that there would have been no incapacity but for the accident.[2] He had to show that *as matter of fact* the incapacity resulted from the injury.[3] In other words, he had to prove that the obesity which caused his incapacity resulted from the injury he had sustained,[4] and in discharging this onus he had to bear the burden of any obscurity in the medical report. This onus he had failed to discharge. He had not proved that the obesity was caused by the accident; on the contrary the Sheriff had found that two of the causes were old age and a natural tendency. These then were *novæ causæ intervenientes* which interfered with the chain of causation between the accident and the incapacity. It could not properly be said that the incapacity was caused by the accident, when the appellant might have been just as obese, and therefore just as incapable, if there had been no accident and if he had been out of employment either from choice or from the state of the labour market.[5] In that case he would have obtained no compensation, as the purpose of the Act was to give compensation for incapacity due to employment,[6] and not to make the employer an insurer of his employee against unemployment. If the appellant obtained compensation here it would be on the ground that he was too stout to obtain employment, which was not a recognised ground for compensation under the Act. The cases relied on by the appellant were all distinguishable, for they were cases where an accident had lowered the workman's vitality so that he became specially liable to disease, or where disease already existing had been stimulated by the effects of the accident. In all the cases there was some injury or weakness or disability still subsisting as a result of the accident. Here there was none. The workman had completely recovered, and his general condition of health was excellent except for the unfortunate tendency towards obesity, which at his age was not an unusual one. It was to be noted further that there was no finding in the case that abstention from hard work had been a necessary part of the treatment required by the appellant, and his condition might therefore be due to unnecessary idleness or abstention from exercise, for which he himself must be held responsible. Upon this point it might be necessary to remit the case to the Sheriff for further proof.[7]

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[1] Donaldson Brothers v. Cowan, 1909 S. C. 1292; Southhook Fire-clay Co., Limited, v. Laughland, 1908 S. C. 831.

[2] Dunnigan v. Cavan & Lind, 1911 S. C. 579, Lord President Dunedin, at p. 582; Euman v. Dalziel & Co., 1913 S. C. 246.

[3] Brown v. George Kent, Limited, [1913] 3 K. B. 624; M'Callum v. Quinn, 1909 S. C. 227, Lord Pearson, at pp. 229-30; Paton v. William Dixon, Limited, 1913 S. C. 1120.

[4] Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Sched. (1) (*b*).

[5] Holt v. Yates & Thom, 3 Butterworth's W. C. C. 75; Malone v. Cayzer, Irvine, & Co., 1908 S. C. 479; Huggins v. Guest, Keen & Nettlefolds, Limited, (1913) 6 Butterworth's W. C. C. 80; Ystradowen Colliery Co., Limited, v. Griffiths, [1909] 2 K. B. 533, Buckley, L.J., at p. 537.

[6] Workmen's Compensation Act, 1906, sec. 1.

[7] The Upper Forest and Worcester Steel and Tinplate Co., Limited, v. Grey, 3 Butterworth's W. C. C. 424; Simpson v. Byrne, (1913) 6 Butterworth's W. C. C. 455.

At advising on 6th March 1914,—

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LORD PRESIDENT.—This case raises a somewhat novel question under the Workmen's Compensation Act. The workman was the victim of an accident which befell him on 7th October 1910, arising out of and in the course of his employment. His employers admitted liability and paid him compensation down to the 11th July 1913, when they ceased payment on the ground that he had completely recovered from the effects of his accident, and they asked the arbitrator to end the compensation. On the motion of both parties, a remit was made to a medical gentleman to examine the workman and to report whether he had completely recovered from the effects of the accident. The questions put were, *inter alia:* (1) "Whether the defender (Hugh Clark) has recovered from the effects of the injury to his body on 7th October 1910?" and (2) "Whether the defender (Hugh Clark) is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages." To these questions the medical gentleman returned this answer: "The defender has recovered from the direct effects of his injury, but not from the indirect."

Now, it is well-settled law that if the indirect results of the accident still remain, compensation is still due, for complete capacity has not been restored. And, therefore, the medical gentleman's answer was in the negative to the two questions put to him, because I take it that it cannot now be gainsaid that, under this statute, to the language of section 1, which speaks of injury by accident caused to a workman, is to be added the language of the First Schedule, which speaks of incapacity which results from the injury. "The word 'results' there, of course, does not mean 'succeeds in point of time.' It means 'succeeds as a consequence of the injury,' and not, . . . as either the necessary, or the natural, or the probable consequence of the injury, but as the consequence in fact." These are the words of Lord Justice Buckley in the case of the *Ystradowen Colliery Company, Limited* v. *Griffiths*,[1] to which we were referred, and, in my judgment, they lay down the law with perfect precision.

The arbitrator, however, desired to have further information upon the question put, and a second remit was made to the medical gentleman, whose report was, briefly stated, as follows:—that the workman had a natural tendency to obesity which was checked by active work; that the result of his injury was to incapacitate him for active work; that the result of his enforced abstention from active work was to increase his obesity with the result that, when the immediate effect of the accident had come to an end, he was unfit to resume his former employment as a miner working at the face, and was only fit for such sedentary employment as that of a watchman.

Now, no doubt, if the workman had to show that his incapacity to return to his former occupation was the direct and immediate result of the accident which befell him, he would have a very difficult case; but the law throws upon him no such obligation. All that he has to show is that his incapacity is due *de facto* to the accident which happened, and

[1] [1909] 2 K. B. 533, at p. 537.

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not to some new cause intervening; and however remote, however indirect, however improbable, however unnatural, the result may be, nevertheless, if it is the result of the accident which befell him, he is entitled to have compensation. That appears to me to be the law as laid down in the case of *Dunham* v. *Clare*,[1] by the Master of the Rolls, where he says, at p. 296, if incapacity "in fact resulted from the injury, it is not relevant to say that 'incapacity' was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences. . . . The only question to be considered is, did . . . incapacity in fact result from the injury."

Now, here the chain of causation appears to me to be complete and unbroken. The accident occurs on the 7th October 1910. The direct consequence is that the man is incapacitated from active employment. The consequence of that is that his natural tendency to obesity is accelerated and increased. The natural consequence of that is that he is unfit to go down the mine and toil at the working face, that he is only capable of being employed at other and less active work. That was substantially the chain of causation in the case of *Golder* v. *Caledonian Railway Company*,[2] where the workman was injured about the head and back and suffered shock, the shock lowered his system, his lowered system rendered him an easy victim to a disease which was already upon him—which would, the Court found, have carried him off sooner or later. The effect of the lowering of his system due to the accident was to render him a rapid and easy victim to this disease, and it was held that his death was the result of his injuries.

The same principle, it appears to me, was laid down by Lord President Dunedin in the case of *Dunnigan* v. *Cavan & Lind*,[3] where he says, "the true question on the merits here is whether the man died from the accident or from a new cause which was introduced, viz., his own foolish action—to say nothing more—in persisting in leaving the hospital and going to his own house when he was suffering from acute pneumonia." The question, therefore, always is—has there been a fresh cause intervening or is the man's incapacity the result—it may be remote and indirect—of the injuries which he formerly suffered. In this case the facts appear to me to be substantially identical with the facts which were presented in the case of *Golder*.[2] For the medical gentleman here reports that the man's incapacity for work "has arisen from the fact that he has been doing no hard work during the last three years." And the case adds:—"It was admitted at the bar that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910."

With these findings in fact before him, with a chain of causation which I repeat was complete and unbroken, the arbitrator "found that the inca-

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[1] [1902] 2 K. B. 292. [2] 5 F. 123.
[3] 1911 S. C. 579, at p. 582.

pacity for work of the said Hugh Clark, resulting from the injuries sustained by him on 7th October 1910, had ceased by 8th October 1913." That appears to me to be a distinct *non sequitur* from the arbitrator's own finding to the effect that the man had been incapacitated for work by the accident, that he had consequently been doing no hard work since 7th October, that he had a natural disposition to obesity, and that his obesity had increased owing to his having been doing no hard work.

The findings of the arbitrator, therefore, appear to me to state clearly a chain of causation, complete and unbroken, to negative completely the intervention of a *nova causa*, and therefore to lead to a conclusion exactly the opposite of that at which he has arrived. I am, therefore, for answering the question which he puts to us in the negative.

LORD JOHNSTON.—This is a most difficult case to have to decide as stated by the Sheriff, and I should have felt more satisfaction in deciding it had it been sent back to him to be re-stated. Clark, a miner, who is the appellant, was injured on 7th October 1910 by a fall of coal. His employers, George Taylor & Company, continued to pay him compensation down to 11th July 1913, when they refused to go on with the payments, on the ground that Clark had completely recovered from the effects of the injury. He has recovered from the effects of the injury. But he cannot return to work at the face, not by reason of any direct effects of the accident, but by reason of age (63) and obesity, which has increased during the years of inaction which have elapsed since the accident.

The question of his employers' continued liability for statutory compensation to Clark came up on an application to record a memorandum, and a counter application to review. The procedure has been unusual. There has been no proof, but by consent a remit to a medical referee, and I assume that the parties are bound to accept what the referee says as in lieu of proof. But unfortunately the referee's report leaves us without explanation as to essential facts, some of which were not within his province, as for instance at what date Clark had recovered from his injury, what was his physical condition before the accident, how far it was necessary that he should abstain from exertion before and after recovery, and others. The referee answers three questions, and he afterwards explains his answers in reply to a letter. Then there is an admission by the parties, and then the Sheriff gives his findings in fact and his conclusion. The greatest difficulty is created by the so-called admission by the parties, which to me is not intelligible. It was admitted that Clark had been incapacitated for work for a time by the accident, and that he had "*consequently*" been doing no hard work since the accident. As we are not told *what* time, or anything else about the man, the scope and effect of the admission is to seek. I could understand the sequence, but the consequence needs explanation.

The finding of the Sheriff was that the incapacity of Clark for work resulting from the injuries sustained on 7th October 1910 had ceased by 8th October 1913, and he accordingly ended the compensation. The question is, Was he entitled on the facts to arrive at that finding? I think that he was and that we have no right to disturb his award.

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In a case of this kind there are always two questions—1st, did the evidence justify the Sheriff's findings in fact? But it is not for this Court to review by way of appeal the Sheriff's findings in fact. All that we can ask ourselves is had the Sheriff evidence before him on which he could reasonably find in fact as he did? 2nd, Did the facts found by the Sheriff justify his conclusion in law—in other words was the Sheriff here, on the facts as stated by him, justified in finding that incapacity had ceased and ending compensation? That is a question for this Court.

The Sheriff's findings in fact, altering somewhat their sequence, were—1. Clark had been incapacitated for a time by the accident. 2. Consequently he had been doing no hard work since the date of the accident, 7th October 1910. 3. Clark had a natural disposition to obesity. 4. His obesity had increased between 7th October 1910 and 8th October 1913. 5. This increase was owing to his having been doing no hard work during that period. 6. On 8th October 1913 he was still partially incapable for work. 7. This partial incapacity was due to his advanced age and to his obesity at the date last mentioned. 8. It did not result from the injuries sustained by him on 7th October 1910.

Subject to a disturbing factor to which I shall afterwards refer, I do not think that any of these findings in fact are questionable or can be altered by us. To entitle us to do so, we must be able to say (7) that this partial incapacity was not accounted for by age and obesity, but (8) that it did result from the injuries received on 7th October 1910,—and that so clearly that we are able to say that the Sheriff has gone against evidence, or else to say that the Sheriff has misdirected himself in law and has thus drawn a wrong conclusion from the facts. I do not think that there is enough to justify us in doing so.

The Sheriff was told by the doctor that Clark had recovered from the direct effects of the injury, but not from the indirect, with the added explanation:—"The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity, have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind." This is, I think, quite clear, but the Sheriff was not quite satisfied that he understood what the doctor meant by the distinction "direct" and "indirect." He asked for information, and in reply the doctor affirmed the proposition that Clark was now incapacitated for anything except light work by age and obesity, his obesity having increased from the fact that he had been doing no hard work during the last three years; and negatived the proposition that Clark had made so slow a recovery, and had for so long a period been incapable of any active exertion, that the natural vigour of his system had become impaired by his long illness and weakness, with the result that he was now incapable of any but light work. On that assumption I think that the Sheriff had enough before him to justify his conclusions in fact, or it may be in fact and law, Nos. 7 and 8 as I have stated them. It is immaterial whether we would have come to the same conclusion, though personally I should have done so.

The only difficulty arises from the very unsatisfactory finding to which I have already alluded, based on an equally unsatisfactory admission of

the parties, viz., that Clark had been incapacitated *for a time* by the accident, and had *consequently* been doing no hard work since 7th October 1910. The one thing is not necessarily or logically a consequence, though it may be a sequence, of the other. But, though I should have preferred to know definitely what is the meaning of the admission and of the finding of the Sheriff based upon it, I do not think that the certain vagueness, which this defect leaves, affects the conclusion of the Sheriff, when the statement of the medical referee is regarded.

I do not quite know whether your Lordship considers that the Sheriff has merely drawn a wrong conclusion, and one which could not reasonably have been drawn from the facts, or whether you think that misapprehending the law he has equally misconstrued the facts.

Under the combined operation of the Act and the First Schedule, in order to support a claim for compensation, incapacity for work must result from injury occasioned by accident arising out of and in the course of the employment. The Sheriff thinks that the partial incapacity here results not from the injury occasioned by the accident, but from age and increased obesity. The opposite view is that there is an unbroken chain of causation. The accident caused the injury, the injury caused the abstinence from work, the abstinence from work caused the increase of obesity, and the increased obesity the partial incapacity. It has sometimes been said that there is grave danger, in administering this Act, lest each judgment, advancing a little on the last, should carry matters to a point which the statute itself never intended. The term "chain of causation" is a neat and expressive phrase. But I think that its indiscriminate use is not unlikely to aid in the onward course which has been deprecated. I think its use here would be indiscriminate, and it can hardly be denied that its application leads to an extravagant result. It is not even suggested that the appellant is suffering from any definite disease in which obesity plays a part, such as fatty degeneration of the heart, &c. He has merely a natural tendency to lay on adipose tissue if he does nothing to keep himself in condition, and he is now sixty-three years of age. If we are to regard the chain of causation we must, I think, regard it strictly, and see that we do not have the legitimate strain crossed by other strains of causation. Here we have the other causes—advancing years and a natural tendency to obesity. The medical referee, though abstaining from the language of logic, is equally accurate, and more easily followed, where he says that Clark had recovered from the direct but not from the indirect effects of the injury. It is only for direct effects, or for effects in the direct line of causation, that I think the employer is liable under the Act.

The phrase the chain of causation was first, I believe, used in *Dunham* v. *Clare*,[1] where it was found that death may be the result of the injury, even though in fact it may be neither the natural nor the probable consequence of it. But consider the circumstances, and one at once sees how close and direct even the unexpected consequence was there. A man had received an injury to his toe, and erysipilas in the wound might have fol-

[1] [1902] 2 K. B. 292.

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lowed immediately, or at least within a week of the injury. It did not do so, but it supervened about a fortnight after, in which case, according to the best opinion, it must have been related, not to the original wound, but to a reopening of the wound, probably caused by the man walking to and from the hospital to get his wound dressed. The present case is at least very wide of these circumstances. Again, in *Ystradowen Colliery Company*,[1] we have a still more instructive case. Disease ensued upon the accident, though not directly related to the injury, as thus:—A workman was severely injured by a fall of the roof; he had to drag himself home a considerable distance on an inclement evening in his suffering and weakened condition; he caught a severe cold which developed into bronchitis, and this produced chronic asthma, from which he had not before suffered; and he became thereby incapacitated for work. The essential question whether the incapacity was in fact caused by the accident was presented in this form—Was the man's present condition the result of the accident in the sense that it was occasioned by his debilitated condition immediately after the accident, and so occasioned by the accident? And it was answered in the affirmative. There is no indication in the statement of the case of anything so remote from the accident and the injury as we have here.

There have also been some cases in Scotland more or less bearing on the point. In *Malone*,[2] where there was supervening insanity and suicide, the Court merely held that the case was not so clearly irrelevant as to exclude inquiry. In *Euman's* case,[3] a fall resulted in direct and painful injury to the ankle, but also in general shock to the system. The injury to the ankle improved, but the patient continued to suffer and was in a low state. He was suddenly seized with acute internal pain, and died of appendicitis. The Court held merely that there was evidence to support an award. There was continuous suffering, and no one could competently dissociate the final result from the general shock from the accident, though it had nothing to do with the patent external injury. In the case of *Dunnigan*[4] again, we get a distinction which exactly covers this case. It was there laid down that the Sheriff was not entitled to ask himself whether, *but for* the accident, death or incapacity would not have resulted, but only whether, *as matter of fact*, they did result from the accident. The present case is only one where at best it may be said that *but for* the accident incapacity would not have occurred when it did, and not one in which it can be said, *as matter of fact*, that it did result from the accident.

For these reasons I do not think that there is any ground for disturbing the Sheriff's award.

Lord Skerrington.—I am of opinion that upon the facts which the arbiter has held to be established he ought to have found that the appellant's present partial incapacity resulted from the injuries sustained by him on 7th October 1910. The chain of causation is unbroken, and the links are as follows:—(1) The injuries above referred to; (2) Total in-

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[1] [1909] 2 K. B. 533.
[2] 1908 S. C. 479.
[3] 1913 S. C. 246.
[4] 1911 S. C. 579.

capacity physically resulting from these injuries and continuing for a period not specified by the arbiter; (3) Enforced idleness during said period; (4) Obesity increasing during this period caused by such idleness and by a natural disposition to obesity jointly, and (5) Permanent incapacity for active work caused by such obesity and by old age jointly, and commencing at or prior to the termination of said period. It is immaterial that two causes for which the respondents are not responsible contributed to the final result, viz., a natural tendency to obesity and old age. The arbiter has not found that any new cause intervened subsequent to the accident to which, in his opinion, the appellant's present condition of partial incapacity ought to be attributed—such as the appellant's failure to take reasonable means to counteract his tendency to obesity, or his having aggravated the tendency by following bad medical advice, or his having reached an age at which active work would have been impossible even if he had not been obese. The sole ground, as I understand, upon which the arbitrator has proceeded is the fact that the obesity was not caused by any physiological or pathological condition of the appellant's body caused by the original injuries, but was caused by a fact of a different order, viz., the appellant's enforced idleness for a prolonged period, during which his natural tendency to obesity operated so as to produce permanent incapacity for active work. This distinction is, in my view of the statute, irrelevant, though it might have been most material if the inquiry had been whether the obesity was a natural result of the injuries or whether the injuries were the proximate cause of the obesity. I am of opinion that the question of law should be answered in the negative.

THE COURT answered the question of law in the negative and remitted the case to the Sheriff-substitute to proceed as accords, and to deal with the question of expenses of new.

MACPHERSON & MACKAY, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

JOHN FOSTER (James Marshall's Trustee), First Party.—*D. P. Fleming.*
MRS JEANIE RUSSELL OR CAMPBELL (James Marshall Campbell's Executrix-Nominate and General Disponee), Second Party.—*D. P. Fleming.*
HUGH CAMPBELL AND OTHERS, Third and Fourth Parties.—*Macquisten.*

No. 51.

Succession—Vesting—Conditional institution—Destination to A "and her heirs and successors"—Destination to A "and her heirs and representatives."

A testator by his trust-disposition and settlement conveyed his whole estate to trustees, and directed them to pay to his wife, during her lifetime, the whole income thereof, and on her death, *inter alia*, (1) to convey a certain heritable subject to his daughter "and her heirs and successors whomsoever," and (2) to pay to the daughter "and her heirs and representatives" a sum of £300. The daughter survived the testator but predeceased the liferentrix.

Held that both bequests vested in the daughter *a morte testatoris*.

Bowman v. *Bowman*, (1899) 1 F. (H. L.) 69, *commented on* and *distinguished*.

Mar. 10, 1914.

Marshall's Trustee v. Campbell.

2D DIVISION.

ON 15th March 1913 a special case was presented for the determination of questions which had arisen with regard to the construction of the trust-disposition and settlement of the late James Marshall.

By his trust-disposition and settlement James Marshall conveyed his estate, heritable and moveable, to trustees for certain purposes. By the second of these purposes he directed the trustees to make up a title to the whole estate and pay his wife during her lifetime the income thereof. The third and fourth purposes were in the following terms:—"Thirdly, that my said trustees, as soon as convenient after the death of my said wife, shall give, assign, dispone, and convey the subjects and others aftermentioned to the following parties, viz.:— . . . To my daughter, Catherine Marshall or Campbell, wife of Duncan Campbell, railway inspector, Bathgate, and her heirs and successors whomsoever, All and Whole that dwelling-house, stables, and piece of garden ground therewith connected, belonging to me, situated in Mid Street, Bathgate. . . . Fourthly, that my said trustees shall, as soon as convenient after the death of my said wife, sell, dispose of, and convert the whole of the remainder of my heritable and moveable means and estate . . . and shall out of the proceeds thereof give and pay the following legacies, viz.:— . . . To my said daughter, Catherine Marshall or Campbell, and her heirs and representatives, £300 sterling. . . ." By the fifth purpose the testator directed his trustees, after paying the foresaid legacies, to "divide the residue or remainder of my moveable means and estate, if any, . . . equally between my said daughters Catherine Marshall or Campbell and Isabella Marshall or Foster."

James Marshall died on 1st October 1893 survived by his wife and his daughter, Mrs Campbell. His wife died on 15th March 1912. Mrs Campbell died intestate on 18th July 1906 survived by five children, of whom the eldest son died on 8th October 1910 survived by a widow, Mrs Jeanie Russell or Campbell, but without issue, and leaving a will by which he bequeathed his whole estate to his widow and appointed her his executrix.

The *first party* to the case was the surviving trustee under James Marshall's trust-disposition and settlement; the *second party* was Mrs Jeanie Russell or Campbell, as her deceased husband's executrix and general disponee; and the *third* and *fourth parties* were the surviving children of the testator's daughter, Mrs Campbell.

The questions of law for the opinion and judgment of the Court were:—"(1) Did the legacy of the dwelling-house and others in Mid Street, Bathgate, bequeathed to the said Catherine Marshall or Campbell and her heirs and successors vest (*a*) *a morte testatoris;* or (*b*) at the date of her death; or (*c*) at the date of the death of the liferentrix of testator's estate? (2) Did the legacy of £300 bequeathed to the said Catherine Marshall or Campbell and her heirs and representatives vest (*a*) *a morte testatoris;* or (*b*) at the date of her death; or (*c*) at the date of the death of the liferentrix of testator's estate?"

The case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Salvesen, and Lord Anderson) on 27th February 1914.

Argued for the second party;—(1) Both bequests vested *a morte testatoris* in the testator's daughter, Mrs Campbell. The law favoured vesting at the earliest possible moment, and the mere

interposition of a liferent did not postpone vesting.[1] Where there was a destination-over vesting was postponed, because otherwise it would not be possible to give effect to such a destination. But the words "A and his heirs" did not constitute a destination-over in the proper sense of the term. A phrase of this kind did not import a conditional institution of A's heirs so as to suspend vesting in him[2]; it merely expressed what the law implied, and the heirs only found a place in the destination through the relation which they bore to A. The addition of the words "and her heirs and successors whomsoever" in the one case, and of the words "and her heirs and representatives" in the other merely indicated the absolute right which the legatee had in the fee of the legacies, and were in no way inconsistent with vesting at the testator's death. In the case of *Bowman* v. *Bowman*[3] the destination was to a person named "or" his heirs, and the word "or" was held to be equivalent to "whom failing." In the present case the destination to the daughter's heirs was introduced not by the word "or," but by the word "and"; and "and" was not equivalent to "whom failing."[4] Moreover, the dicta in the case of *Bowman*[5] did not express disapproval of the principle of the decision in *Hay's Trustees* v. *Hay*.[6] What they expressed disapproval of was a dictum of Lord M'Laren in that case.[7] There was nothing in the terms of Mr Marshall's will to suggest that the right constituted in favour of the daughter "and her heirs" was an alternative right of either the daughter or her heirs to receive the legacies.[8] On the contrary, the use of the term "successors," and still more the use of the term "representatives," in conjunction with the term "heirs," made it plain that these rights were not alternative. A successor or representative could only take after or in place of one who had himself already taken a right.[9] (2) Alternatively the pecuniary legacy vested at the date of Mrs Campbell's death in her five children then alive as her "heirs and representatives," and the legacy of the heritable subjects vested at that date in the second party's husband as his mother's heir.[10]

Argued for the third and fourth parties;—It was clear from the terms of the settlement that vesting was postponed until the death of the liferentrix. There was in this case a destination-over in favour of the daughter's heirs who took, not through the daughter, but in their own right. The words "and her heirs and successors whomsoever" and "and her heirs and representatives" were not mere surplusage.[11] These words were equivalent to "and failing the daughter

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[1] Carleton v. Thomson, (1867) 5 Macph. (H. L.) 151.

[2] Thompson's Trustees v. Jamieson, (1900) 2 F. 470.

[3] (1898) 25 R. 811, *aff.* 1 F. (H. L.) 69.

[4] Thompson's Trustees v. Jamieson, 2 F. 470, *per* Lord Low, at pp. 495 and 496; Wright v. Fraser, (1843) 6 D. 78, *per* Lord Justice-Clerk Hope, at p. 83.

[5] 1 F. (H. L.) 69, see opinions of Lord Watson and Lord Davey.

[6] (1890) 17 R. 961.

[7] Bowman v. Bowman, 1 F. (H. L.) 69, Lord Davey, at p. 76.

[8] Bowman v. Bowman, 1 F. (H. L.) 69, Lord Watson, at p. 73.

[9] Reference was made to Bell's Dictionary *sub voce* "Succession," the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 4, and to Manson v. Hutcheon, (1874) 1 R. 371, *per* Lord President Inglis.

[10] Gardner v. Hamblin, (1900) 2 F. 679.

[11] Clark's Executors v. Paterson, (1851) 14 D. 141, *per* Lord President Boyle, at p. 145; Bell v. Cheape, (1845) 7 D. 614.

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by her decease during the currency of the liferent to her heirs and successors whomsoever" in the one case, and similarly to "her heirs and representatives" in the other. A destination-over in favour of the heirs of an instituted child had the same effect as a destination-over in favour of a stranger *nominatim*, and was suspensive of vesting in the child.[1] The principle of the decision in *Hay's Trustees*[2] was disapproved by Lord Watson and Lord Davey in *Bowman*,[3] and their opinions were followed in the case of *Forrest's Trustees* v. *Mitchell's Trustees*.[4]

At advising on 10th March 1914,—

LORD SALVESEN.—The trust-disposition of the late James Marshall, which we are called upon to construe, contains provisions of the simplest kind. The testator left his estate to trustees whom he directed to pay his widow a liferent of his whole estate, and as soon as convenient after her death to convey to his daughter Catherine "and her heirs and successors whomsoever" a dwelling-house and offices in Bathgate. By the fourth purpose he also directed his trustees as soon as convenient after his wife's death to sell his heritable and moveable estate so far as not specially destined, and to pay his said daughter Catherine "and her heirs and representatives" £300 sterling. Catherine survived the testator, but predeceased the liferentrix. The point of law for our decision is, did these legacies vest *a morte testatoris*, or was vesting postponed until the death of the liferentrix?

It seems to be settled by authority that vesting is not postponed merely by the interposition of a trust for the purpose of securing a liferent. If, therefore, the two legacies in favour of Catherine had been expressed as being payable to her only, it was conceded that they would *prima facie* have vested in her *a morte testatoris*. On the other hand it is equally clear that, if there had been a proper substitution in the destination of the fee, such substitution would be presumed to have been made in view of the contingency of Catherine predeceasing the liferentrix; in which case the fee would not vest in Catherine unless and until she survived the liferentrix.

The third and fourth parties maintained that the words added after Catherine's name, "and her heirs and successors" in the one case, and the similar words "and her heirs and representatives" in the other are to be read as an institution of Catherine's heirs to the legacies primarily destined to her conditional upon her predecease of the liferentrix; in other words, as being equivalent to "whom failing by her predecease of the liferentrix, to her heirs and representatives." I am unable so to construe them. In the case of *Hay's Trustees* v. *Hay*,[2] where the direction to the trustees was, on the expiration of a liferent, to convey a certain heritable subject to "A B and his heirs," the First Division held that the fee vested in A B *a morte testatoris*, and that the heirs were introduced into the

[1] Bowman v. Bowman, 1 F. (H. L.) 69, see opinions of Lord Watson and Lord Davey.

[2] 17 R. 961. [3] 1 F. (H. L.) 69.

[4] (1904) 6 F. 616. *Cf.* Cairns' Trustees v. Cairns, 1907 S. C. 117.

destination only in the event of the legatee not surviving the testator. The words here are at least as favourable to vesting *a morte* as those used by the testator in *Hay's* case.[1] Indeed, my own opinion, apart from authority altogether, would have been that they were introduced by the conveyancer simply as words of style indicative of the testator's intention to pass the full right of property to the legatee, so that it would either pass to her heirs if she died intestate, or according to her directions whether testamentary or *inter vivos*. Similar words are constantly introduced into bonds for repayment of money or dispositions of heritage. They express nothing more than the law implies; and it appears to me not necessary to attach any peculiar weight to them simply because they occur in a testamentary deed. No doubt they would have the effect of preventing the lapse of the legacy in the event of the legatee dying before the testator; but that can scarcely have been within his contemplation, as the gift is obviously made on the assumption that the testator will be survived by the objects of his bounty. It appears to me difficult to assume that the testator should prefer the unknown heirs of his daughter to herself, simply because she happened to predecease the liferentrix; or that if he did so intend he should not have made his meaning quite plain. The presumption is always in favour of vesting as at the death of the testator unless language is used which points to a contrary intention.

It was strongly argued on behalf of the third parties that the case of *Hay's Trustees*[1] was no longer authoritative in view of the opinions of Lord Watson and Lord Davey in the case of *Bowman* v. *Bowman's Trustees*.[2] I do not read these opinions, even if they had been concurred in by the other members of the tribunal, as in any way overriding *Hay's Trustees*,[1] but merely as commenting adversely on one of the reasons assigned by Lord M'Laren for his judgment. The destination, moreover, in *Bowman's* case[2] was quite differently expressed from the one we have here, the gift being given to A B "or his heirs" and not, as here, to A B "and her heirs and successors." Lord Watson speaks of the destination in *Bowman's* case[2] giving an alternative right to the heirs to receive payment at the death of the liferentrix—language which is quite inapplicable to the destination as expressed here. Moreover, in the subsequent case of *Thompson's Trustees*[3] a majority of the whole Court held that a destination to A B "and his heirs or assignees" did not import a proper conditional institution of A B's heirs suspensive of vesting in him, and that the fee vested in him *a morte testatoris*; and the minority of the Court dissented upon grounds applicable only to the particular settlement there under construction. Lord M'Laren, who was in the minority, can scarcely be supposed to have disapproved of the judgment in *Hay's Trustees*[1] in which he gave the leading opinion; and there is no suggestion in any of the opinions that that case was no longer to be regarded as authoritative. On the contrary, Lord Moncreiff in dealing with this very matter says: "Lord Watson and Lord Davey take exception to the statement of the law in *Hay's Trustees*,[1] which was adopted by the Court and has been followed in subsequent

[1] 17 R. 961. [2] 1 F. (H. L.) 69. [3] 2 F. 470.

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cases. Perhaps the law was somewhat too broadly stated in that case; but, in view of a series of decided cases in this Court, which at present it is unnecessary to cite, I am not prepared to hold, until it is directly decided, that a destination to 'A and his heirs or assignees' is the same thing or should receive the same effect as a destination to 'A, whom failing to B.'" I agree with that opinion and with the reasoning of the Judges who constituted the majority of the Court in *Thompson's* case[1]; and I accordingly move your Lordships that we should answer the first branch of the first and second questions in the affirmative.

LORD ANDERSON.—I agree. The question to be determined in this case depends, in the main, on a consideration of the terms of the third and fourth purposes of the trust-disposition of the late James Marshall.

The second party presented an alternative argument as to the period of vesting, maintaining that there was either vesting in Mrs Campbell *a morte testatoris*, or that there was vesting in her children at the date of her death, which occurred at a date intermediate between the death of the truster and the death of the liferentrix. I was not impressed with the argument for vesting at an intermediate date. A truster may, it is true, fix any date he may choose as that of vesting, but, where an unusual or unwonted date is suggested, there must be clear indication of his intention to fix that date. In a case like the present, where a liferent has been bestowed, it is practically unprecedented to find the period of vesting at any other date than that of the death of the testator or of the liferenter. I am unable to hold that the truster meant to fix the date of his daughter's death as the period at which what he had bequeathed to her should vest in her children. The only case to which we were referred in which the Court had found that vesting had taken place at an intermediate date was that of *Gardner*.[2] That case presented these special features—(1) the deed in question was a declaration of trust addressed by two sisters to their three brothers regarding certain bank stock, to the purchase price of which each of the five had contributed an equal part; (2) a Court of three Judges held that the deed fell to be construed as if it were a joint settlement of the fund; and (3) a majority of the Court held that the fee had vested, on the death of the second brother, in the last surviving brother, subject to defeasance in the event of the sisters having children. Both sisters ultimately survived all three brothers, and died without issue, and the representatives of the last surviving brother, by the judgment of the majority of the Court, took the whole fund. That decision, accordingly, does not seem to me to impinge upon the proposition I stated, to wit, that it must be clearly indicated, by the language used, that the testator meant to fix an unusual period of vesting, and, in the present case, I am unable to reach the conclusion that he has done so.

I have formed the opinion that the truster intended vesting to take place at his death. To begin with, there is a presumption that vesting occurs at the earliest possible date, that is, in general, *a morte testatoris*.

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[1] 2 F. 470. [2] 2 F. 679.

Further, the presumption in favour of vesting *a morte* is unusually strong in the case of provisions to the truster's immediate children—*Jackson* v. *M'Millan*.[1] This presumption is not affected by the fact that payment has been postponed to a time certain, as to the expiry of a liferent; nor does it weaken the presumption that the machinery of a trust has been set up—*Carleton* v. *Thomson*.[2] On the other hand, where there is contingency both in time and event in connection with a bequest, the presumption is that there is no right in the beneficiary unless and until the condition has been purified. A clause of survivorship is, in general, referable to the period of division, and a proper destination-over is, in substance, equivalent to a clause of survivorship. It is maintained by the third and fourth parties that, in the present case, there is a proper destination-over, the effect of which is to postpone vesting. The decision, accordingly, really turns upon the effect which is to be given to the phrases in the third and fourth purposes "and her heirs and successors whomsoever" and "and her heirs and representatives."

Prior to the decision of the House of Lords in the case of *Bowman's Trustees*,[3] it was well settled that a destination-over, in order to be effectual to postpone vesting, must be to a person named or described independently of the institute.[4] In *Bowman's Trustees*[3] in the House of Lords there are dicta in the opinions of Lord Watson and Lord Davey to the effect that a destination-over in favour of the heirs of an instituted child should have the same effect as a destination-over in favour of a stranger. The question always remains, however, whether the clause under consideration has effected a proper destination-over. In *Bowman's Trustees*[3] the phrase used was "or to their respective heirs," the conjunction "or" being a proper equivalent for the words "whom failing," which are ordinarily employed in a proper destination-over. In the present case the conjunction used is "and," which is not synonymous with "whom failing." It seems to me that the law laid down in *Bowman's Trustees*[3] cannot be held as impugning what has been so often decided in these Courts—that a gift to A and his heirs is nothing more than a gift to A. The law, in my judgment, still remains as stated by Lord Justice-Clerk Moncreiff in the case of *Jackson*,[1] where he says at p. 630: "But a legacy to A and his heirs, or A and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta*; and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee, if he predecease the period of division, may be regarded more

[1] (1876) 3 R. 627.

[2] (1865) 3 Macph. 514, and (1867) 5 Macph. (H. L.) 151, *per* Lord Colonsay, at p. 154.

[3] 25 R. 811 and 1 F. (H. L.) 69.

[4] Hay's Trustees v. Hay, 17 R. 961; Ross's Trustees v. Ross, (1897) 25 R. 65; Mellis v. Mellis's Trustee, (1898) 25 R. 720; Bowman's Trustees v. Bowman, 25 R. 811 and 1 F. (H. L.) 69.

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Ld. Anderson.

as the natural result of the legacy having vested than as an indication of the reverse." I find that this passage was quoted and approved in *Ross' Trustees*.[1] Lord M'Laren's opinion in *Hay's Trustees*[2] is to the same effect. I do not regard the terms "successors" and "representatives" in conjunction with "heirs" as having any other effect than that of strengthening the considerations in favour of vesting *a morte*. The term "heirs" has reference to intestate succession, and the other terms were probably introduced to include testate succession. If this be so, vesting *a morte* is presupposed, as otherwise there could be no proper testamentary disposition by the institute of the property bequeathed by the trust-disposition.

I stated, at the outset, that the question for decision was mainly dependent on a consideration of the third and fourth purposes of the trust-disposition; but, in endeavouring to ascertain the truster's intention, his deed as a whole should be looked at. An examination of the fifth clause seems to confirm and corroborate the conclusion as to the date of vesting which I have expressed. By that clause the residue is bequeathed to the two daughters of the truster *nominatim*, and without any reference to their heirs. This clause clearly imports vesting *a morte*, and I cannot think the truster intended to fix a different period of vesting for the other bequests which he made in favour of his daughters.

I therefore agree that the questions should be answered as suggested by your Lordship.

Lord Justice-Clerk.—I have had an opportunity of reading the opinions of Lord Salvesen and Lord Anderson, with both of which I concur.

The Court answered heads (*a*) of each of the two questions of law in the affirmative.

John Sturrock, Solicitor—Purves & Simpson, S.S.C.—Agents.

No. 52.

Mar. 11, 1914.

Ross.

David Ross, Applicant.—*A. Crawford.*

Poor's-Roll—Admission—Poverty—C. A. S., 1913, *A*, x. 6.

In an application for admission to the poor's-roll the Court will not *ex proprio motu* consider the question whether the applicant's means entitle him to the benefit of the roll. In order to raise the question objection must be taken by the adverse party when the remit to the reporters on *probabilis causa* is made.

2d Division.

David Ross, being desirous of admission to the poor's-roll to enable him to bring an action in the Court of Session against his wife, presented a note to the Court for a remit to the reporters on *probabilis causa litigandi* in terms of the Codifying Act of Sederunt, 1913, A, x. 6.* The certificate of poverty which was lodged in terms of

[1] 25 R. 65, at pp. 72 and 73. [2] 17 R. 961.

* The C. A. S., 1913, provides:—"A, x. 6 . . . The party's agent shall box a note to the Lord President of the Division . . . craving a remit to the reporters on the *probabilis causa*; whereupon the Court may,

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the Codifying Act of Sederunt, A, x. 5, stated that the applicant's earnings were 31s. per week.

On 21st January 1914, no appearance being made for his wife, the Court remitted to the reporters to report whether the applicant had a *probabilis causa litigandi*.

On 24th February 1914 the reporters on *probabilis causa* reported that the applicant had a probable cause; and appended the following note to their report:—"*Note.*—Had a special remit been made in this case, the reporters would have refused the application on the ground that the applicant's circumstances are not such as to entitle him to the benefits of the poor's-roll."

On 11th March 1914, in the Single Bills of the Second Division, counsel for the applicant moved for admission to the poor's-roll, and referred to C. A. S., 1913, A, x. 6, already cited, and also to A. S., 21st December 1842, section 5, and A. S., 16th June 1819, section 6.

Lord Justice-Clerk.—In this case the Court had nothing before them when they made the remit except the application for admission to the poor's-roll, in which the applicant asked that his case be remitted to the reporters on *probabilis causa*. Now the matter which the reporters had to inquire into, and on which alone they had to report, was the question of probable cause. I do not blame them at all—if they came to the conclusion which is expressed in this note—for calling our attention to the circumstances of the applicant, in case the Court might see fit to hold in law that he could not get on the poor's-roll because he was not qualified for it. But I do not see how we can interfere in that matter.

When a case comes up in which the applicant for the poor's-roll asks a remit to the *probabilis causa* reporters to see whether he has a good case *prima facie* for litigating, and the adverse party does not appear and object to the application on the ground that the applicant's circumstances do not entitle him to admission to the roll, the sole question remitted for the reporters' consideration is, Is there a *probabilis causa?* and, when the report comes back to us stating that there is a *probabilis causa*—the adverse party having taken no steps to have it ascertained whether the certificate of poverty is exact or not, or whether the party is in such circumstances that he ought not to be put on the poor's-roll although he has a *probabilis causa*—I think we have no power then to deal with the question of the applicant's means. We have power, if the adverse party appears at the bar to object before the case is remitted to the *probabilis causa* reporters, to take the assistance of the reporters upon the question of whether there is poverty or not by making a special remit. It is often done. But here there was no such objection. The ordinary remit was made; the applicant has got a report that there is a *probabilis causa;* and I do not see that we can now do anything but admit him to the poor's-roll.

Lord Dundas.—I agree.

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on hearing any objections, either refuse the application *de plano*, or remit to the reporters, who shall thereupon consider the party's case, hear all objections, and report whether the applicant has a *probabilis causa litigandi*, and, should the remit so require, whether he otherwise merits the benefit of the poor's-roll. . . ."

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LORD SALVESEN.—On the regulations, as at present existing, I am forced to concur in the opinion which your Lordship has just delivered, although I do so with reluctance.

It is quite obvious that, under the present system, parties may be admitted to the poor's-roll although their circumstances are such that they are not entitled to be so admitted. The condition of our considering, or directing others to consider, the question of suitability for admission is that objection shall be taken in Single Bills when the application for remit to the reporters is made. Well, if we have tied our hands in that way by our own regulations, it is obvious that this applicant is entitled to take the benefit of these regulations as they at present exist. But I desire to say, for my own part, that I think the sooner the abuse of the poor's-roll of which this case is an illustration is remedied the better so that we can at any time take up the question of the suitability of the applicant for admission to the poor's-roll.

LORD GUTHRIE.—I am of the same opinion. Whether there should be some change in the earliest stage of such proceedings as those we have before us,—namely, in the practice of granting a certificate of poverty without any consideration whatever of what the amount may be that is being earned by the applicant,—is a question not directly before us. But, so far as we are at present concerned, it is quite clear that we ought not to be, as we now are, in a position of helplessness unless somebody appears to state objections. Whatever the papers disclose, apparently we can do nothing unless there is an objector.

The larger question that Mr Crawford referred to, namely, whether the present scale of income that will entitle an applicant to be put upon the poor's-roll, which was fixed at a time when money was much more valuable than it is now, should not be altered, may require also to be considered, but is not directly before us now.

THE COURT found the applicant entitled to the benefit of the poor's-roll, and remitted to counsel and agent for the poor to conduct the case.

W. MACDUFF URQUHART, S.S.C., Agent.

No. 53.

Mar. 13, 1914.

M'William v. Great North of Scotland Railway Co.

WILLIAM M'WILLIAM, Pursuer (Appellant).—*G. Watt, K.C.*—*W. A. Fleming.*

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Defenders (Respondents).—*Moncrieff, K.C.*—*T. G. Robertson.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Dangerous act committed in breach of rules—Railway porter jumping on to footboard of incoming train.*

A railway porter, whose duty it was to unload passengers' luggage, was seriously and permanently injured by falling on to the rails while attempting to jump on to the footboard of an incoming train in order to be ready to remove the luggage as quickly as possible when the train stopped. This act was in breach of the company's rules, a copy of which the porter had received but had not read, and he had been reprimanded by the station-master for doing the same thing on previous occasions.

Held that the accident arose out of and in the course of his employment.

EXTRA DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Banff between William M'William, railway porter at Tillynaught Station, and the Great North of Scotland Railway Company, the Sheriff-substitute (Stuart) refused compensation, and at the request of the workman stated a case for appeal.

The case set forth:—

"The appellant, who is twenty years of age, entered the respondents' service as a railway porter at Tillynaught Station on 3rd April 1913. On 26th April he met with the accident for which he claims compensation. It was part of his duties to be in attendance upon the platform on the arrival of passenger trains and to transfer luggage and parcels to and from the trains running on the main line and the local line to Banff. On the day in question the appellant was on the platform, opposite the door of the booking office, awaiting the arrival of the 10.55 A.M. passenger train from Elgin which arrived at Tillynaught Station one minute after scheduled time, namely, 12.15 P.M., in order to be ready to remove luggage and parcels from the van of that train. The point at which the van of said train usually stops, and at which it stopped on this occasion, was about twenty yards further up the platform than the point where the appellant was standing. As the van of the train passed the appellant, which it did at a considerable rate of speed, he ran after it, and overtaking it as its speed decreased, jumped or tried to jump upon the footboard of the luggage van, which was the last vehicle but one of the train, in order to be ready to remove the luggage as quickly as possible when the train stopped. He succeeded in taking hold of the handle at the end of the van, but did not succeed in getting a foothold with both feet upon the footboard. He appears to have partly swung round the corner of the luggage van and slipped off the footboard on to the line, and his right foot and ankle were severely injured by the wheels of the meat van, which was the last vehicle of the train. He was removed to the hospital at Banff, and it was found necessary to amputate his leg between the knee and ankle. As the result of the accident the appellant sustained serious and permanent disablement, and has been wholly incapacitated from work down to the date of the present action. The stump of his leg is now healed.

Mar. 18, 1914.

M'William v. Great North of Scotland Railway Co.

"When the appellant entered upon his duties on 3rd April the station-master, according to the usual practice, gave him a book of the rules and regulations defining, *inter alia*, the scope of the duties of servants dealing with trains at stations, to be observed by the respondents' servants, and the appellant signed the document (No. 8 of process) to the following effect:—'I, William M'William, having this day been furnished with a copy of the Book of Rules and Regulations of the Great North of Scotland Railway Company, and Appendix to Working Time Table, which came into operation on 1st August 1908, hereby undertake to observe and obey the same and all other Rules, Regulations, and Instructions that may from time to time be issued for the working and management of the Company's Railways, so long as I remain in the Company's service. (Signed) Wm. M'William, Porter, Tillynaught Station, 3rd April 1913. Witness (Sgd.) Jas. Dawson.' Rule 23 (c) of the General Rules and Regulations is in these terms:—'No servant must jump on to the steps or footboards, or run alongside of trains entering stations.'

"The appellant deponed that he had not read the rules, and I accepted his statement. The station-master did not, in handing him the book, direct his attention to Rule 23 (c), or to any particular rule. He merely told him to read the rules. During the time the appellant was in the respondents' service the station-master observed him disobeying Rule 23 (c), by jumping upon the steps of an incoming train on more than one occasion, and on each occasion the station-master checked him for doing so. He was also, on one occasion, warned by one of his fellow-servants, who saw him doing so, that it was a dangerous practice.

"It was proved that it is generally understood in the railway service that the prohibition as expressly stated in Rule 23 (c) refers only to the case of trains which are entering a station. In the case of outgoing trains, and in shunting operations, it is a common practice for guards and porters to board trains in motion, and the rule referred to does not forbid this. While this distinction is generally understood by railway servants, it was not proved that the appellant knew of it. It was not proved that the respondents, or their officials, permit the practice of jumping upon trains entering stations without objection. On the contrary, I found it proved that this practice is as far as possible checked by those responsible for enforcing the rules; and in the appellant's case, as already mentioned, he was warned upon more than one occasion. Upon these facts, I found that the accident which caused the appellant's injuries, while it arose in the course of, did not arise out of, his employment, in respect that the appellant's act was (1) unnecessary; (2) obviously dangerous; and (3) not expected or required of appellant but expressly forbidden. I therefore refused compensation."

The question of law for the opinion of the Court was:—"Whether there was evidence upon which it could competently be found that the appellant's injuries were not the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906?"

The case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 27th and 28th February 1914.

Argued for the appellant;—The cases in which the workman had

been found not entitled to recover compensation for an accident arising in the course of his employment fell into two classes:—(1) where he was doing work which he was not employed to do[1]; (2) where he was doing something for his own purposes, which created an additional risk.[2] The present case did not fall within either of these classes. The appellant at the time of the accident was doing his proper work, and the fact that he was doing it in an improper way did not debar him from compensation.[3] Serious and wilful misconduct would not debar him,[4] nor would a breach of a positive order.[5] The decision in *Symon* v. *Wemyss Coal Company, Limited*[6] was at variance with the law laid down by the House of Lords.

Argued for the respondents;—On the question of fact the Sheriff-substitute was final, and the onus lay upon the appellant to show that the facts led to a necessary inference that the accident arose out of the employment. The appellant had failed to discharge this onus. It was no part of his duties to jump on to a moving train, and in so doing he subjected himself to an added risk. A workman would not be debarred from compensation merely because he broke a rule[7]; but the breach of a rule was an important element to be taken into consideration because it raised a presumption that he was acting outside the scope of his employment.[8] If the workman was doing what he was not employed to do (as here jumping on to a train in motion), and in so doing broke a positive rule, he was not entitled to compensation,[9] the only exception being the case of a workman undertaking a fellow-employee's duties in an emergency.[10] The workman here was in an analogous position to a workman injured in the employment of someone other than his master, in which case the master was not liable.[11]

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[1] Kerr v. William Baird & Co., Limited, 1911 S. C. 701; Burns v. Summerlee Iron Co., Limited, 1913 S. C. 227; Smith v. Fife Coal Co., Limited, 1913 S. C. 662; M'Diarmid v. Ogilvy Brothers, 1913 S. C. 1103.

[2] Kane v. Merry & Cunninghame, 1911 S. C. 533; Revie v. Cumming, 1911 S. C. 1032; M'Laren v. Caledonian Railway Co., 1911 S. C. 1075; Smith v. Lancashire and Yorkshire Railway, [1899] 1 Q. B. 141; Reed v. Great Western Railway Co., [1909] A. C. 31; Barnes v. Nunnery Colliery Coal Co., Limited, [1912] A. C. 44.

[3] Richard Evans & Co., Limited, v. Astley, [1911] A. C. 674.

[4] Fraser v. John Riddell & Co., 1913 2 S. L. T. 377.

[5] Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660; M'Daid v. Steel, 1911 S. C. 859; Harding v. Brynddu Colliery Co., Limited, [1911] 2 K. B. 747; Mawdsley v. West Leigh Colliery Co., Limited, (1911) 5 Butterworth's W. C. C. 80; Watkins v. Guest, Keen, & Nettlefolds, Limited, (1912) 5 Butterworth's W. C. C. 307.

[6] 1912 S. C. 1239.

[7] Durham v. Brown Brothers & Co., (1898) 1 F. 279; Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660; Mawdsley v. West Leigh Colliery Co., Limited, 5 Butterworth's W. C. C. 80.

[8] Traynor v. R. Addie & Sons, (1910) 48 S. L. R. 820, 4 Butterworth's W. C. C. 357; Barnes v. Nunnery Colliery Co., Limited, [1912] A. C. 44.

[9] Plumb v. Cobden Flour Mills Co., Limited, [1914] A. C. 62; Revie v. Cumming, 1911 S. C. 1032; Symon v. Wemyss Coal Co., Limited, 1912 S. C. 1239.

[10] Devine v. Caledonian Railway Co., (1899) 1 F. 1105; London and Edinburgh Shipping Co. v. Brown, (1905) 7 F. 488.

[11] M'Daid v. Steel, 1911 S. C. 859; Burns v. Summerlee Iron Co.,

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At advising on 13th March 1914,—

LORD DUNDAS.—[After narrating the facts]—If one regards the facts of the case apart (for the moment) from the special rule of the Company and the appellant's disobedience of it, they do not, in my opinion, afford a sufficient warrant for the Sheriff-substitute's conclusion that the accident did not arise out of the employment. It is true that, as the respondents' counsel insisted, the duty of a porter is (primarily and etymologically) to carry things; but it is equally plain that the appellant's duties extended to attending the arrival of trains and removing luggage from vans; and it appears that it is the common and recognised practice of porters at this (as at many) stations, in shunting operations and the like, to board trains in motion. The indiscretion of this lad in jumping on the footboard—prompted apparently by overzeal "in order to be ready to remove the luggage as quickly as possible when the train stopped"—could not, I think, be held to amount to a departure from his proper sphere of service. He was performing his duty in an indiscreet and wrong manner, but still he was performing it.

It seems to me, then, that the place and importance in the case of the rule and its transgression have weighed unduly with the Sheriff-substitute; and that he has in consequence arrived at an unwarrantable conclusion. There are many decisions and dicta upon the point. "Put in a single sentence, the law, I think, is perfectly well settled, that mere disobedience to an order will not take a man out of the scope of his employment" (*per* Lord Dunedin in *Burns* v. *Summerlee Iron Company, Limited.*[1]) In *Barnes*,[2] the Lord Chancellor (Loreburn) said that you cannot deny a man compensation "on the ground only that he was injured through breaking rules." Still more recently, in *Plumb* v. *Cobden Flour Mills Company, Limited*,[3] Lord Dunedin pointed out that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." The rule and its transgression were no doubt facts which the learned arbitrator was entitled to have in view, not as conclusive against the workman's claim, but along with the other facts in the case, in considering whether or not the accident arose out of the employment—*Traynor* v. *Addie & Sons.*[4] But, as already said, the other facts seem to me to afford no legal basis for the arbitrator's conclusion; and I do not see that the added fact of disobedience to the rule could alter that position. If the man had, in disobedience to the alternative branch of the rule, run alongside the train, and while doing so had tripped

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Limited, 1913 S. C. 227; Smith v. Fife Coal Co., Limited, 1913 S. C. 662; Watkins v. Guest, Keen, & Nettlefolds, Limited, 5 Butterworth's W. C. C. 307.

[1] 1913 S. C. 227, at p. 230.
[2] [1912] A. C. 44, at p. 47.
[3] [1914] A. C. 62, at p. 67.
[4] 48 S. L. R. 820, 4 Butterworth's W. C. C. 357.

and fallen and met with serious injury, I do not think the arbitrator could competently have held that the accident did not arise out of the employment; and the actual event does not appear to me to be of any different quality. I am therefore constrained to hold—and the terms in which the finding is expressed seem to me to point in that direction,—that the arbitrator here misdirected himself in law to the effect that disobedience to the rule took the workman out of the scope of his employment; and that his finding, therefore, cannot stand.

We were referred at the discussion to the case of *Plumb* v. *Cobden Flour Mills Company, Limited*,[1] where Lord Dunedin delivered the judgment of the House. I gather that, so far as previous decisions are concerned, the spirit of his Lordship's very instructive opinion is rather in the direction of consolidation than of amendment or repeal. The workman, it appears, had improvised a mechanical convenience for the easier performance of his allotted task; and had, in so working, sustained injuries; and the House of Lords, affirming the judgment of the Court of Appeal, who reversed the award of the County Court judge, held that the accident did not arise out of the employment. Lord Dunedin pointed out that it is well, in considering the numerous decided cases, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute; that though it is often useful, in striving to test the facts of a particular case, to express the test in various phrases, such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words; and that it is wrong and unfair to seize upon some phrase used by a judge in any given case, and treat it as if it afforded a conclusive test for all circumstances. In the case before us, I have no mind to discuss in detail the various decisions cited during the argument; but I think that, if one sets about to apply to this case some of the more familiar tests and phrases used in previous cases, the result I have indicated will be found capable of bearing such application. It seems to me, for example, that, at the time of the accident, this workman was acting within the sphere and scope of his employment; that he was doing his own work, though (it may be) in an improper way, and in a way in which he had been told not to do it, and was not arrogating to himself, or usurping, the functions of another; that he was not doing something merely for purposes of his own; and that the risk he incurred—viz., slipping between the platform and a train which had not come to rest—was one which might be reckoned as reasonably incidental to his employment as a porter. But, following Lord Dunedin's injunction, I apply my mind to the very words of the statute; and so doing, I hold that the facts disclose no grounds upon which the arbitrator could competently find that the accident did not arise out of the appellant's employment.

For these reasons, I am of opinion that the learned Sheriff-substitute's finding cannot stand; and that we should sustain the appeal, answer the question put to us in the negative, and remit to the arbitrator to proceed as accords.

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[1] [1914] A. C. 62, at p. 67.

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LORD MACKENZIE.—I am of the same opinion. I do not regard this as a case in which one or other of two inferences might have been drawn by the learned Sheriff-substitute from the facts. If the case had been one of that category, then, even although one did not think that the inference drawn was the inference one would have drawn one's self, still the judgment of the Sheriff-substitute as arbitrator could not have been interfered with. The best illustration of that view is to be found in the case of *Traynor* v. *Robert Addie & Sons*.[1] I think in the present case the Sheriff-substitute has gone wrong upon a question of law, and that the accident here described did arise out of the employment of the workman. I turn to the reasons which were given by the Sheriff-substitute for the conclusion which he reached, and I am unable to find any reason but one which can be regarded as sufficient. I do not think that his conclusion can be supported upon the ground that the appellant's act was unnecessary; it cannot be supported on the ground that it was obviously dangerous; nor can it be supported on the ground that it was not expected or required of the appellant. There remains only the ground that it was expressly forbidden.

As your Lordship has pointed out, it has been said in more than one case that disobedience to an order *per se* is not sufficient to disentitle a workman to get compensation. In order to disentitle him there must be something more than a mere breach of the rule. The facts of this case have already been adverted to, and I do not require to resume them. The terms of the rule are that "no servant must jump on to the steps or footboards or run alongside of trains entering stations." I think it is too plain for argument—and I do not think counsel attempted to argue the contrary—that, if this accident had occurred when the porter was running alongside of the train and he had fallen and sustained injury, it would have been an accident which arose out of the employment. I consider that the first part of the rule is really in the same category. In doing what he did on this occasion the appellant may have been over-zealous in his work; but I think it is quite plain that he was doing his proper work and was not doing anything for purposes of his own. He was not, at the time of the accident, out of the territory of his employment, nor was the act put outside the range of his service by the prohibition.

If one requires to seek illustrations from the cases that were cited to us, it appears to me that the case of this workman is much more like the case of the workman in *Mawdsley* v. *West Leigh Colliery Company*[2] than the case of the workman in *M'Diarmid* v. *Ogilvy*.[3] In *Mawdsley's* case[2] the man was told not to oil a certain machine when it was in motion. He did oil it when it was in motion, and that did not prevent him from getting compensation. In the case of *M'Diarmid*[3] the man was told not to clean a machine except upon certain stated days. He did clean it on a different day, and it was held that what he did was not within the sphere of his employment. He was not employed to do what he did when he met with the accident. It appears to me that there was no more "added

[1] 48 S. L. R. 820, 4 Butterworth's W. C. C. 357.
[2] 5 Butterworth's W. C. C. 80. [3] 1913 S. C. 1103.

peril"—a phrase which occurs in some of the cases—in the present case than there was in the case of *Mawdsley*.[1]

I think that when the accident happened to the workman here he was within the sphere of his employment; and that the accident arose not only in the course of, but also out of, the employment. Therefore, I think that the question should be answered in the manner proposed by your Lordship.

LORD CULLEN.—I entirely concur.

THE COURT answered the question of law in the negative.

GRAHAM, JOHNSTON, & FLEMING, W.S.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

No. 54.

Mar. 17, 1914.

Marquess of Bute's Trustees v. Crawford.

LORD EDMUND BERNARD TALBOT AND ANOTHER (Trustees of the late Marquess of Bute), Pursuers (Reclaimers).—*Chree, K.C.*—*Pitman.*

JEMIMA CRAWFORD, Defender (Respondent).—*Lippe*—*Lillie.*

Superior and Vassal—*Casualty*—*Action for declarator and payment of casualty*—*Onus of proving death of last entered vassal*—*Conveyancing (Scotland) Act*, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4 (4).

In an action for declarator and payment of a casualty in the form introduced by sec. 4 (4) of the Conveyancing (Scotland) Act, 1874, the onus lies on the pursuer of proving the death of the last entered vassal.

1ST DIVISION. Lord Cullen.

ON 2nd May 1913 Lord Edmund Bernard Talbot and another, the testamentary trustees of the late Marquess of Bute, as the feudal superiors of certain subjects in Bute, brought an action of declarator and for payment of a casualty in the statutory form introduced by section 4 (4) of the Conveyancing (Scotland) Act, 1874, against Jemima Crawford, the proprietrix infeft in the subjects.

The pursuers averred;—(Cond. 2) "By charter of confirmation and precept of *clare constat* by the tutor-at-law for the Most Honourable John Patrick Crichton Stuart, Marquis of Bute, the then immediate lawful superior of the subjects before described, in favour of the now deceased George Walker, merchant in Madras, dated 21st February, and instrument of sasine following thereon, recorded 30th March, both in the year 1852, the said George Walker became vest and seised in the said subjects. These subjects are held of and under the said Lord Edmund Bernard Talbot and Archibald Robert Craufurd Pitman, as trustees foresaid, in feu-farm for payment of the sums specified in the said charter of confirmation in favour of the said George Walker." After quoting the terms of the reddendo clause of the said charter the pursuers' averments and the defender's answers thereto proceeded as follows:—(Cond. 3) "The subjects contained in said charter of confirmation and precept of *clare constat* were subsequently disponed by the commissioner for the said George Walker to Hector Macfie, shipmaster, Rothesay, and by various transmissions the defender,

[1] 5 Butterworth's W. C. C. 80.

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the said Jemima Crawford, is now proprietrix of the subjects before described, and is infeft therein. The defender is a singular successor of the said George Walker, and is by the feu-right of the said subjects liable in a casualty of a year's free rent of same. The pursuers have been unable to obtain information as to the place and date of death of the said George Walker. The annual rent of said subjects belonging to the defender for 1900, being the year of her infeftment, is £55 or thereby, but in determining the sum of a year's free rent the usual deductions fall to be allowed." (Ans. 3) "The defender's title is produced and referred to for its terms. Believed to be true that the trustees have been unable to ascertain the place and date of death of the said George Walker. *Quoad ultra* denied. Explained that the pursuers have produced no evidence that the said George Walker is dead, and the defender does not admit that he is dead. The defender is willing, and has all along been willing, to pay to the pursuers such sum as should be ascertained to be the amount of any casualty due by her in respect of the said subjects, but she declines to pay such casualty in the absence of evidence of the death of the said George Walker."

On 18th July 1913 the Lord Ordinary (Cullen) pronounced the following interlocutor:—"Finds that the pursuers as a condition of their claim against the defender for the casualty sued for are bound to prove the death of George Walker mentioned on record: With this finding allows to the parties a proof of their averments on record, and appoints the said proof to proceed on a day to be afterwards fixed." *

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* "OPINION.—The pursuers are the superiors of a feu in which the defender, as a singular successor, is infeft by virtue of a recorded disposition in her favour; and in this action the pursuers claim right to a composition on the footing that the vassal last vest and seised in the lands, one George Walker, sometime merchant in Madras, has died. The action is in the statutory form introduced by section 4 (4) of the Conveyancing Act of 1874.

"While the pursuers aver that George Walker is now deceased, they say on record that they do not know when or where he died, and from what was said at the hearing it would appear that the information which they at present have does not ascertain the fact of his death, and that it is mere matter of supposition. The defender does not admit that George Walker is dead. It was explained that the present action was intended to present for decision a question of general importance—to wit, whether, when a superior claims a composition as having become due in consequence of the death of the last entered vassal, there is an onus on the superior to prove the fact of such death, or whether the onus lies on the defender to prove that the last entered vassal is still alive. It is rather singular that this question should be an open one at this time of day, but it is said to be so.

"The present action, as I have said, is the species of action introduced by section 4 of the Conveyancing Act of 1874. While that is so, the parties at the hearing were at one in saying that the question fell to be decided in the same way as if it had been raised in a declarator of non-entry brought prior to the Act. The pursuers say that in a declarator of non-entry the superior, producing his sasine in the lands, was bound to do nothing more, in the first instance, than to allege that the lands had been in non-entry from a stated date, and that the onus then lay on the defender to oppone a subsequent entry. The defender says that the superior was bound to prove, in the first instance, the death of the former

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The pursuers reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 3rd and 4th March 1914.

Argued for the reclaimers;—There was no direct authority upon this question, but it followed from the nature and history of the right which the pursuers sought to enforce that the onus of proving the death of the last entered vassal was not upon them. Under the older law of ward-holding, from which the right to casualties sprang, the superior was entitled at all times to have a vassal in the feu who was bound and able (*e.g.*, one of full age) to perform the services in respect of which the feu was held. The nature of the superior's right remained the same when feus became hereditary. His only concern continued to be with the lands. If he did not find his entered vassal, but another, in possession, that other either had to show that the fee was full or had himself to enter with the superior, failing which the superior was entitled to resume posses-

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vassal whom he alleged to be the last entered, and that it then lay on the defender to oppone, if he could, a subsequent entry, or, if he could not do so, to offer himself to enter.

"A declarator of non-entry was not a claim by the superior to the fee of the land by virtue of his sasine therein. The hypothesis of it was a duly constituted feu and a formerly entered vassal. On the averments that that vassal had died and that his heir had not entered—in more modern times that no successor had entered—the superior sought to have it declared that the lands had been in non-entry since the death of the former vassal, and that he should be held entitled to the fruits of the feu so long as the non-entry continued. Following on a decree that the feu had been in non-entry since the date he libelled as that when, by the death of the last vassal, the fee had become vacant, he had a retrospective claim for the retoured duties.

"In the styles to which I have been referred (Dallas's and Juridical Styles) the summons of declarator of non-entry libels as a fact the death of the last entered vassal and the date of the death. The insertion of the date marked the period to which the superior's claim for retoured duties went back.

"Now, as the hypothesis of the action was a duly constituted feu and a formerly entered vassal whose entry filled the fee, the superior's claim rested fundamentally on the fact of that vassal having died, so that his entry was spent and a vacancy had occurred. 'Ex morte vassalli . . . ad dominum superiorem pertinent non-introitus et custodia . . . Mortuo igitur vassallo, quamdiu haeres differt intrare, sive adire hereditatem feudi, seque pro haerede gerere, tamdiu feudum in non-introitu dicitur esse'—Craig, ii. 19, secs. 1 and 3. The death of the entered vassal being the fact which gave rise to the superior's claim to have a new vassal, and to the casualty of non-entry so long as no successor entered, I do not, apart from authority, see why the superior should not have been bound to show that a vacancy in the fee had in fact arisen.

"The authorities cited by the pursuers to show that the superior was relieved from proving—although he alleged—the death of the former vassal consist of two passages in Stair and Erskine. Stair (ii. 4, 21) dealing with the declarator of non-entry says: 'In this declarator the superior, producing his infeftment, needs not instruct the defender his vassal . . . neither needs he instruct that the lands were void from the time libelled, because that is a negative fact and proves itself, unless the vassal instructs that they were full.' Similarly Erskine (ii. 5, 41) says: 'In the action of general declarator the superior must produce as his title his seisin in the lands to prove his right of superiority. . . . But neither superior nor non-donatory need bring evidence that the lands

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sion of the lands. Accordingly, the superior was absolved from the necessity of proving the "negative," *i.e.*, that the lands were in non-entry.[1] This being the origin and nature of the superior's right, it was only to be expected that it should not have been the practice for the superior, in an action for enforcement of the right, to aver the date of the death of the last entered vassal,[2] as it undoubtedly would have been had the onus of establishing this fact been upon him. The changes introduced by the Conveyancing Act, 1874, had not altered the nature of the superior's right or its consequences so far as the present question was concerned; it had only provided a new machinery for the enforcement of the right, which was required because of the new conditions of entry which the Act introduced.

Argued for the respondent;—There was no specialty which absolved the pursuer in such an action as the present from proving

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were without a vassal from the time libelled, because that is a negative which proves itself, unless the defender make it appear that the lands were full.' The corresponding passage in Craig is where, speaking of the defences to a declarator of non-entry, he says: 'Prima, quod terrae sint aditae sive introitae, seu feudum introitum (nos plenum dicimus); non introitus enim negatio est, neque melius negationi occurritur quam per affirmationem.'

"Underlying these statements is there not the assumption that the death of the former vassal, alleged by the superior to have been the last entered vassal, was an ascertained fact? What the superior is said to be relieved from proving is called a 'negation'—the negation of entry 'from the time libelled.' But what about the fact of a vacancy in the fee having occurred *at* the time libelled? This, from the superior's point of view, was not a negative but a positive fact, seeing that his summons postulated a constituted feu and an original full fee, which, while it continued, excluded non-entry. It seems to me, therefore, that the negation which the superior was relieved from proving did not include proof of the fundamental fact on which his action was based—to wit, that the former entered vassal had died so as, *prima facie*, to show a vacancy thereby occurring in the fee. This fact being ascertained, the continuance of the non-entry was a negative fact which it lay with the defender to displace by pointing to a subsequent entry.

"Non-entry was generally treated favourably to the vassal rather than to the superior. If the pursuers' view of the law is right, then, in any case where the entered vassal had disappeared and it could not be ascertained whether he was alive or dead, the superior could at once have had a non-entry declared, and he could have carried back his claim for the retoured duties to a purely arbitrary date. I do not think that the authorities cited warrant this result.

"The pursuers, pointing to the style of a summons of declarator of non-entry which libelled the death on a particular date of A B, 'the last entered vassal,' say that it would be inconsistent with the law as stated

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[1] Stair, II. iv. 3, 6, 21, and 23; Ersk. II. v. 29, 31, and 41; Menzies' Lectures, (1900 ed.) pp. 484 and 485; Bell's Lectures, (3rd ed.) 622; Bell, Pr., secs. 705, and 709; Earl of Lauderdale v. Brand, (1704) M. 9325; Houston v. Buchanan, (1892) 19 R. 524, *per* Lord Stormonth-Darling; Lord Advocate v. Moray, (1890) 17 R. 945.

[2] Walker v. Earl of Eglinton's Tutors, (1828) 6 S. 407; Magistrates of Dundee v. Kid, (1829) 7 S. 801; Mackenzie v. Mackenzie, (1838) 16 S. 1326 and (1842) 5 D. 246; Town-Council of Brechin v. Arbuthnot, (1840) 3 D. 216.

the averments on which he founded. The action was, in terms of the Conveyancing Act, 1874, sec. 4, in the form of a petition in which the superior was *in petitorio*. The reclaimers' contention might properly express the condition of matters under the old feudal law, but since feus had become hereditary, no claim for a casualty could emerge until the death of the last entered vassal, and the fact of his death was the crucial fact upon which the superior founded in making his claim. The old styles bore that both the fact and the date of the death of the last entered vassal must be averred in the summons.[1] Before 1874 it was necessary that this date should be established in order to fix the date from which retoured duties fell to be paid. Both the death and its date were libelled in the form of summons attached to the Conveyancing Act, 1874.[2] The passages from the institutional writers cited for the reclaimers did not support the contention which they founded upon them. It was assumed by the writers that the death of the last entered vassal was admitted, and the negative which the pursuer was said to be exempted from proving was not the fact that the lands were in non-entry, but the fact that they had remained in non-entry since that admitted date. The forms of summons in the cases to which the reclaimers had referred[3] did not support their argument, because in each of these cases there had been combined with the declarator of non-entry an action of reduction improbation, and if the pursuer had succeeded in the latter, there would have been no necessity to inquire into, or fix, the date of the death of the last entered vassal. It was an essential part of the pursuer's case to fix the date of the last entered vassal's death, because it was from the data of that year that the amount of the casualty fell to be computed.[4]

At advising, on 17th March 1914,—

LORD PRESIDENT.—The acute and learned criticism of the reclaimers' counsel failed, in my judgment, to detect any flaw in the closely reasoned judgment of the Lord Ordinary. I am, therefore, for adhering to the

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in the authorities above referred to that the superior should have been bound to prove the whole of his averment. This is true, because, if the superior proved the death of the 'last entered' vassal, there would be no room for a proof by the defender of a subsequent entry. But what the superior was relieved from proving was a negative fact—non-entry 'from the time libelled'—and as his summons postulated a former full fee, I read these authorities as meaning that when the superior had shown, *positivè*, the occurrence of a vacancy by the death of a former entered vassal whom he alleged to be the last entered it then lay on the defender to show that there had been an entry subsequent to that of the said deceased.

"As the point was not argued, I express no opinion on the question whether the onus, under the statutory action introduced by the Act of 1874, is different from what it would have been in a declarator of non-entry brought prior to that Act."

[1] Dallas's Styles, p. 240; Juridical Styles, (1828 ed.) vol. iii. p. 186.

[2] 37 and 38 Vict. cap. 94, Schedule B.

[3] *Supra*, p. 462, footnote [2].

[4] Steuart v. Murdoch & Rodger, (1882) 19 S. L. R. 649; Campbell v. Stuarts, (1884) 22 S. L. R. 292. Hamilton v. Chassels, (1902) 4 F. 494 was also referred to.

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interlocutor reclaimed against for the reasons assigned in the note, on the statement of which I am certain I cannot improve, and to which I can add nothing.

LORD JOHNSTON and LORD SKERRINGTON concurred.

THE COURT adhered.

J. & F. ANDERSON, W.S.—WALTER M. MURRAY, S.S.C.—Agents.

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THOMAS OGILVIE MATHIESON, Pursuer (Reclaimer).—*Constable, K.C.—Black.*

ROBERT SMITH ALLAN AND OTHERS (Mrs Jane Smith or Allan's Trustees), Defenders.

THE LORD ADVOCATE ON BEHALF OF THE POSTMASTER-GENERAL, Defender (Respondent).—*Sol.-Gen. Morison—Pitman.*

Property—Building restriction—Buildings to be "continued permanently as dwelling-houses"—Restriction on construction or on use.

The titles of certain steadings of ground on which a row of dwelling-houses was erected contained restrictions declaring that the proprietors "shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on" a specified plan, and that the "said lodgings shall always be maintained and kept in good and sufficient repair, and that the same shall . . . be kept of the same dimensions and architectural style or form in time coming, and be continued permanently as dwelling-houses, and no part of the dwelling-houses or of the stables and offices to be erected on any part" of the subjects "shall at any time be converted into shops, warehouses, or trading places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever. . . ."

The proprietor of one of the houses, founding on these restrictions, sought to interdict the Postmaster-General, who had acquired a lease of the adjoining house, from using it as an office for the discharge of certain clerical work by the staff of the post office.

Held, on a construction of the titles, that these restrictions applied to structure only and not to use; and, as the Postmaster-General proposed to make no structural alterations, action *dismissed*.

1ST DIVISION. Lord Hunter.

ON 17th June 1913 Thomas Ogilvie Mathieson, proprietor of No. 1 Park Gardens, Glasgow, brought an action against the trustees of the late Mrs Allan, and against the Lord Advocate as representing the Postmaster-General, in which he sought declarator "that the defenders, as heritable proprietors of the self-contained dwelling-house No. 2 Park Gardens, Glasgow, have no right by themselves or by any other person or persons or bodies or Government Department authorised by them, to alter the structure of the said house so as to make it unfit to be used as a self-contained dwelling-house, and they further have no right by themselves or as aforesaid to use the said premises as a trading place of any description, and in particular as an office for conducting any part of the business of the post office." The summons also concluded for interdict in similar terms.

The pursuer averred that both his title and that of the defenders, Allan's trustees, flowed from a disposition and instrument of sasine following thereon by William Nicoll and others to the city of Glasgow, dated in October and November 1852. Certain provisions and restrictions contained in this disposition and instrument of sasine were as follows:—"Declaring also, as it is hereby expressly provided and declared, that in building on the remaining portions of the subjects before described, not restricted as aforesaid, the said disponees and their foresaids should be bound to erect self-contained lodgings only in an architectural style which would harmonise with the style of the lodgings in Clairmont Terrace aforesaid: Declaring also that the said disponees and their foresaids should have full power and liberty to erect on the ground behind the said lodgings to be erected by them such offices as they might consider necessary, but the side walls of such out-buildings should not in any case or on any account rise higher than sixteen feet above the level of the ground or meuse lane behind the same, and their extreme height should not exceed twenty-two feet, and that the stables or coach-houses to be built on the said back ground behind such lodgings should not be let for public or livery stables, but should be *bona fide* occupied by the proprietors or tenants for the time being of the said lodging or offices, the said offices being allowed to be let for stables or other purposes to tenants separate from the dwelling-houses, but for private use only: Declaring farther that as the lodgings which might be erected on said subjects as aforesaid were intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading places of any description, nor should common stairs be erected nor the houses divided into flats on any pretence whatever, unless the whole proprietors of the compartment in which the lodging proposed to be altered was situated should agree in writing to such alteration: Declaring also that the pleasure ground in the second place before described should be for the use only of the proprietors or occupiers of the said lodgings which might be erected by the said disponees as before provided *pro indiviso*, and along with the other proprietors of houses situated opposite to the said pleasure ground, and it should not be lawful to nor in the power of the said disponees or their foresaids to allow access to said pleasure grounds to the public or to any private party whatever, other than the proprietors or occupiers of such lodgings as might be erected by the said disponees as aforesaid . . . And the said disponees and the said proprietors or feuars, according to their several rights aforesaid, should have the exclusive use and privilege along with them, the said trustees, feudally vested as aforesaid, and their successors and no others, of using the said grounds as ornamental pleasure grounds, but for no other use or purpose whatsoever, all which declarations, conditions, provisions, and restrictions should be held and considered, and are by the said disposition so presented expressly declared to be real liens and burdens affecting the subjects thereby disponed, and the foresaid portions of Clifton Street and Clairmont Place, and as such should be inserted in the instrument of sasine to follow thereon, and in all the future conveyances and transmissions of the subjects thereby disponed, and in all the future conveyances which should be granted by the said trustees, feudally vested as aforesaid, of the steadings fronting Clairmont Place so far as applicable thereto,

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and in the instruments of sasine to follow thereon, under pain of nullity. . . ."

The provisions and restrictions affecting the subjects were all contained *ad longum* or by valid reference in the titles of the pursuer and defenders, and of all the other proprietors of Park Gardens. In particular, a contract of ground-annual entered into between the City of Glasgow and James Jameson and others, dated in 1854, by which the first parties disponed to the second parties the six steadings of ground on which the houses forming Park Gardens were erected, contained the following provision:—"Also declaring that the second party and their foresaids shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on such elevation plan as may be prepared by the architect of or approved of by the first party or their committee on their behalf of the buildings to be erected on the plot or area of ground of which each steading forms a part, and that the said lodgings shall always be maintained and kept in good and sufficient repair, and that the same, along with the sunk areas to be formed in connection therewith, shall be kept of the same dimensions and architectural style or form in time coming, and be continued permanently as dwelling-houses, and no part of any of the dwelling-houses or of the stables and offices to be erected on any part of the said several steadings of ground shall at any time be converted into shops, warehouses, or trading places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever, and that the walls enclosing the back ground of each of the said steadings shall not exceed in height eight feet, but the said second party and their foresaids shall have full power to erect on said back ground such offices as they may consider necessary for additional convenience, on this express condition and declaration only that the side walls of such outbuildings shall in no case or on any account rise higher than what is required for arching underneath the pleasure-ground to be formed in front of the upper terrace marked Z on said plan, and with power to the said second party and their foresaids to erect above the surface of the said pleasure-ground such ventilating flues or shafts as are necessary for the said stables and offices, at the sight and to the satisfaction of the said Charles Wilson: Farther, that any stables or coach-houses forming part of the offices shall not be let for public or livery stables, but they shall be *bona fide* occupied by the proprietors or tenants for the time being of the said lodgings or offices, the said offices being allowed to be let to tenants separate from the dwelling-houses, but for private use only."

The pursuer averred;—(Cond. 7) "The dwelling-house, No. 2 Park Gardens, and pertinents thereof, which, up to the present time has been occupied as a dwelling-house, has recently been let by the defenders to the authorities of the post office for the purposes of the post-office business, and the pursuer believes and avers that it is to be occupied during business hours by a large staff of clerks and other employees. Correspondence with reference to telephone contracts, including letters soliciting orders for the installation of telephones, is dealt with at and conducted from the house. Large baskets, believed to contain these letters, are left

lying on the steps and pavement in front, and business is regularly carried on in the said house until long after usual business hours. The pursuer does not know to what further or other use the said authorities may put the said dwelling-house." (Cond. 9) "The business of the post office is a trading business, including the business of common carriers of goods and transmitters of letters and telegrams, and of telephone messages, for the purpose of gain or profit. The result of the post office being established in the said house and pertinents will be to convert the self-contained dwelling-house into a trading place within the meaning of the restrictions in the title-deeds. The pursuer believes and avers that the house will no longer continue to be used as a dwelling-house, and that its whole character will be changed by its conversion into or use as a post office, or a branch of the Post Office Department. Further, the whole character of the said pleasure-ground will also be changed by the said clerks and other employees using the same."

The pursuer pleaded;—(1) The defenders' alterations on and proposed use of the said self-contained dwelling-house, No. 2 Park Gardens, Glasgow, being in violation of their title on a sound construction thereof, the pursuer is entitled to decree of declarator and interdict as concluded for.

Defences were lodged by the Lord Advocate on behalf of the Postmaster-General.

On 14th November 1913 the Lord Ordinary (Hunter) repelled the pursuer's first plea in law, and dismissed the action.*

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* "OPINION.—[After narrating the circumstances of the action]—In the disposition to the common author of the pursuer and the defenders it was provided that the disponees should be bound to erect self-contained lodgings only on the ground; and it was declared that, as 'the lodgings which may be erected on said subjects as aforesaid are intended to continue permanently as dwelling-houses, neither they nor the offices shall be converted into shops, warehouses, or trading places of any description.' Provision is made for the declarations and restrictions being made real burdens upon the subjects, and it is said that the titles of the pursuer and the defenders all contain *ad longum* or by valid reference the said declarations and restrictions. I assume, therefore, that the pursuer has a title to enforce these declarations and restrictions against his co-feuars.

"In terms of the lease in favour of the Postmaster-General, No. 11 of process, it is provided that 'The lessee is at liberty, so far as the lessors are concerned, to utilise the premises as the working place for clerical purposes of a staff of assistants engaged in Government official business.' According to the pursuer's averments the house is to be occupied during business hours by a large staff of clerks and other employees. 'Correspondence with reference to telephone contracts, including letters soliciting orders for the installation of telephones, is dealt with at, and conducted from, the house. Large baskets, believed to contain these letters, are left lying on the steps and pavement in front, and business is regularly carried on in the said house until long after usual business hours.' The main question which I have to determine is whether this use of the property constitutes an infringement of the condition as to user to which I have referred.

"In the recent case of *Graham* v. *Shiels*, (1901) 8 S. L. T. 368, Lord Kyllachy held that a clause expressed in practically the same terms as the one in question did not prevent a dwelling-house being used as a nursing home, such use not having the effect of converting the premises into a shop, warehouse, or trading place *ejusdem generis* with a shop or ware-

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The pursuer reclaimed and the case was heard before the First Division (without Lord Johnston) on 7th March 1914.

Argued for the reclaimer;—What the reclaimer chiefly sought to obtain here was a declarator against the use of this house as an office. The restrictions in the defenders' titles applied not only to construction but to use. It was obviously intended that the ground in question should be occupied constantly by dwelling-houses, that is, by places of residence as opposed to places used for the purpose of a business or trade.[1] The case of *Colville* v. *Carrick*,[2] referred to by the Lord Ordinary, raised the question of degree, which did not arise in the present case. The question there considered was whether the addition of the purposes of a school to those of an ordinary dwelling-house was sufficient to transgress the restriction. Here no use at all as a dwelling-house remained, seeing that the premises were being used exclusively as business premises. The Outer House case of *Graham* v. *Shiels*[3] which the Lord Ordinary founded upon was wrongly decided, and was inconsistent with the decision of the First Division in *Montgomerie-Fleming's Trustees* v. *Kennedy*.[4] It did not necessarily follow from the fact that the restriction in question was embedded in a clause which contained architectural provi-

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house. His Lordship, in the course of his opinion, expressed a doubt whether the words expressive of the original disponer's intention that the lodgings were to continue permanently as dwelling-houses formed part of the operative restriction. In view, however, of the opinion of the Lord President expressed in the case of *Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912 S. C. 1307, I think that I must hold that the circumstance that the declaration is expressed in parenthetical form does not prevent effect being given to a prohibition which is intended to be a real burden upon the land. The pursuer therefore maintains that the contemplated use of the premises by the Postmaster-General constitutes an infringement which he is entitled to prevent. He relies mainly upon the case of *Ewing* v. *Hastie*, (1878) 5 R. 439, where it was held that the use of a house as a young ladies' school for about twelve boarders and fifty day scholars constituted an infringement of a restriction that the house was to be used as a private dwelling-house only. A restriction upon user which it is sought to enforce must be strictly construed, and in the present case it is merely provided that the houses are to be used as dwelling-houses, not that they are to be used as private dwelling-houses. In the case of *Colville* v. *Carrick*, (1883) 10 R. 1241, Lord Young at p. 1245 expressed an opinion that a clause as to buildings in the following terms—'And as they are intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading places of any description'—did not prevent the use of the premises as a school. No case was cited to me to show that the Court had held that premises ceased to be regarded as lodgings or dwelling-houses because no person resided in them at night. The real question seems to me to be whether the use complained of converts the premises, as Lord Kyllachy said in *Graham's* case, into a trading place such as a shop or warehouse. I do not think that the use by clerks in the employment of the post office as described by the pursuer will have this effect; and I shall therefore dismiss the action."

[1] Fraser v. Downie, (1877) 4 R. 942; Ewing v. Campbells, (1877) 5 R. 230; Ewing v. Hastie, (1878) 5 R. 439; Johnston v. Walker Trustees, (1897) 24 R. 1061.

[2] (1883) 10 R. 1241.

[3] (1901) 8 S. L. T. 368.

[4] 1912 S. C. 1307.

sions that it was to be construed as referring solely to construction. The clause contained provisions for distinct and separate purposes; to regulate the architectural style, to secure use as dwelling-houses, and to forbid conversion into business premises or into residential flats. The latter part of the clause in question provided that no dwelling-house on the ground should be "converted into a trading place of any description." This restriction was clearly one as to use, whether the canon of *ejusdem generis* fell to be applied or not,[1] and as it had been transgressed here, that transgression fell to be restrained.

Argued for the respondent;—The titles contained restrictions in regard to construction and to structural alteration, but no restrictions in regard to use. Even if the Court was prepared to construe the latter part of the restriction as being a restriction in regard to use, there was no contravention of that restriction in the present case. The use to which it was proposed to put the premises did not convert them into a "shop, warehouse, or trading place" within the meaning of the titles.[2] The decision in *Ewing* v. *Hastie*[3] was not applicable, for there the use was expressly limited to use as a "private" dwelling-house.

At advising on 17th March 1914,—

Lord Mackenzie.—The pursuer is proprietor of a self-contained dwelling-house, No. 1 Park Gardens, Glasgow. The defenders are proprietors, as trustees, of No. 2 of the same street. These two dwelling-houses form part of a continuous row, six in number, known as Park Gardens. The defenders have let the house No. 2 Park Gardens to the Post Office for the purposes of Post Office business. The conclusions of the present action are as follows:—[His Lordship quoted the conclusions].

It was explained at the bar that the pursuer does not desire a declarator with reference to the structure of the house. He now only seeks to have it declared that the defenders have no right to use the house for the purpose of the business of the Post Office.

The ground upon which the Lord Ordinary has decided the case against the pursuer is that the titles merely provide that the houses are to be used as dwelling-houses, not that they are to be used as private dwelling-houses, and that the use complained of does not convert the premises into a trading place such as a shop or warehouse.

I agree with the conclusion reached by the Lord Ordinary, but upon a different ground. It appears to me that on a sound construction of the titles the restriction as regards the dwelling-houses is in regard to structure and structure only, not in regard to use or occupation. The ground upon which Park Gardens is built belonged at one time to William Nicol and others, and formed part of an area of 6510 square yards which was disponed by them to the Lord Provost, Magistrates, and Council of the city of Glasgow by disposition, dated in 1852, the instrument of sasine following upon which was recorded on the 1st of November 1852. This instrument of sasine, while it makes careful provision for the architectural

[1] Admiralty v. Burns, 1910 S. C. 531.
[2] Graham v. Shiels, 8 S. L. T. 368.
[3] 5 R. 439.

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style of what are therein termed self-contained lodgings, contains no provision in regard to their use and occupation. The want of any such provision as regards the houses is the more remarkable, if such a restriction was intended, because there is careful provision limiting the use of the stables or coachhouses to be built on a back ground behind the houses, these being "for private use only." In the same way, as regards the pleasure ground, it is provided that this should be for the use only of the proprietors or occupiers of such lodgings, and that it should not be lawful for them to allow access thereto to the public or to any private party whatever. Then follows a declaration which provides that "the said disponees and the said proprietors or feuars, according to their several rights aforesaid, should have the exclusive use and privilege along with them, the said trustees, feudally vested as aforesaid, and their successors and no others, of using the said grounds as ornamental pleasure grounds, but for no other use or purpose whatsoever." The word "use" does not occur in the sasine with reference to the dwelling-houses, nor is there any express provision in regard to their occupation. There is a clause, however, upon which the pursuer founded, which is in these terms:—"Declaring farther that as the lodgings which might be erected on said subjects as aforesaid were intended to continue permanently as dwelling-houses, neither they nor the offices should be converted into shops, warehouses, or trading places of any description, nor should common stairs be erected nor the houses divided into flats on any pretence whatever, unless the whole proprietors of the compartment in which the lodging proposed to be altered was situated should agree in writing to such alteration." I construe this clause as meaning that the structure of the dwelling-houses was not to be altered, and I reach this conclusion because its terms show what was meant by "intended to continue permanently as dwelling-houses" by the expressions which immediately follow. The words that follow, viz., "converted," "erected," "divided," and "altered," refer to structure only. All these declarations, conditions, provisions, and restrictions were expressly declared to be real liens and burdens, affecting the subjects and also specified portions of Clifton Street and Clairmont Place, to be inserted in all future conveyances and transmissions of the subjects. The titles of the pursuer and the defenders flow from this instrument of sasine. The contract of ground-annual, dated in 1854, and recorded in the Register of Sasines in 1869, by which the Magistrates of Glasgow disponed the six steadings upon which the houses in Park Gardens are built, contained the clause particularly above referred to in the instrument of sasine though in somewhat different language. In that deed also there is the same absence of restriction of use or occupation as regards the dwelling-houses, although, where a restriction upon use was intended, this is provided for in express terms. After the clause imposing the obligation to build a dwelling-house on each of the said six steadings of ground there is a declaration that the grantee shall not "make use" of any parts of the lands for certain purposes enumerated. Then follows a declaration that the grantee and disponee "shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said

several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on such elevation plan as may be prepared by the architect, . . . and that the said lodgings shall always be maintained and kept in good and sufficient repair, and that the same, along with the sunk areas to be formed in connection therewith, shall be kept of the same dimensions and architectural style or form in time coming." Then follow the words upon which the pursuer founds, and which correspond to the clause already referred to in the instrument of sasine, although not in identical terms. The clause goes on—"and be continued permanently as dwelling-houses, and no part of any of the dwelling-houses or of the stables and offices to be erected on any part of the said several steadings of ground shall at any time be converted into shops, warehouses, or trading-places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever, and that the walls enclosing the back ground of each of the said steadings shall not exceed in height eight feet, but the said second party and their foresaids shall have full power to erect on said back ground such offices as they may consider necessary for additional convenience." Here again there is no reference to use or occupation. After the writer says that the lodgings are to be continued permanently as dwelling-houses, he goes on (as was done in the instrument of sasine) to explain what he means by this. The same exegetical phrases occur—"converted," "erected," "divided,"—applicable to structure and not to use. When, however, the next clause is reached, dealing with the stables and coach-houses, the use of these is regulated in express terms. The conclusion I draw is that, provided the dwelling-house belonging to the defenders continues to be a dwelling-house, no valid restriction is imposed by the titles in regard to its use. As Lord Shand points out in *Fraser* v. *Downie*,[1] such a serious restriction on the use of property by its owner is not to be lightly inferred. Nor *in dubio* will a title be construed adversely to freedom of possession.

One case was strongly founded upon by the pursuer's counsel, *Ewing* v. *Campbell*,[2] and we were referred to a passage in the opinion of the Lord President to the effect that the condition in the title there under consideration would not be satisfied if a dwelling-house was built on the feu and then converted to a different use. Each title must, however, be construed in accordance with the exact language used, and I do not find in the feu-charter in that case the sharp distinction between provisions as to structure and use which I find in the present. Moreover, the judgment in *Ewing* v. *Campbell*[2] proceeded on the construction put upon a clause which did deal with use and occupation. The vassal there was prohibited from allowing to be kept on the feu "any public-house or tavern." This was held to strike against a hydropathic establishment or inn or hotel. In the case of *Graham* v. *Shiels*,[3] Lord Kyllachy, in the Outer House, had to construe a title in identical terms with the present, applicable to an adjoining terrace. His Lordship said this—"If reliance be placed on the introductory words whereby it is declared that the

[1] 4 R. 942. [2] 5 R. 230. [3] 8 S. L. T. 368.

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subjects are intended to continue permanently as dwelling-houses, I may, in the first place, observe that I am not at all satisfied that these introductory words are part of the operative restriction." The Lord Ordinary's criticism of what Lord Kyllachy says is based on the opinion of the Lord President in *Montgomerie-Fleming's Trustees* v. *Kennedy*.[1] I am unable to agree with this criticism. The clause in the *Montgomerie-Fleming* case,[1] though parenthetical in form, contained an express provision in regard to occupation. That is wanting here. If the clause under consideration here had been that the lodgings were to be occupied permanently as dwelling-houses, the question would then have arisen whether occupation in the manner described on record by the Post Office is occupation as a dwelling-house, and it would have been necessary to construe the expression "trading places of any description." For the reasons above stated, I do not consider it necessary to go into this question, which is the one dealt with by the Lord Ordinary. All I desire to say on this point is that, before considering it, a precise averment would be required in regard to the actual business that is done in the premises. In my opinion, the restriction in the title is in regard to the structure of the dwelling-houses, not the use, and consequently the demand of the pursuer fails. The interlocutor of the Lord Ordinary should, in my opinion, be affirmed.

The LORD PRESIDENT and LORD SKERRINGTON concurred.

THE COURT adhered.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—JOHN S. PITMAN, W.S.—Agents.

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Boyd & Forrest v. Glasgow and So.-Western Railway Co.

BOYD & FORREST, Pursuers.—*Clyde, K.C.—MacRobert.*
THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders.—*Macmillan, K.C.—Watson, K.C.—J. R. Dickson.*

Contract—Constitution—Error—Remedy—Contract induced by innocent misrepresentations causing essential error—Rescission—Restitutio in integrum—Conditions limiting liability.

Contract—Construction—Conditions—Breach—Remedy.

Contract—Construction—Work executed different from work contemplated—Basis of payment.

Recompense—Quantum meruit—Construction of railway—Claim, in excess of contract price, for value of work done.

A railway company invited tenders for the construction of a line of railway, and for the information of intending offerers exhibited what purported to be a journal of bores taken along the proposed line. A firm of contractors, to whom that journal had been exhibited, tendered for the work, and a lump sum contract was entered into with them for the construction of the railway. The contract contained an exemption clause which stated that the Company did not guarantee the accuracy of the bores and would not be liable in respect of any inaccuracy in the journal or any error in or omission from the

[1] 1912 S. C. 1307.

specification of work prepared by them. The contractors were also taken bound, *inter alia*, to make good any injury to water-pipes caused by their operations.

During the progress of the work the contractors encountered more rock or hard substance than they had anticipated. They ultimately ascertained, after the work had been completed, that the bores had been taken by servants of the Company, who, as the Company knew, had no skill in such work; that the so-called journal was not a record kept by the borers, but was compiled by the Company's engineer from notes supplied by the borers; and that in compiling the "journal" the engineer had omitted the results of some bores and in other cases had inserted, not what the borers said, but what the engineer thought they meant, with the result that ground was called "soft" when in reality it consisted, and had been reported by the borers to consist, of hard material. The engineer acted in good faith and with the honest intention of representing what he believed to be the true meaning of the borers' reports, but the effect was that the contractors were misled regarding the nature of the ground. It was also discovered, while the work was in progress, that a bridge required to be built at great expense to carry a water-pipe, the existence of which was known to the railway company, but was not disclosed by them to the contractors. An unexpectedly large amount of "boulder clay," which was difficult and expensive to work, was also discovered in one of the cuttings. In consequence of these circumstances, the work cost far more than the contract price, on account both of the extra labour required and of the disorganisation caused by the unexpected obstacles.

The contractors completed the work, and thereafter brought an action against the Company concluding, in name of recompense, or alternatively in name of damages, for a sum to cover the extra cost of constructing the railway.

Circumstances in which *held* (1) that although the work as executed by the pursuers was not so materially different from that contemplated by the contract as to make the contract inapplicable, yet, as the exemption clause did not protect the defenders against errors caused by their own misrepresentation and as the pursuers had entered into the contract under essential error induced by the misrepresentation (although innocent) of the defenders regarding the journal of bores, the pursuers, in spite of their inability to give *restitutio in integrum* otherwise than by a readjustment of the money payments, were entitled to set aside the contract; (2) or otherwise, that the defenders, being in breach of an essential implied condition of the contract, namely, that the journal of bores should include all the bores, and should be an accurate record of the borers' reports, were not entitled to hold the pursuers to the contract as the basis of charge; (3) and on either view, that the pursuers were entitled to payment on the footing of *quantum meruit* for the extra cost in which they had been involved through the error into which they had been led.

Held alternatively, and on the assumption that there was no sufficient ground for treating the contract as rescinded, that the pursuers were entitled to claim damages for the loss which they had sustained through the failure of the defenders to supply an accurate and complete journal of bores and to disclose the existence of the water-pipe.

Lord Guthrie *dissented*, *holding* (1) that there was no obligation on the defenders to supply the actual results of all the bores and that their engineer was entitled to state what he believed to be the true import of the borers' reports; (2) that the pursuers had not been misled regarding the nature of the ground to any material

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extent; (3) that the pursuers were barred from asking rescission of the contract by their inability to give *restitutio in integrum*; and accordingly, (4) that the pursuers were not entitled to set aside the contract; and *holding* further, (5) with regard to the claim of damages, that the defenders were not in breach of any condition of the contract express or implied, and that, in any event, they were protected by the exemption clause against liability for any failure on their part to supply full and accurate information regarding the nature of the ground or the existence of the water-pipe.

2D DIVISION. Ld. Johnston.

(REPORTED *ante*—1911 S. C. 33 and 1050; 1912 S. C. (H. L.) 93).

In November 1907 Messrs Boyd & Forrest, contractors, Kilmarnock, brought this action against the Glasgow and South-Western Railway Company. The only conclusion of the summons was for payment by the defenders to the pursuers of the sum of £106,688. 13s. 11d., conform to a detailed account which was lodged by the pursuers.

The action arose out of a claim for work done by the defenders in constructing a line of railway, about 12½ miles long, from Dalry to Johnstone.

In March 1900 the defenders advertised for tenders for the construction of the line in question. The pursuers made a tender, which was accepted on 12th April 1900, and a formal contract between the parties was executed in September 1900. The pursuers' knowledge of the ground where the work was to be done was derived from a document exhibited to them by the defenders, which purported to be a journal of bores taken along the line of the proposed railway.

The contract provided that the pursuers should execute the work described in the specification and schedule annexed to the contract for the sum of £243,090, and within thirty months from 12th April 1900. Extra work was to be paid for at an agreed-on rate. The pursuers were bound to make good all injury caused by their operations, *inter alia*, to water-pipes, and to relieve the defenders of all statutory obligations with regard to the same. The specification (copies of which had been supplied to intending offerers), signed as relative to the contract, contained an exemption clause in these terms:—

"The plans, sections, and drawings are intended to show the extent and position of the work and the details of its construction; but neither they nor the specification are meant to show or describe every part or portion of the work. Should there be any things omitted, therefore, which may be fairly considered to be necessary for the completion of the work, they shall be held as included in the contract sum, and no advantage is to be taken by the contractor of any apparent or inadvertent errors or omissions. . . ."

"CUTTINGS AND EMBANKMENTS.

"Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journal of these bores may be seen at the engineer's office, but the Company does not in any way guarantee their accuracy, or that they will be a guide to the nature of the surrounding strata. Contractors must, therefore, satisfy themselves as to the nature of the strata, as the Company will not hold themselves liable for any claim

that may be made against them on account of any inaccuracy in the journals of the bores. . . .

"Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule, the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these, although the material may turn out to be different from what is calculated and given in the detailed schedule."

The detailed schedule (copies of which had been supplied to intending offerers), signed as relative to the contract, contained a note in these terms:—

"Note.—*The particular attention of intending contractors is directed to the specification in regard to the following matters:*—

"The probability of slips in cuttings and embankments and sites of embankments.

"The probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material turn out to be different from what is calculated and given in the schedule."

The work was commenced in April 1900, and was not completed until May 1905 in consequence of the difficulties which emerged, consisting mainly of the unexpectedly large amount of hard material encountered in the cuttings which the journal of bores had indicated as soft, and of the fact that the pipe carrying the main water supply to Paisley crossed the line of the railway, a circumstance which had not been disclosed to the tenderers. After the completion of the work this action was brought, the sum sued for (£106,688, 13s. 11d.) being the difference between the amount which the pursuers alleged that the work had cost (£378,658, 13s. 11d.) and the amounts paid to them (contract price £243,090, and extra payments, £28,880).

The facts of the case are fully narrated in the previous report (1911 S. C. 33), and are not further detailed here, but so far as material to this report they will be found summarised in the rubric, *supra*, p. 473.

The pursuers pleaded, *inter alia*;—(3) The contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, in respect (*a*) that said contract was induced by the fraud of the defenders; (*b*) that said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders; (*c*) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract; (*d*) that said contract was by agreement of parties departed from as the basis of charge; and (*e*) that the defenders are by their actings barred from founding on said contract as the basis of charge. (4) Alternatively, the pursuers having suffered loss and damage to the extent of the sum sued for owing to the fraud, negligence, or breach of contract of the defenders as condescended on, the pursuers are entitled to decree as concluded for.

On 20th January 1910 the Lord Ordinary (Johnston), after a proof, pronounced this interlocutor:—". . . Sustains branches (*a*) (*b*) and (*c*) of the 3rd plea in law for the pursuers, and finds

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that the pursuers having on the defenders' employment executed the work contained in the account sued for, are entitled to reasonable recompense therefor, allowing for payments to account, either in name of *quantum meruit*, or, which in the present case is substantially the same thing, of damages, as the same may be ascertained."

The defenders reclaimed, and on 10th November 1910 the Second Division pronounced this interlocutor:—". . . Sustain branches (*a*) and (*e*) (omitting branch (*b*)) of the 3rd plea in law for the pursuers; adhere with the above variation to the said interlocutor reclaimed against." *

The defenders appealed to the House of Lords, and on 16th May 1912 their Lordships pronounced this order:—"Ordered that the interlocutors complained of be reversed; found and declared that the respondents had failed to prove that they were induced to enter into the contract by the fraud of the appellants or of anyone for whom they were responsible; and cause remitted to the Court of Session (1) to repel branch (*a*) of the respondents' third plea in law; (2) to repel branches (*b*) and (*e*) of the same plea in so far as founded on or maintained on allegations of fraud; and (3) to hear and dispose of the whole pleas and contentions of the parties except in so far as repelled in terms of the foregoing directions." †

In terms of the remit by the House of Lords the case was heard before the Second Division on 17th and 21st to 25th October and 4th to 7th and 26th to 28th November 1913.

Argued for the pursuers;—The House of Lords had negatived fraud on the part of the defenders, which disposed of branch (*a*) of the pursuers' third plea, and the pursuers no longer insisted on branch (*d*) of that plea. The pleas they now maintained were 3 (*b*), (*c*), and (*e*), and also 4 so far as founded on negligence and breach of contract. (1) The pursuers were induced to enter into the contract by representations on the part of the defenders, which —though they must now be taken to have been made innocently— were at least negligent, and were certainly false. The defenders represented, *inter alia*, that a complete copy of the actual bores taken could be seen at the office of the Railway Company, whereas the copy shown to the pursuers contained only selected bores, and in at least four material cases the description of the borer had been altered. They further represented that no legal obstacle existed to the completion of the work, whereas the fact was that the proposed line was crossed by the Paisley water pipe, which had been laid under statutory authority and could not be interfered with.[1] These misrepresentations were material, and led the pursuers wholly astray as to the nature of the work. They were "representations," although to a certain extent they consisted only in the concealment of facts

* Reported 1911 S. C. 33.

† Reported 1912 S. C. (H. L.) 93.

[1] Queen v. South Wales Railway Co., (1850) 14 A. & E. 902; Manchester, Sheffield, and Lincolnshire Railway Co. v. Great Northern Railway Co., (1851) 9 Hare, 284; Great Northern Railway Co. v. East and West India Docks and Birmingham Junction Railway Co., (1852) 7 Railway Cases, 356; Oxford, Worcester, and Wolverhampton Railway Co. v. South Staffordshire Railway Co., (1852) 1 Drewry, 255; Dublin and Drogheda Railway Co. v. Navan and Kingscourt Railway Co., (1871) I. R., 5 Eq. 393; Deas on Railways, (1897 ed.) p. 154.

which it was the duty of the defenders to disclose.[1] There could be no doubt that if the pursuers had known the true facts they would never have entered into a contract in these terms, and that was the test of "essential error."[2] In these circumstances the pursuers were entitled to ignore the contract and to treat it as rescinded.[3] They had no claim of damages in connection with this plea, the misrepresentations not being fraudulent,[4] but they were entitled to recompense, on the basis of *quantum meruit* for the work done by them for the defenders.[5] It was no bar that literal *restitutio in integrum* was impossible. In every case where a party had been misled by misrepresentation, however innocent, so that his position was changed for the worse, the law would provide a remedy. Admittedly it was necessary that, so far as possible, parties should be restored to the position in which they were before the contract was begun.[6] In the present case it was sufficient compliance with this doctrine that the pursuers should repay what they had received and then receive recompense limited to the amount to which they were entitled for the work done.[7] The *actio quanti minoris* was an example of a remedy provided when matters were no longer entire.[8] It would be inequitable that the pursuers should be denied the appropriate remedy for misrepresentation merely because they could not give actual *restitutio*, seeing that the facts relating to the misrepresentation were not known, and could not be known, to them till the carrying out of the contract was nearly completed. The only instances in which the impossibility of *restitutio* made rescission inappropriate were when the rights of third parties had intervened, or when the subject-matter of the contract had been destroyed,[9] and neither of these exceptions applied in the present case. The exemption clause, which was the chief line of defence, did not protect the defenders against the consequences of their own false representations. There was no foundation in fact for the suggestion, put forward for the first time at a late stage in the proof, that "actual top of rock" was an *ex gratia* line of concession, and that the pursuers had already received payment for all hard material excavated. (2) The same facts which supported the plea of misrepresentation, also supported the plea of breach of contract. *Inter alia* it was a condition precedent that the journal of bores should be complete and not grossly inaccurate, and that the borers should have been competent. It was also a condition precedent that the defenders should give the pursuers access to the whole ground and should

[1] Kerr on Fraud, (4th ed.) p. 61; Freeman v. Cooke, (1848) 2 W. H. & G. 654; Assets Co., Limited, v. Bain's Trustees, (1904) 6 F. 692.

[2] Menzies v. Menzies, (1893) 20 R. (H. L.) 108, *per* Lord Watson, at p. 142.

[3] Adam v. Newbigging, (1888) 13 App. Cas. 308; Rawlins v. Wickham, (1858) 3 De G. & J. 304; Mair v. Rio Grande Rubber Estates, Limited, 1913 S. C. (H. L.) 74, *per* Lord Shaw, at p. 82; Edgar v. Hector, 1912 S. C. 348; Anderson v. Croall & Sons, Limited, (1903) 6 F. 153.

[4] Ersk. Prin., (21st ed.) p. 291. [5] Bell's Prin., sec. 538.

[6] Steuart's Trustees v. Hart, (1875) 3 R. 192.

[7] Whittington v. Seale-Hayne, (1900) 16 T. L. R. 181.

[8] Louttit's Trustees v. Highland Railway Co., (1892) 19 R. 791, *per* Lord M'Laren, at p. 800.

[9] Western Bank of Scotland v. Addie, (1867) 5 Macph. (H. L.) 80, *per* Lord Cranworth, at p. 90.

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disclose all obstacles known to them. [LORD DUNDAS referred to *Mackay & Son* v. *Leven Police Commissioners*.[1]] These were essential conditions going to the root of the contract, the breach of which by the defenders entitled the pursuers to treat the contract as rescinded,[2] and to claim recompense on the basis of *quantum meruit* for the services rendered by them to the defenders. (3) If these conditions were not so essential as to justify rescission, they were at least conditions for the breach of which the pursuers were entitled to damages, which in the present case would amount to the same thing. (4) The circumstances under which the work was carried out were so different from those contemplated by the contract, that the pursuers were entitled to treat the contract as at an end and to recover upon a *quantum meruit*.[3] In particular the additional amount of rock and boulder clay and the bridge for carrying the Paisley pipe were not "extras," but amounted to "work so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all."[4]

Argued for the defenders;—(1) The pursuers had no conclusion for reduction of the contract. Apart from this objection to the form of their record they could only succeed under plea 3 (*b*) if they proved that the defenders were guilty of misrepresentation, that essential error was thereby induced, that this was the cause which led the pursuers to enter into the contract, and, lastly, that the pursuers were entitled to rely on the representations of the defenders. None of these had been proved. The evidence showed that the "journal of bores" was substantially correct, and that any error in it had been much exaggerated by the pursuers, and was more than covered by the exemption clause. The defenders were under no obligation, legal or otherwise, to exhibit the actual result of every bore, and their engineer was entitled to state what he honestly thought the borers meant, and if in so doing he made any mistake that also was covered by the exemption clause. The same clause showed that the pursuers had expressly contracted not to rely on the defenders' representations.[5] The case really resolved itself into the question who was to bear the loss consequent on the work turning out more difficult than either party anticipated. The loss should fall on the contractor, whose business it was to take the risk of this, just as he took the advantage if the work proved easier and cheaper. So far as the extra rock excavation was concerned, he had suffered no loss, because he had, *ex gratia*, been paid as for rock up to the line "actual top of rock," which included much that was not rock. Innocent misrepresentation was no ground for rescission unless it were such that there was complete difference in substance between the thing bargained for and the

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[1] (1893) 20 R. 1093.

[2] Wade v. Waldon, 1909 S. C. 571; Turnbull v. M'Lean & Co., (1874) 1 R. 730; Macbride v. Hamilton & Son, (1875) 2 R. 775.

[3] Bush v. Trustees of Port and Town of Whitehaven, (1888), reported in Hudson on Building Contracts, (3rd ed.) vol. ii. p. 118; Smail v. Potts, (1847) 9 D. 1043; Quin v. Gardner & Sons, Limited, (1888) 15 R. 776; G. Mackay & Son v. Lord Advocate, 1914 1 S. L. T. 33.

[4] Thorn v. Mayor and Commonalty of London, (1876) 1 App. Cas. 120, *per* Lord Chancellor Cairns, at p. 127.

[5] S. Pearson & Son, Limited, v. Dublin Corporation, [1907] A. C. 351.

thing obtained,[1] and this could not be said in the present case. Admittedly the pursuers were not entitled to damages in addition to rescission,[2] and this was clear from the fact that, after the decision in *Derry* v. *Peek*,[3] it required an Act of Parliament[4] to make directors liable in damages for innocent misrepresentations in company prospectuses. There were only two classes of misrepresentation, fraudulent and innocent, and negligent misrepresentation belonged to the latter class.[5] The remedy of rescission in the case of innocent misrepresentation was an equitable remedy,[6] and accordingly was not always appropriate. In particular it was not appropriate to a case, such as the present, where it was impossible for matters to be restored to their original position.[7] Restitution was always impossible in an executorial contract after the work had been completed. What the pursuers offered, namely, that they should repay what they had received and then be recompensed for their services, was not restitution at all, for it put the defenders in the position of having entered into a *quantum meruit* contract, which they certainly would never have done originally. In effect it put upon the defenders the risk of loss under the contract, which was precisely what they had provided against in the exemption clause. (2) There had been no failure on the part of the defenders to perform their part which would justify the pursuers either in treating the contract as at an end[8] or in claiming damages, even if they had a record for such a claim, which they had not. The defenders had not committed such a breach of the contract as to infer their intention of repudiating it. Even if they had, the pursuers, having gone on with the contract, could not now set it aside, and could at most claim damages. The alleged conditions did not go to the root of the contract, and in any event had not been broken. As already explained, it was no part of the contract that the journal of bores should be complete in the sense demanded by the pursuers, or that the defenders should be bound to remember and disclose beforehand the position of every water-pipe on the line of the railway. On the contrary, it was expressly provided that the defenders should not be responsible for errors and omissions. The brdge was an extra within the meaning of the contract, and had been rightly paid for as such, and the pursuers' claim was really in respect of

[1] Kennedy v. Panama, &c., Mail Co., (1867) L. R., 2 Q. B. 580, *per* Blackburn, J., at p. 587; Stewart v. Kennedy, (1890) 17 R. (H. L.) 25; Woods v. Tulloch, (1893) 20 R. 477.

[2] Manners v. Whitehead, (1898) 1 F. 171.

[3] (1889) 14 App. Cas. 337.

[4] Directors' Liability Act, 1890 (53 and 54 Vict. cap. 64).

[5] Angus v. Clifford, [1891] 2 Ch. 444, *per* Lindley, L.J., at p. 463.

[6] Ferguson v. Wilson, (1904) 6 F. 779.

[7] Western Bank of Scotland v. Addie, 5 Macph. (H. L.) 80; Houldsworth v. City of Glasgow Bank, (1880) 7 R. (H. L.) 53, *per* Lord Blackburn, at p. 64; Hay v. Rafferty, (1899) 2 F. 302; Sharpe v. San Paulo Railway Co., (1873) L. R., 8 Ch. 597; Sheffield Nickel Co. v. Unwin, (1877) 2 Q. B. D. 214; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Clarke v. Dickson, (1858) E. B. & E. 148; Bell's Comm., (7th ed.) vol. i. p. 466, note 2; Kerr on Fraud, (4th ed.) p. 365.

[8] Mersey Steel and Iron Co. v. Naylor Benzon & Co., (1884) 9 App. Cas. 434; Rhymney Railway v. Brecon and Merthyr Tydfil Junction Railway, (1900) 69 L. J., Ch. 813.

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disturbance and delay. These were risks incidental to the construction of every work, and risks which, both at common law and under the terms of this contract, fell to be borne by the pursuers themselves. (3) The work was not "entirely different" from that contemplated in the contract. The rule of such cases as *Bush*[1] applied only to instances where the contract had become inapplicable as a basis of charge owing to the occurrence of some event wholly outside the scope of the contract, such as the interruption of a charter party by shipwreck.[2] In the present case the discovery of an excessive amount of rock or boulder clay, and the necessity for building a bridge to carry the water-pipe, were incidents natural to the construction of any railway, and, though possibly unexpected, did not alter the character of the work.

At advising on 7th March 1914,—

LORD JUSTICE-CLERK.—This process stands in a somewhat unusual position. The pursuers' case is that they were led to enter into a contract with the defenders to execute certain works of construction of a railway for a lump sum, and that they were led to tender to do the work for a certain price, by the other party, the defenders, having, through their responsible officials, supplied them with information which was in essential particulars misleading information; and that thus they, the pursuers, were induced to enter into the contract by fraud, or otherwise that they were misinformed by an incorrect representation of facts, and were thus under essential error. They claim that the sum to which they were entitled for the work done is much larger than what they have received, and they sue for the excess. There is also a claim in respect of the work when in progress being interrupted and delayed by the failure of the defenders to give notice of a special piece of work relative to a town water-supply pipe which crossed the line. They sue for what they maintain is due to them after crediting the defenders with the amount already paid to them, payments having been made, as is usual in the case of such contracts, from time to time as the work proceeded.

When the case was formerly before this Court, the Lord Ordinary was of opinion that the pursuers had established their averments of fraud, and he found accordingly, and this Division refused a reclaiming note against his interlocutor, and affirmed his judgment. That being the view of the Court it was unnecessary to consider the alternative of misrepresentation leading to essential error, as the greater necessarily included the less. The defenders having appealed to the House of Lords, the judgments finding fraud were held to be erroneous and were reversed, but no decision was given on the other pleas of the pursuers. Thus the case is now before us, with that which relates to fraud disposed of finally, but nothing else. As the Lord Chancellor expressed it in the discussion as to the form of the order of the House of Lords:—"The form of the order will require to be put regularly. The substance is that the House allows the appeal on the question of fraud which alone was argued before them.

[1] Reported in Hudson on Building Contracts, (3rd ed.) vol. ii. p. 118.
[2] Jackson v. Union Marine Insurance Co., (1874) L. R., 10 C. P. 125.

. . . In this House the only question that the House was asked to adjudicate upon was plea 3, branch (*a*), if I recollect rightly, which is fraud."

The effect of this order was to leave all other questions open. And that this was the intention is plain from what was said by Lord Atkinson, who gave the leading judgment, from which I think it may be well to quote. Referring to the important question of the representations of the defenders as to the journals of bores exhibited to the pursuers before they made their tender, he said,—"It may well be that under the contract entered into Melville owed a duty to the contractors to prepare this journal of bores with reasonable skill, care, and accuracy, or that a term was by implication introduced into the contract to the effect that the Company should appoint, or had appointed, to do the work of boring, skilled persons fully competent for that work, or again, that the documents submitted to the contractors for perusal should reasonably answer the description of a journal of bores, or further, that the Company warranted that this compilation was correct, or the borers highly skilled, and that an action, or several actions against the Company for the breach of one or all of these warranties or contractual obligations would on the evidence given at this trial have been sustained; but in my view these matters, so far as they are not proof of Melville's fraud, are wholly irrelevant to the only issue decided upon by the Second Division of the Court of Session from which this appeal has been taken. I accordingly have not formed, and do not express, any opinion upon any of these matters." The Lord Chancellor further states in his brief opinion that he refrains "from expressing any opinion upon other matters that may or may not be open for litigation and decision." It thus plainly appears that the case is remitted back to this Court to deal with it on all matters other than fraud, from which it may be implied that there is matter relevant to be dealt with, and upon which no guidance is given by the Court of supreme instance.

I have been careful to state the position of the case fully, so as to indicate that I hold this Court absolutely free to consider, and bound to consider, the whole case, now for the second time before us, without being bound by any *obiter dicta* which may have fallen from their Lordships not touching the question of fraud, as this plea only was argued before them, and they plainly state that they do not deal with any other. In every aspect except that of fraud, which this Court has been found to be wrong in affirming, the whole case is open, and the question is whether there are facts proved which will justify a judgment in favour of the pursuers on the pleas stated, after deleting that part of the pleading which relates to fraud.

There are two principal matters of fact to be considered: (1) There is the question whether the pursuers have proved that, as regards the material to be excavated and dealt with in the construction of the railway line for which they took the contract, they were misled by incorrect information laid before them as in aid of their deliberations as to the tender they would make for the work, and were thus brought into essential error, under which they were induced to make the tender which they did make, resulting in great loss. (2) As regards the Paisley water-pipe, were

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the pursuers made to suffer loss by (*a*) Omission to inform them of this *opus manufactum*, which was not the property of the Company, and could not be tampered with without special arrangements to meet the requirements of the owners; and (*b*) Delay caused by the omission hindering the general progress of the construction of the line and making necessary expensive changes in the mode of working; the preparations, plant, &c., provided being rendered inefficient and the scheme of the work being upset? There are some subsidiary, but in degree unimportant, questions which need not be noticed in the general argument.

If these questions fall to be answered in the affirmative—or either of them—the further questions of law will arise: (1) Are the pursuers entitled to any remedy for the loss they have sustained, and, if so, is that remedy still open to them in the present circumstances? and (2) If there is a remedy, what is its proper form?

As regards the first question, which necessarily had to be considered by this Court at the former hearing—because if there was no misrepresentation by statement or concealment, there could be no fraud—I have listened with close attention to the very able arguments addressed to us by counsel, and have considered the proof and documents to which attention was called, and I find myself unable to come to any other conclusion than that which was implied in the judgments pronounced in this Court, which have been set aside, on the question of fraud, viz., that there was misrepresentation and concealment leading to essential error.

It is obviously impossible, in giving an opinion in this almost unprecedentedly bulky case, to go into elaborate detail, making a full analysis of the evidence, oral and documentary. It is only possible to deal with the salient points, and to state generally the grounds of the opinion formed.

The work for which the pursuers contracted was great in quantity, extending over many miles of railway construction, and the contractors had only a fortnight to consider at what sum they would undertake the contract and to make up the necessary details, their only opportunity for inspection being on 8th March 1900, and the Railway Company calling for tenders to be delivered by 18th March. Thus it was certain that, as regards all calculations as to cutting work, they could not inform themselves by any inspection of their own, or conduct any boring works to make their own tests as to the nature of the material to be taken out and removed. They could not have tendered at all without having some information, and this information the Company professed to supply by giving them access to the records of the experiments they had made for the purpose of informing themselves how to lay off the line, so as to provide as much as possible that material to be cut out could be used for sufficient embankment of low-lying land, and that the excavation would provide stone for necessary building work—bridges, &c.—and stone for permanent way ballasting. In the circumstances it was evidently contemplated as necessary that the information thus obtained should be given as an aid to contractors in tendering, so that they might have a reasonable belief that they were undertaking a work which would yield them a business profit and not subject them to a loss.

The defenders put forward in argument a contention, and strenuously

maintained it, that such contractors are engaged in speculation, and that the mere fact that they can show a loss on a particular work in no way entitles them to claim compensation. This is of course quite sound as a general argument. A contractor must judge for himself in making a tender; but this can never imply that, where an important part of the necessary information which he must have before him in making his calculations is supplied—as in a case like this it must be—by the party with whom he is invited to contract, it is part of his speculating consideration to speculate as to the accuracy of the information supplied to him, and to discount any material part of it as untrustworthy. He is at least entitled to assume that, when he is supplied with what bears to be a record of the result of investigations made, it shall be that result as certified by the person who made the investigations, and not something which he did not record, but which is supposed by someone else to be what he ought to have recorded. Now in this case it appears to me to be established beyond question that in material particulars what was laid open to the pursuers as a "journal of bores" was not a record of the person who made the bores, but was a statement, made up in the form of a journal, in which the description of what was found in the bores was in contradiction of information supplied by the borer himself, and this without any explanation or statement on the face of the so-called journal as to how it came about that the borer's report was set aside, and words of description substituted which had a different meaning. The word "hard" in the report was struck out, the expressions giving name to substances—"black ban," "rock," "appears to be rock"—disappear, and a different name, "blaes," is put in, this name, we are told, being understood in engineers' and contractors' language to indicate a material which was not hard but soft. The insertion of the word "blaes" was intended to convey to the contractor that the depth of material which the borer called "hard" and "rock" was a soft material. In one case where the borer had given a name to the class of "rock," namely, "whinstone," it was assumed, without any inquiry either from the borer or by examination, that the borer must have made a "clerical" error, and once more the word "blaes" was substituted for "whinstone," the assumption being made that the substance could not be rock and must be "blaes." One would think that, if some one reporting was supposed to have used a descriptive word by clerical error, the right course would be to find out what it was the reporter intended to say, and not to put down as his a descriptive word he had not used. It is, one would think, a thing without precedent that where a person in a report names something, someone else should strike out the name given and insert another name meaning something totally different, on the footing that he thinks the writer made a clerical error and assumes that he must have meant another substance not the same in character as regards density and hardness.

About all these facts there is no dispute. And it is certain that, up to the time of the evidence being taken, the pursuers never knew that the information contained in the so-called journals was not in essential particulars in accordance with the reports made by the borers who did the work.

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It is abundantly clear that the borers who were at first employed to make the bores were quite incompetent to do so efficiently. This is admitted by the engineer, Mr Melville, and stated as fact by the survivor of the two Cowans, who did the work and supplied the reports. Nothing can make it more plain that they were incompetent than that Mr Melville should be making inquiries and asking for samples of what the borers found. Yet he does not have the bore as to which he wishes further information examined, but he asks the incompetent borer—one whom he describes as "not a qualified mineral borer"—to send him a sample, and he gets this, not from the bore, which could have been well tested by digging down at that spot, but from another bore at some considerable distance, and all he gets is a small chip, which might quite easily have been a chip dropped down into the lower part of the hole from the strata above as the boring proceeded, and, as the borer was incompetent, might not be the same at all as what he had reported on before. But on this Mr Melville thinks himself justified in altering the report as to the other bore. In no way could he more clearly indicate how untrustworthy he considered the borer he employed to be.

Further, he ordered certain check bores, and no journals of these were laid open to the contractors. Thus the information given, which professed to be of the bores taken by the Company, was not complete. It was strenuously argued at the debate, that the notice that the journal of bores, which was to be seen at the office, did not mean "all the bores." I cannot accept this. It was upon the information of all the bores that the Company necessarily proceeded in their considerations as to the contract. I cannot hold otherwise than that, if they gave out that they had taken bores, and that the journals could be seen at the office, that in all fair dealing meant all the bores, not selected bores. Of all the bores, one would at least expect that "check" bores would be most valuable for information, particularly when it is remembered that it is part of the defenders' case that the strata in this line are very variable in their quality, and vary at very short intervals of space. The very fact that it was thought necessary to take check bores indicates that the engineer thought them necessary for his information. But surely, if the bores are for information, and in the case of the check bores for better information, that information should be—as I hold it was professed to be—before the person proposing to tender (who could not tender without such information as to proportions of hard and soft which are of the essence of the matter) that he might judge of it in considering what tender he should make. It would appear from what the defenders maintain that it is not necessary in their view to inform the contractor of what was reported by the borers, but only of what the employer of the borers thought should have been in the report, and that a statement of what is called a journal of bores may be an expression of what one who did not take the bores thinks was the material found, the borers having as he thinks made mistakes or written in names by clerical error, and that selected bores may be given as being the bores taken. To that I cannot assent. A journal of bores must be assumed to be a statement of the borer, stating what in his judgment he found, not a statement of someone else of what they think he

found. The journal should contain the borer's facts. Any explanation or expression of doubt by anyone else may be appended for consideration, but the contractor is entitled to form his own opinion of the facts stated, and of any explanations or views of others, if they think fit to add them. If he was told the borer's statement and an explanation was given that it was not supposed to be correct, he would naturally make inquiry and satisfy himself. The judgment of others, in the form of a journal which the borer never issued, is not to be put before him as being the fact stated by the borer.

It is very plain that if the pursuers had been told that the borers had reported "hard," "rock," "whinstone," they would have considered these reports, and formed their own opinion as to whether their tender should be calculated on taking the strata as hard, or whether they would have been satisfied with the explanations and emendations of the engineer, and would have tendered on the footing of "soft," or whether they would tender at all, until they had more satisfactory information or facts on which they might proceed with prudent regard to their own interests.

The defenders founded strongly on the clause in the contract whereby the contractor is bound to satisfy himself as to the completeness and accuracy of the schedules, and by which he is made to understand that "no allowance will be made should the material turn out to be different from what is calculated in the schedule." And further as regards the bores, the notification that "the Company does not in any way guarantee their accuracy or that they will be a guide to the surrounding strata." I cannot think that these are reasonable contentions in the circumstances. Had they supplied journals of bores, stating the facts as the borers stated them, then the clause would have applied, if it turned out that the conclusions, put down by borers of such competency that the defenders might be justified in employing them, were erroneous even to the effect of being detrimental to the contractors. In such a case the only question that could have been raised would be the question whether they had professed to give the reports of competent borers, when they knew that those they had employed were incompetent. But it is difficult to see how this clause can be founded on, when what was supplied as a "journal of bores," was, as regards its most essential part, a statement of opinion that the facts contained in the borers' reports were not truly facts, and that they found something else than what they said in their report they had found.

There are two further circumstances in connection with the cutting work, which seem to me to be of great importance, and as regards which the defenders present upon the proof anything but a satisfactory case. It is not in dispute that substantial portions of the line, in which strata were found corresponding with the original reports of the borers, were laid off with a batter at the lower part of the cutting, which is the accepted batter for rock, and not for soft material. This was done by directions of the engineers of the Company in charge of supervising the work. And accordingly such cuttings were paid for as for rock cutting. The engineer of the line will not admit that this payment was made because rock was found, but declares that this was done *ex gratia*. It is not easy to under-

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stand how such an expression can be held to apply in the circumstances. This is certain that Mr Melville knew that these cuttings were so made with the rock batter, that the line was exhibited to the Board of Trade Inspector with this rock batter, and that the traffic has been carried on on the same footing since the line was opened with the sides standing at rock batter. The defenders say that there is some deterioration or crumbling on the faces of these cuttings. This may well be. When the material is exposed and is weathered, winter frosts may attack the face where water is percolating from the slope above. But that does not alter the fact that, when the cutting was made, it was through hard and not soft material, accepted as hard by, and set up as hard at the sides with the sanction of, the Railway's engineers. That when it is exposed change may take place in its consistency cannot affect the question whether it was hard when the operation took place of removing the natural strata as they were deposited underground.

The other circumstance is one relating to the alleged fact that on one occasion, when Sir James Bell, the chairman of the Company, and Mr Melville, the engineer, were present, a demonstration was given by the pursuers by blasting, showing as matter of fact that where "blaes" had been represented to be found there was rock and not soft material. This was clearly deponed to by the pursuers' witnesses as a demonstration which took place before these gentlemen. But, strangely enough, no account of the matter is given by the defenders. Sir James Bell is not called as a witness, and Mr Melville, who was a necessary witness for the defenders, neither admits nor denies the fact. In answer to repeated questions, his statement is one of non-recollection only. I feel bound to accept the evidence for the pursuers, and that evidence is most unfavourable to the defenders.

But it was maintained by the defenders that, supposing their arguments were not to receive any effect as to alteration or withholding of journals, the pursuers had in fact failed to show that the amount of hard material was any greater than had been put before them in the bores, schedules, and sections with which they were furnished, seeing that they were paid large sums as for rock for what was not rock, *i.e.*, not hard material—that while the scheduled quantity was something over 41,000 cubic yards there were in fact about 8000 yards less, and yet the Company paid as for 71,000 cubic yards. If this was proved to be so it might of course be fatal to the pursuers' case—if, even though there had been misrepresentation, no error causing loss followed. It is difficult to understand, and not easy to accept the suggestion that the large sums representing the difference between soft price and hard price should have been paid by the Company if the truth was that less hard was actually taken out than the scheduled quantity. The case put forward in support of this is that the extra payments were made *ex gratia*, but I confess that an analysis of the evidence leads me to hold that this explanation, the burden of proof of which lies on the defenders, has not been substantiated by them.

In considering this matter the progressive section of the work is of importance. It bears on it a line which is named in words as "actual top of rock," and when the case was before the Court here that was held

to be conclusive in the pursuers' favour as to the levels throughout at which in the excavation rock was encountered. It was maintained that these words "actual top of rock" did not mean the top of the rock, and that the line referred to was expressive of what consisted of actual rock, and also of what *ex gratia* was paid for as rock although it was not rock. And it is remarkable that at one part of the section the line of "actual top of rock" falls below the expected line for a considerable distance. It is difficult to conceive how, if that line was laid off not to indicate the rock as found but in order to give an *ex gratia* line of concession higher up in the strata than was actually the fact, a part of the line called "actual top of rock" should be carried down below the other line. There is no intelligible explanation of this. I find it very difficult to understand how this could be so. Such a progressive section by its very name is intended to be a record of the work as it proceeds. It certainly would appear to be a strange way of doing business to put down upon a section a description of a material which was not found in the ground as having been found there, and to say that, in paying for it as what it was not, the action was *ex gratia*. There is no record of such a thing having been done. Mr Melville says he consulted Mr Cooper, the chief engineer, and the chairman of the Company as to paying for what was "not rock as rock." Neither of these gentlemen is called as a witness, and there are no documents in any way tending to support the statement. Indeed any there are tend rather in the opposite direction, as when Mr Cooper applied to Mr Melville for explanations regarding the large amount of extra payments over contract, Mr Melville expressly in several letters speaks of "rock" encountered at several places contrary to expectation as the cause of the allowances. Thus the case now made, to overcome the force of the line on the progressive section showing "actual top of rock" as distinguished from the lower line of "assumed" top of rock, seems to me to fail. Without going into detail I think the other documents tend to corroborate the pursuers. It may be that after this lapse of time Mr Melville is in misrecollection in this matter of the requests for explanation from Mr Cooper, and that he believes he did consult the chairman and Mr Cooper and obtained sanction to allow rock price for what was not rock, but this is certainly not proved; on this point I feel bound to add that without much more clear proof I cannot get over the real evidence of the progressive sections.

I must say further on this part of the case that, if a contention was to be maintained of *ex gratia* action by the Company, it was one which ought to have been relevantly specified in the record as notice to the pursuers; and still further, that it ought to have been put to the pursuers in cross-examination that their account of it might be taken. Instead of this it was never mooted until the pursuers' case was closed.

As regards the further facts relating to the bores, I do not feel it necessary to enter into further detail, for that was done when the case was formerly considered in this Court. Except upon the question as to whether what was done was done fraudulently, I see no reason for altering the view that I entertained formerly, and that was entertained by the other Judges who considered the case. The evidence convinces me that

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in placing before the pursuers reports of bores which were in contradiction of the borers' reports—and the pursuers were entitled to assume these to be the borers' reports—and in withholding the reports of many bores taken, including check bores made to test the original bores, there was misrepresentation causing essential error.

The other important matter of fact relates to the Paisley water-pipe, and the relative Bridge 12A. The pipe of the public water-works of Paisley, which was authorised by statute, crossed the line of the railway in question at a very oblique angle at a part of the line which was to be in deep cutting. Of this fact no notice was given to the pursuers, no plans or specifications were prepared or exhibited showing how the obstruction to the making of the line was to be dealt with, and the attention of the pursuers was never called to it in any way by the engineers. In fact, as was confessed by the officials, the matter was totally forgotten in their preparations for construction, although the pipe was mentioned in the book of reference lodged in the Parliamentary proceedings. As it turned out, two things were necessary; one, that a bridge should be built to carry the water supply across the line, and the other, that the pipe should be reconstructed and have its course altered so as to cross the line at right angles, because to carry the bridge across at the existing angle would be an impracticable mode, and would involve a very large unnecessary expense.

When it was discovered, long after the works had been going on, that this pipe was in the way, the work of construction of the line was necessarily most severely hampered, as nothing could be done to continue the line past the place where the pipe crossed until means could be taken to prevent injury to the Paisley water supply while the works proceeded, and until the officials of the Railway Company should supply the necessary plans and specifications for the permanent carrying of the pipe over the line. That a great deal of time was occupied in the negotiations and operations there can be no doubt: the evidence proves it sufficiently. Negotiations with the Paisley Water Authority were necessary for the diversion of the pipe from its existing line, so as to cross at right angles, and, when the proposed works were agreed upon, there was further delay in having the necessary pipes constructed to go round the angles required to obtain the right angle crossing.

The pursuers maintain that this interruption to their freedom to push their works forward involved them in great expense, compelling them to alter their mode of working, both as regards the taking out of the material, and its conveyance to the places where it was to be used for embanking, &c. There is evidence, and it appears to be according to common sense, that where such a work has to be done it should be done at first before the general work is begun, and that if the obstruction is only discovered when work is in full progress, it will constitute a "very material disturbance" blocking the work, and making serious difficulties of drainage. The pursuers also maintain that in the work of building the bridge they found themselves in circumstances which they had not to consider in making their original tender. One important item they found upon is the large amount of work in excavating rock so as to get down to and

prepare the foundations of the piers. They plead that this is not to be treated as mere extra work under the contract to which the schedule prices apply, but must be dealt with as a separate work and not as a mere extra. It is easy to see how such an obstruction as a public supply water-pipe would embarrass a contractor. Until provision was made for carrying it, it must be protected from injury. Thus the work of pushing on the line at that point would be interfered with if, when taking out the material in preparation for the bridge to support it, such material could not be taken out easily, and that would be the case if it were hard, as blasting could not be resorted to without risk of injury to the pipe, and consequent serious damage to the Paisley water supply, and possible consequent danger to health and commercial loss to the town. The removal of material taken, if it had to be carried elsewhere for embankment or building, &c., would also necessarily be much hampered.

It only remains to consider in what manner the pleas in law of the pursuers are to be dealt with in detail. Upon the important plea, viz., the third, branch *a* is now out of the case. Branches *b*, *c*, and *e*, fall still to be dealt with, excluding from branches *b* and *e* what formerly stood in them relating to fraud.

Assuming that there was misrepresentation and consequent essential error in the matter of the bores, the defenders maintain that there could be no claim for damages under head *b*, and that, if the proposed remedy falls under the class of reduction, it is excluded because the case is one in which there can be no *restitutio in integrum*. I agree that the case, if the views held upon the facts are sound, is not one for which damages are appropriate. The remedy, if there is one, is in equity, and it is by setting aside the contract, and not by claiming damages under it, that the pursuers must prevail, if they are to prevail, on the question of the bores. It is plea 3 (*b*), which must be sustained. The practical question comes to be, Are the pursuers barred on the ground that *restitutio in integrum* (being an essential preliminary to their obtaining judgment in their favour) is impossible; the effect of which would be that, although the defenders had got all the work done that was contracted for, presumably to the contractors' great loss, no remedy was open? This is not by any means the simple case to which *restitutio* applies. It does not resemble a case of a sale of an article, which is delivered and the form of the article changed so that it cannot be restored, as in a case which was pressed on our attention of a sale of cattle, where the purchaser had turned the cattle into dead meat, and therefore *restitutio in integrum* was impossible. In such a case a purchaser can, before altering the form of the article, inspect it himself so as to make up his mind whether to make *restitutio* and proceed against the opposite party. Nor does it resemble a case where rights of third parties have intervened. Unless the rule were an absolute one I can conceive of no case more unsuitable for its application than the present. Here the contract is to perform extensive works on lands, with only the possibility of viewing the ground and considering information supplied by the owner of the lands who desired the works to be done. There was no sale or exchange of property in regard to which inspection was open. The contractors, if anything was done to mislead,

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could not discover the error until the expensive preparations for work were made, and the work had progressed to a stage when it could be for the interest of neither party that the unfinished work should be brought to a stop. It is not suggested that the pursuers have by unnecessary delay barred themselves from seeking a remedy. Is there, then, no equitable remedy open? Does the fact that the work has been done and taken over by the defenders place them in the position of availing themselves of it, although, as is assumed in the argument, they have misrepresented, and caused essential error, and therefore are in possession of the lands converted, as they desired by contract to have them converted, at a pecuniary advantage to themselves and to the loss of the pursuers? In other words, are the pursuers to be in the same position as they would have been in if no misleading representation had been made, viz., that they must suffer all the loss themselves because they chose to tender to do the work for a certain sum? Surely, if they were under the influence of misrepresentation when they made their tender, their position is very different from what it would be if they could found on no misrepresentation, but were in the position of having proceeded on their own judgment, trusting only to their own experience and skill. If any case had been presented to us resembling in its features the present case, where such a contention had been successfully made, I would of course bow to an authoritative decision. But so far as I am aware there is none, and no one of the cases founded on by the defenders comes in any degree near it. On the contrary, I think there is marked contrast between the cases cited and this case. Here I cannot hold that an equitable remedy is not possible. The fulfilment of the contract consists in certain work being done and a certain sum being paid for that work. The pursuers will willingly concede that what they have received should be set off against the amount brought out as due on the footing of *quantum meruit*—they reimbursing the defenders if they are found to have been overpaid, or giving a full discharge if, on any difference in excess of payments received being ascertained in their favour, that difference is paid to them. I would, therefore, sustain branch *b* of the third plea. I think the pursuers can claim readjustment, in so far as it can be shown that they claim it as forming a reasonable result of error caused by the defenders' action in misrepresentation or concealment in the matter of the communications as to the bores.

As regards the water-pipe question, although there is no doubt that the pursuers, when they had proceeded so far with their work, were delayed and their progress seriously hampered by the presence of the water-pipe, of which, by unfortunate oversight of the Railway Company's officials, they got no notice, it is plain that in this matter the failure to give information to the contractors was an inadvertence, and that it falls under the saving clause as to omissions in the contract. There was no real question of legal obstacle, the book of reference having contained notice, and there having been no opposition by the Paisley authorities, the only question they were concerned with being to secure that the work should be done safely and be well executed in the interest of their burgh. The contractors being liable to deal with all water-courses and pipes by the terms of the contract, I cannot hold that the pursuers are entitled to

set aside the contract on the ground that the defenders broke the condition that they should have right in law to do the work. As regards the alleged failure to give immediate access because of the presence of the Paisley pipe, I do not think it can be held, looking to the whole matter, that this gives ground for setting aside the contract. But I think the pursuers have a good claim for damages under this head. This was not an omission of a detail, but a failure to give notice of a great work, which absolutely called for plans and specifications to be laid before the contractors before they sent in tenders. But it was contended by the defenders that, although the Company's failure might not be covered by the clause relating to "inadvertent errors or omissions," the works connected with the pipe and relative bridge were such as fell under "extras" in the contract. Now this was not an extra in the ordinary sense, but an entirely new and extensive work, and its execution necessarily involved great disturbance and delay in the general work of the contract. I think the right to make a claim for damages cannot be excluded by force of the clause as to payment for extras. This work on the pipes and Bridge 12A was something quite outside what is appropriately named an "extra." I know of no case in which anything the least resembling this, not specified and described in a contract, has been held to be covered by a clause as to extras. It was a work which it was well known to the defenders had to be executed, and for which they cannot say they would not have supplied plans and specifications, if they had not forgotten to do so.

As regards subsection (*c*) of the 3rd plea, by which the pursuers ask that it shall be held that the work done by them was entirely different from what the contract contemplated, I cannot see ground for sustaining it. Their contention is based on extra work in Kilbirnie Cutting, on the work of Bridge 12A, and on a large quantity of boulder clay, very difficult to work, having been met in Whirlhill Cutting, while the bores, as reported, at that place gave "sand and gravel." I cannot see that there is anything to justify subsection (*c*) of plea 3 in these matters. Extra work could not justify anything more than payment for extra work as agreed on in the contract. As regards the boulder clay, it appears to me that this was just one of the matters with regard to which it lay with the contractor to form his own opinion in making his tender. As he had not been supplied with any information by the defenders, they cannot be held to have made any misrepresentation. It was just a case in which the contractor has to run his risk in forming an opinion. If he judged "hard" in tendering, and it turned out "soft," he would profit. The defenders could not claim any deduction from the price because "soft" was come upon where "hard" was expected. Conversely the pursuers cannot claim more than their contract price because they encountered hard. I therefore, on this matter, cannot give any effect to the pursuers' claim for additional payment in respect of the boulder clay encountered.

As regards the interlocutor to be pronounced, I have had an opportunity of seeing Lord Dundas's opinion, and I content myself with expressing my concurrence with his proposals.

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LORD DUNDAS.—On 14th July 1908, a proof before answer was allowed to the parties of their averments so far as bearing upon the pursuers' third plea in law. That plea had five branches. The position of matters now is that the House of Lords has finally decided that the pursuers have failed to prove that they were induced to enter into the contract by the fraud of the defenders, or anyone for whom they were responsible. Branch (*a*) of the plea has accordingly been repelled; and also branches (*b*) and (*e*), so far as founded or maintained on allegations of fraud. But the House of Lords made it quite clear that they decided no other or further issue than that of fraud; and that the whole remaining pleas and contentions of parties were left open for discussion and decision in this Court. Branch (*d*) of the plea is now abandoned by the pursuers. There remain, therefore, for judgment branches (*b*) and (*e*), so far as not founded on fraud, and also branch (*c*).

Branch (*b*) submits that the contract is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon them, in respect that the contract was entered into by them under essential error, induced by the misrepresentations of the defenders. The pursuers' case on misrepresentation is based principally upon the manner in which the journal of the bores was made up by the defenders, and communicated by them to the pursuers. The matter of the bores is one of vital importance; it lies at the very root of the contract. I need not labour the point, which I do not think was seriously disputed; but may refer to, and hold as repeated, what I said about it in my previous opinion (1911 S. C., at p. 77).

The specification stated (App. 265 E, F) that "bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journals of these bores may be seen at the engineer's office." As matter of fair construction of these words, I think the defenders represented to the pursuers, and the pursuers were entitled to believe, that the small scale plan showed the positions of all bores which had been put down on the line; that they could see at the engineer's office the accurate and complete journal of all these bores, as reported by the borers to the Company; and that the bores had been made by borers whom the defenders considered to be competent. If these conditions were not complied with, I think there was misrepresentation by the defenders to the pursuers, however innocent may have been the motives of the former in editing or revising the borers' actual journals, or in not divulging part of what the borers had in fact reported. Now, it seems clear upon the evidence that, in regard to several of the bores—Nos. 7 and 9 are, I think, the strongest instances, but they do not stand alone—the "journal" exhibited to the pursuers was not in fact a true report or copy of any journal actually made by a borer; and also that a number of bores which were actually taken and reported were not included at all in the journal exhibited at the office. The only actual journal was the borers' letters (Mr Melville, Proof 277 G); the journal exhibited at the office was what is printed in the Appendix (pp. 291 *et seq.*). I think that if a railway engineer, however innocent his motives may be, after making a statement such as I have quoted from the specifi-

cation, exhibits to contractors something which is not in fact the actual and complete journal received from his borers, that is misrepresentation, and the Company must take the risk of liability if the result is material error and consequent loss to the contractors. I do not propose to analyse, or even summarise, the evidence in regard to this matter; it has been reviewed in the previous judicial opinions in the case, and I do not repeat what was there said.

The defenders, however, rely strongly upon certain clauses in the specification as being sufficient to protect them, even assuming (which they deny) that any misrepresentation was innocently made to the pursuers. The clauses, it was conceded, would not avail in the case of fraud; but are, it was contended, amply sufficient to cover that of misrepresentation or concealment, short of fraud, however serious the consequences might prove to the contractor. The passage already quoted from the specification is immediately followed by the words (App. 265 F, G),—"but the Company does not in any way guarantee their" (*i.e.*, the bores') "accuracy, or that they will be a guide to the surrounding strata; contractors must therefore satisfy themselves as to the nature of the strata, as the Company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores." Other passages relied on by the defenders' counsel will be found in the Appendix (pp. 266, 277, 288). I am unable to see that any of the protecting clauses, comprehensive as their language is, can cover a case where the contractor has *ex hypothesi* been led into serious error, involving corresponding loss, by misrepresentation and concealment (though not fraudulent) on the part of the Company in regard to the true journal of their bores. The accuracy of the bores is not guaranteed; but I think there was a representation, amounting to an implied guarantee, that the journal exhibited disclosed a full and true account of the borers' reports of all the bores they had put down.

The defenders' counsel next maintained that, even if all this were (contrary to their arguments) to be granted, the pursuers have entirely failed to show that any error was occasioned or induced by the journal of bores exhibited to them; or that the quantities of hard material actually encountered by them in the cuttings was any greater than they were led by the bores, sections, and schedule, to anticipate. As regards Kilbirnie Cutting, one of the defenders' witnesses states that, while the scheduled quantity of rock was 41,765 cubic yards, the actual quantity was only about 33,000, though the Company has, *ex gratia*, "adopted as rock cutting," and paid for, 76,009 cubic yards (Macpherson, Proof, 408, C; D). The argument thus boldly maintained is a very serious one; for, even if misrepresentation were established, that would not avail the pursuers unless there was also resulting error of a material character. *Prima facie*, the evidence on this point seems to be all against the defenders. The Lord Ordinary (1911 S. C., at pp. 48 and 54) referred to the progressive section as being, along with other "contemporaneous evidence," conclusive in the pursuers' favour; and in this Division the same view was unanimously entertained. But the defenders' counsel put forward at our bar, with great vigour, an argument which, according to my recollection,

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confirmed by my notes made at the time, was but faintly presented at the former hearing, to the effect that the progressive section was not in any sense a contemporaneous document, and that the dotted line upon it, bearing to show "rock" or "actual top of rock," does not represent what one would naturally suppose it to mean, but merely indicates the top line of what the defenders (*ex gratia*, as their witnesses say) paid for as rock, though to a very large extent it was not so in fact. I have considered this argument with all the more care because of two circumstances:—(1) its somewhat tardy appearance in the fighting line, and (2) the impression it is represented to have made upon the mind of one of the noble and learned Lords (Lord Atkinson) who heard the appeal. I need not say that Lord Atkinson's observations command my high respect. But they were necessarily *obiter dicta;* the whole evidence bearing on the point was not (as I gather from counsel) read to the House of Lords; Lord Atkinson's opinion makes it quite clear that the only question the House considered and decided was that of fraud, and that his Lordship had not formed, and did not express, an opinion upon any other matter; and indeed, if his Lordship (and the House) had intended to hold it proved that Mr Melville's conclusions, as expressed in the journal of bores exhibited to the contractors at his office, were substantially correct, there would have been no need to remit the case to this Court, because, even assuming misrepresentation (short of fraud), the pursuers would not, *ex hypothesi*, have been under essential error in the matter of the bores. The conclusion I have reached is that the pursuers must be taken to be substantially right upon this point. The burden of proof is, I think, on the defenders; but, whether or not, the matter seems to be definitely proved against them. It is not necessary to suggest any lack of honesty or good faith on the part of Mr Melville or his assistants, so far as they support him (Mr Stronach scarcely seems to do so—Proof, 328); the proof took place a good many years after the period during which the dotted line must have been put on, and recollections may well have faded in the interval. The whole matter of these "*ex gratia*" payments is left, upon the parole evidence, in some obscurity. But I think Mr Melville must be mistaken when he says (Proof, 297, top; cf. 306 E to 307 C) that he consulted Mr Cooper and the chairman about "paying for what was not rock as rock." Neither of these gentlemen is called to corroborate him on the point; and in 1904, when Mr Cooper wrote (App. 112 C, D), on behalf of the chairman for explanation of the large amount of "extras over contract," Mr Melville replied (App. 112 foot, 113): "*Extra rock in cuttings, £8000.* In the cuttings between Kilbirnie and Lochwinnoch and at Drygate rock cutting was found instead of soft as expected, and the contractor has been paid for the rock excavated. *Side cutting, £1600.* Owing to the extra rock met with in the cuttings, an increased quantity of side cutting was necessary to make up the deficiency of the embankment. . . . *Road alterations, £1500.* At Whirlhill public road diversion rock cutting was met with instead of soft material as expected." The weight of evidence is, I think, overwhelming to the effect that what lay below the dotted line was in fact substantially, though not entirely, "hard" material. The cross sections show a line of "actual top of rock" as distinct from, and lying up above, the original

assumed line; and also the rock batter, at which, in many instances, the cutting was formed, instead of the contemplated "soft" slope. The level-books (App. 560-569), the correspondence (App. *e.g.*, 62, 63, 64, 67, 70, 71, 72, 73, 83, 86), and—though less uniformly and emphatically—the wagon sheets and reports (App. pp. 357 *et seq.*; cf. Dick, Proof, 346 A, B), are in the pursuers' favour. Again, the words on the dotted line upon the progressive section appear to mean what they say; for when "blaes" (and not "rock") is intended, the former word is used; and there is also at least one place where the "actual top" goes for a considerable distance below the line originally assumed. We were also referred to two documents which are produced, though not printed: (*a*) Mr Stronach's diary (Nos. 238, 239 of pro.) in which, we were told, no record appears of any arrangement for paying upon an artificial or assumed line, or paying for blaes, &c., as if it were rock; and (*b*) a monthly instalment book (No. 163 of pro.) kept by the defenders, which contains an entry (8th September 1902) of an allowance "for extra rock in Stoneyholm" (*i.e.* Kilbirnie) "Cutting." Lastly, I must say that if the argument as to the true history and meaning of this line of "actual top of rock" was to be maintained as it has latterly been maintained, the point ought, in my opinion, to have been plainly and specifically put in cross-examination to the pursuers' witnesses. This was not done; and their evidence (*e.g.* R. B. Forrest, Proof, 71 E, F, 72 A, D, 74 F, G) was allowed to pass unchallenged. It looks, to my mind, as if the point now urged is somewhat of an afterthought; but, however that may be, I hold that it is not proved that the substantial bulk of material below the dotted line on No. 177 of process was other than "hard," as opposed to "soft," material for the purposes of this contract.

Having listened attentively to the renewed argument at our bar, I retain the view summarised in my former opinion (1911 S. C., at p. 80) that it is "proved that the errors in the bores did, as might have been expected, very materially falsify the sections which were based on them, and the quantities, and the respective allocation of hard and soft materials, put forward in the schedule; and that the contractors' actual work, especially in Kilbirnie and Whirlhill Cuttings, was materially, and indeed disastrously, different from what they had been led to suppose it would be." I consider that the pursuers entered into this contract under essential error, induced by misrepresentation and concealment (though without any fraud) on the part of the defenders in regard to the journal of the bores. If this conclusion is sound, it would seem to follow that branch (*b*) of the pursuers' 3rd plea must be sustained. The contract is for a lump sum; it must in that respect stand or fall as a whole. I think it is idle for the defenders to rely on the fact that only a small number, at the worst, out of the total number of the bores was incorrect. It is not a question of how many bores were wrong, but of the result to the pursuers' work of such errors as existed. A small number of bores being wrong might well dislocate the contractors' scheme of operations over a great part or even the whole of his contract. I shall have a few words to say upon this view of the case at a later stage.

But some further contentions were advanced for the defenders in regard

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to branch (*b*) of the plea, which deserve very serious consideration. Mr Macmillan, in the course of an admirable argument, insisted on the following propositions:—(1) that, assuming material error induced by non-fraudulent misrepresentation or concealment, the pursuers can have no remedy by way of damages; (2) that their only remedy would be by reduction of the contract; (3) that reduction cannot be granted, because *restitutio in integrum* is now impossible; and (4) that, even on the assumption postulated, the pursuers, having suffered no legal wrong, are left without any remedy, although the defenders have, *ex hypothesi*, reaped pecuniary advantage as the result of their innocent misrepresentation or concealment. I believe that the first and second of these propositions are substantially correct. As regards the first there is curiously little authority in the law of Scotland. Except the case of *Manners* v. *Whitehead*,[1] I do not think we were referred to any. But in England it seems to have been repeatedly and authoritatively laid down that, where a contract has been induced by misrepresentation (not fraudulent), the only remedy open to the person misled is to rescind the contract, and that he cannot claim damages. There has been no legal wrong done to him; his remedy is in equity, and not at common law. It is sufficient to refer to *Derry* v. *Peek*,[2] and *Angus* v. *Clifford*.[3] The decision of the House of Lords in *Derry* v. *Peek*[2] was followed by the Directors Liability Act, 1890 (since repealed, but substantially re-enacted by the Companies (Consolidation) Act, 1908, section 84), which gave a remedy by way of damages in the particular cases dealt with by the statute. It is therefore, I take it, correct to say that the pursuers' remedy (upon the assumptions postulated), if they have one, must be by way of reduction, and not of damages. But Mr Macmillan's further propositions seem to be of more doubtful soundness. As a general statement, it is no doubt true to say that, by our law, reduction will not be granted unless *restitutio in integrum* is possible. It is clear that *restitutio in integrum*, in an absolutely literal sense, is impossible in this case. Parties cannot now be put back into the actual positions they respectively occupied before the contract was entered into. The work has been done, and cannot be undone. On the other hand, the pursuers did not, and could not have, become aware of the misrepresentations under which, in my opinion, the contract was entered into, until after the work was substantially completed, and literal restitution had become impossible. If Mr Macmillan's argument is sound, the defenders, though they have *ex hypothesi* induced the pursuers to make the railway under ruinous terms and conditions, are entitled to retain the pecuniary advantage arising from their own misrepresentation, merely because the work has been done, and cannot be undone. There has been no delay on the pursuers' part to bar them from applying for their remedy; for time could not begin to run for this purpose until the facts were known (or ought to have been known) to them. This result does not commend itself to my mind as a fair or just one. I do not think that equity lies in the direction of refusing all remedy in a case such as this, where equitable restitution is a mere matter of money in account; nor do

[1] 1 F. 171. [2] 14 App. Cas. 337. [3] [1891] 2 Ch. 449.

I know of any law which should compel me to such a conclusion. I am not aware of any case—certainly none was cited—where the remedy of rescission has been refused under circumstances at all closely resembling those here present. The rule, I understand, is a rule of equity,—a general, but not an absolute or inflexible one. I imagine the theory to be that a pursuer is not entitled to claim the equitable remedy of rescission unless he is able to make restoration or restitution to the defender This is often impossible where rights of third parties have intervened, or the like. But I do not think that in the present case equitable restitution is impossible. The defenders on their part do not desire or require restoration of the land to its *status quo ante contractum*. They have got a railway constructed which, if the pursuers' contract had been timeously rescinded, they must have had made by some contractor, and must have paid for. The pursuers, on the other hand, are able and willing to make restitution. All the payments they have received from the defenders are, so to speak, held in suspense until a proper sum on the basis of *quantum meruit* is ascertained, and will be imputed towards that sum, or reimbursed to the defenders if and in so far as that sum falls short of the amount already paid. There is nothing more to restore. The whole question seems to me to be one absolutely capable of solution by the payment of money; it is the adjustment of a disputed account. I am therefore unable to hold that the pursuers' claim for reduction, if otherwise sound, is in any way barred or impeded by the doctrine of *restitutio in integrum*; and for the reasons now stated, I am prepared to sustain branch (*b*) of the pursuers' third plea in law. I should add, before leaving this part of the case, that Mr Clyde put forward a serious argument to the effect that essential error, induced by misrepresentation and concealment, was also present in regard to the matter of the Paisley water-pipes and Bridge 12A. I am unable to accept that argument, but I reserve, for what seems to me a more convenient place, what I have to say upon that important point.

If I am right in what I have said, it is sufficient to decide the case substantially in the pursuers' favour: for, branch (*b*) being sustained, they would be entitled to be paid for their whole work on the basis of *quantum meruit*, on the footing that the contract must be reduced, and the lump sum contracted for must be disregarded. While this is my conclusion, I desire to make it clear that though, in my judgment, the contract price falls out of count, it does not by any means follow that each and every item of the work done is to be matter for revision and readjustment in the inquiry which (if my view is correct) must follow; and which, by the way, I hope would be instituted, not by way of further proof in this Court, but by a remit to some person of skill. Readjustment would, in my opinion, be necessary and legitimate only in so far as the pursuers can establish that they are entitled to it as a necessary or reasonable consequence of the error into which (on my theory of the case) they were led by the defenders' misrepresentation or concealment in the matter of the bores. A large portion of the work done was probably quite unaffected by this error.

But a different aspect of the case was alternatively presented in argu-

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ment by the pursuers' counsel, upon which I think they would be entitled to succeed. The pursuers maintain, upon the same facts as those on which their contention in support of branch (*b*) is based, a legal argument to the effect that the defenders are in breach of various contractual conditions, express or implied; and that the breaches are of so essential a character as to entitle them to set aside the contract; or, otherwise, to bar the defenders from holding to it as the basis of charge. They ask that branch (*e*) of their plea should be sustained. The conditions alleged to have been violated by the defenders are, I understand, principally as follows, viz.: (*a*) that the journal exhibited should be an accurate and complete journal of all the bores that had been taken; not an incomplete one, and partially edited according to Mr Melville's view of what he supposed the borers to have meant; (*b*) that there was no legal obstacle to prevent the contractors from constructing every part of the line; (*c*) that the contractors should get timeous access to the whole ground; and (*d*) that all plans for the works should be timeously delivered to them. I have already dealt with (*a*) under the head of misrepresentation. I think, as above indicated, that upon a fair construction of the specification (App. 265 E, G) this was, by clear implication, a condition of the contract, going to the essence of it. The law applicable to the matter is clearly stated by Lord Dunedin in *Wade* v *Waldon*.[1] "It is familiar law, and quite well settled by decision, that in any contract which contains multifarious stipulations, there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages." I consider that we have here a condition contained by clear implication in the contract, which goes to the very root of it; and that the defenders having, as I hold, broken that condition, the pursuers are entitled to declare the contract at an end; or (the same thing in other words) that the defenders cannot hold the pursuers to the contract as the basis of charge. The next of the conditions (*b*) is connected with a matter which bulked largely in the evidence and in the arguments. The facts underlying it are summarised by Lord Ardwall (1911 S. C., at p. 70). There is dispute as to the actual period of delay caused by the unfortunate forgetfulness of the Company, the amount of additional work and trouble imposed on the pursuers thereby, and whether the pursuers themselves did or did not contribute to both of these by mismanagement of the situation. But the affair is undoubtedly a very serious one. I should be prepared to hold that it was an implied and an essential condition of the contract that no legal impediment existed to prevent the construction of the entire line of railway. But I think the pursuers put their case too high when they contend that any such legal impediment existed in fact. The Paisley pipes were scheduled in the defenders' book of reference; and the Paisley authorities were thus notified that the proposed line of railway was to cross their pipes. If they were unwilling to rest content with the protection afforded them by the general

[1] 1909 S. C. 571, at p. 576.

statute law of the land, they might, failing agreement with the promoters, have petitioned Parliament against the Bill, with the view of obtaining a special clause for their protection; but they did not do this. Now, by the specification (App. 270 E, F), the contractors were expressly referred to various sections of the Railways Clauses Consolidation (Scotland) Act, 1845, which formed an appendix to it, and were notified that they would be bound to implement the whole obligations relative, *inter alia*, to water-pipes there laid upon the Company. In these circumstances, I am unable to hold that there was a breach by the defenders of the implied condition in the contract that the defenders had legal power to construct this part of the works, so as to entitle the pursuers to rescind the whole contract or declare it at an end. (*c*) While I consider that it was an implied condition of the contract that the pursuers should have timeous access to the whole ground, I am not prepared to hold that the circumstances in regard to the Paisley water-pipes and Bridge 12A are such as to entitle the pursuers to put an end to the contract. (*d*) This matter arises in connection with alleged delay in furnishing the pursuers with plans for certain aqueducts. I think it is proved that there was such delay, and that that was contrary to proper practice and custom (Proof, R. Forrest 30, R. B. Forrest 78, Stronach 310, 334, Hogg 496 A, B). There was, I think, breach of contract on this head. But I do not dwell upon the point, for it does not seem to me to be one of much magnitude, or going to the essence of the contract. My conclusion, therefore, on this part of the case, is that the pursuers' argument fails upon all the heads of it other than (*a*)—the first and main one—that, the defenders having violated an essential condition of the contract, viz., that in relation to the journal of the bores, the pursuers are entitled to declare the contract at an end; or (to express the same result in other words) the defenders are barred from holding the pursuers to the written contract as the basis of charge. On that head, the pursuers' alternative case is, I think, well founded; and I am prepared to sustain branch (*e*) of their third plea in law.

In order, however, to dispose exhaustively, if possible, of all the contentions of parties, I must now deal with the aspect of the case which would arise if I am wrong in thinking that the contract ought to be reduced on either of the grounds which seem to me to warrant that course. It was contended for the pursuers that, upon that theory of the case, they are entitled, standing the contract, to damages for various breaches of it by the defenders, viz., those which I have considered in the preceding paragraph of my opinion. The defenders' counsel repudiated any liability for damages. They urged in the first place that no question of damages could arise within the limits of the proof allowed, viz., the averments of parties so far as bearing on the pursuers' third plea in law. I am far from applauding the pleadings in this case. I commented upon the summons in my former opinion (1911 S. C., at pp. 81-2), and I think the whole pleadings of the parties, embracing the condescendence, defences, and pleas in law are open to much adverse criticism. But I am not prepared to say that a finding that the pursuers are entitled to damages for certain specified breaches of contract would be incompetent, looking to the wide scope of the evidence which has been led; and to the fact that the pur-

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suers have a plea—the 4th—directed to damages, though such averments as they make in support of it were not specifically remitted to proof. As regards head (*a*)—the matter of the bores—I think the defenders would, standing the contract, be liable to the pursuers in damages for breach of a condition (though not, on the assumption now postulated, an essential condition) of the contract. No clause in the contract seems to me to be sufficient to exclude this claim. They would also, in my opinion, be liable under head (*b*)—the Paisley water-pipes and Bridge 12A. The defenders' counsel argued that this head of claim was clearly untenable, because it would plainly fall under the provisions of the contract (App. 261 B, C) to be dealt with as extra work, and could not be made a basis for damages. He conceded that he could not legitimately pray in aid the clause (App. 264 E, F), as to "inadvertent errors or omissions," to the effect of denying the pursuers any additional payment at all, over and above the lump sum contracted for. I do not think the provision as to extra works can be fairly held to exclude the pursuers' claim for damages as regards the water-pipes and Bridge 12A, and the alleged dislocation of their work arising from the defenders' failure to disclose to them that the line crossed the water-pipes at this point. The minor heads (*c*) and (*d*) seem to afford further grounds for damages, though there is certainly more room in their case for an argument that the contract clauses are sufficient to exclude them. But I am unwilling to devote space and time to detailed consideration of such subordinate and contingent matters. The amount recovered by the pursuers in name of damages would probably be much the same as what they would receive if the contract were reduced, and they were paid on the footing of *quantum meruit;* but the legal theory underlying each of the alternative views is, of course, different.

It only remains to dispose of branch (*c*) of the pursuers' third plea in law, viz., that "the contract founded upon by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding upon the pursuers, in respect . . . (*c*) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract." The facts principally founded upon by the pursuers, as evidencing the "entirely different" character of the work are (1) the matter of the Paisley pipes and Bridge 12A, (2) the boulder clay in Castle Semple Cutting, and (3) the excess—enormous as they say, and quite beyond the antecedent contemplation of either party—of rock cutting in Kilbirnie and Whirlhill Cuttings. I think the evidence does show that, in regard to each and all of these matters, the pursuers had to do a great deal more work, and of a harder character, than they expected, and probably than the defenders anticipated; and that the result was to dislocate, to a large extent, the scheme of their operations. But the plea, as stated and argued, is a bold and rather startling one; and I cannot say that I think the facts proved warrant us in sustaining it. I am not aware of any authority directly in point. The English case of *Bush* (which is only reported in Hudson on Building Contracts) appears to have been a very special one. The learned Judges were hampered by the finding of a jury which, while I gather that it did not commend itself to them, they

did not see their way to set aside or ignore. Neither *Smail* v. *Potts*[1] nor *Quin* v. *Gardner & Sons, Limited*,[2] amounts to a decision on the point. I do not say that a case might not arise, so strong upon its facts as to justify (or compel) the success of a plea such as we are now considering; but that case is not, in my judgment, here presented. I am therefore for repelling branch (*c*) of the pursuers' third plea in law.

Upon the whole matter, we ought, in my opinion, to sustain branches (*b*) and (*e*) of the said plea, to repel branches (*c*) and (*d*)—branch (*a*) has already been repelled; and to find that the pursuers are entitled to be paid for the work done by them for the defenders upon the footing that the written contract is reduced, and the lump sum contracted for falls to be disregarded, and that the basis of payment should, in so far as may be found necessary or reasonable, be a *quantum meruit*; and *quoad ultra*, continue the cause for further procedure.

I repeat my expression of hope that, if our interlocutor is not appealed against, or if it should be affirmed by the House of Lords, the assessment of *quantum*, upon the lines I have endeavoured to indicate, would (failing agreement) be arrived at by a remit to a man of skill, and would not be made the subject of further proof in this Court.

Lord Salvesen.—There has already been such a wealth of judicial opinion expressed with reference to the main facts of this case that I hesitate to make any material addition. As however I took no part in the former judgment which was appealed to the House of Lords, I think it right that I should state as briefly as I can the conclusions at which I have arrived after thirteen days' argument. As a preliminary point I notice in passing that some trenchant criticism was directed by the defenders' counsel to the averments which bear on those parts of the case that have not as yet been finally disposed of. It is just, however, to keep in view that the precise facts on which the pursuers now found were only ascertained by them after the pleadings had been adjusted and they had executed a diligence to recover documents in the defenders' hands. The Scotch form of pleadings serves two main objects—(1) to enable the parties to challenge the relevancy of the action or the defence as the case may be, and (2) to give them fair notice of the case which they respectively have to meet. So far as this Court is concerned it has been finally decided that the pursuers' condescendence discloses a relevant ground of action; and a full proof has been taken with regard to all the statements contained in the record. It is true that the interlocutor of 14th July 1908 for which I was responsible might have been more happily expressed; but the intention, as appears from the opinion which I then delivered, was not in any way to limit the allowance of proof except on the question of amount, which might be more conveniently ascertained by a remit to an engineer, or in some less cumbrous fashion than a proof at large, after the principles of liability had been determined by the Court. Parties appear to have understood the allowance of proof in that sense, for evidence on all matters bearing on the main issue between them—namely, whether the contract of 16th and 18th September 1900 regulates all the

[1] 9 D. 1043. [2] 15 R. 776.

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pursuers' claims in connection with the work done in the construction of the Dalry and North Johnstone Railway—has been taken without objection. There is here no question of surprise, for the main facts relied on by the pursuers were throughout well known to the defenders. It is therefore somewhat late in the day for them to urge technical objections, based on a strict reading of the record and of the allowance of proof, which, if they had been earlier insisted in, could easily have been rectified under our rules of Court. I propose, therefore, to deal with the case as disclosed in the elaborate proof which has been led by the parties.

The pursuers' leading contention is that the contract under which they were originally employed is inapplicable as the basis of charge for the work executed by them in respect it was entered into by them under essential error induced by the misrepresentations of the defenders. On this question I am in favour of the pursuers. I need not refer in detail to the misrepresentations alleged as they have already been so fully discussed, notably by Lord Johnston and Lord Ardwall in this Court and by Lord Atkinson in the House of Lords. It is common ground that a correct copy of the journals of the bores put down at various parts of the line was not shown to the pursuers; but that in certain cases, and in particular with regard to bores 7, 8, 8A, and 9, the copy shown did not describe the strata in terms of the borer's reports, but as the latter were interpreted by Mr Melville. Even on this assumption I have a difficulty in understanding why he should have described the layer of material below the blue clay as "hard black blaes" when dealing with the bore No. 7, and as "black blaes" when dealing with Nos. 8, 8A, and 9. The borer had described this material in his letter of 14th October as "a hard black substance called black band"; and he used the same expression "black band" in his reports written on 18th October relating to bores 8 and 9. As regards bore No. 8A, he reported "at peg No. 1 what seems to be solid rock was come on at 19 feet 5 inches down from the surface"; and at peg No. 2 he described the materials as consisting of blue clay and boulders of rock. The above being the only positive information which Mr Melville had as to the subsoil in the Kilbirnie Cutting, I think it was his duty, in accordance with the representation in the contract, to have given it in the so-called "journal of bores" exactly as he received it from the borer. If he thought it inaccurate there was no reason why he should not have added a note of the inferences which he drew from the bores and had given effect to in the schedule. It is admitted that blaes may be of all degrees of consistency. It may be as soft as sand or as hard as rock, although its composition does not vary any more than that of sand and sandstone. Reading the so-called "journal" along with the specification, schedule, and plans, I think a contractor was justified in coming to the conclusion that in the Kilbirnie Cutting, except where otherwise indicated, he would have to deal only with a homogeneous layer of black blaes which at only one point could be described as hard, and all of which was capable of removal by the mechanical contrivances which are employed upon soft cuttings. He could have no conception that he would have to encounter in this cutting a mass of material on which the more expensive method of blasting had to be employed.

The matter becomes still more serious when regard is had to the reports of the borer in connection with the five so-called check bores. These bores were apparently sunk for the purpose of confirming the reports that had been given of the material encountered in two of the bores. So far from doing this the borers in each case reported that, at the point where black blaes had been found in these bores, rock was now encountered; yet this information was withheld from the contractors. There was absolutely no reason to suppose that the first bore was more reliable than any of the check bores. On the contrary, most people would have assumed that where four out of five bores indicated rock at a certain depth they were more likely to indicate the true nature of the strata than the remaining one which showed "black band." To my mind the check bores afford very convincing proof that the "black band" reported as found in the original bores was as hard as rock, and might appropriately have been so described. But, on the assumption that Mr Melville honestly came to the conclusion that they indicated only posts of rock occurring in a layer of black blaes, that information would have been of the utmost importance to the contractor in making his offer for the construction of the line. I cannot read the clause in the contract as entitling the defenders to make a selection of the bores, and to put before intending offerers only those which would induce them to quote a low rate for the execution of the work. Thus, to take a concrete illustration: suppose bores 7 to 9 had been in point of fact sunk in soft blaes, but that at a little distance from each of them other bores had shown a layer of rock, it would surely not have been fair dealing to have disclosed to the contractors only those which showed soft blaes, and to have framed the contract on the footing that the whole intervening material might be expected to turn out of the same description. I do not overlook in this connection that one of the check bores reported whinstone as having been found, and that in fact there was no whinstone in this cutting. It is, however, to my mind unintelligible that Mr Melville should have dealt with this as a "clerical error." No attempt was made in the proof to establish that such an error was in fact made, and the chemical composition of the particular rock was of little moment to the contractor so long as he was informed that he would have to prepare for hard excavation instead of soft. Further, no communication on the subject was made at the time to the borer. Mr Melville simply assumed whinstone to be an error for blaes, apparently because it conflicted with his preconceived theory as to the material in this particular cutting.

The importance from the contractor's point of view of the information disclosed in the "copy journal of bores" is not disputed. The bores formed the only indication as to the nature of the material which fell to be removed in the cutting. Accurate and complete information as to what had been actually found in the bores was all the more necessary because of the stringent clauses throwing upon the contractors all the risk that might arise from the nature of the intervening and surrounding strata. The defenders took care in their contract to protect themselves (1) as to any inaccuracy in the journals of the bores—that is, any mistake which the borers might have made in describing the strata; and (2) as to the actual strata which might be encountered. Thus, to revert to my former illus-

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tration, if all the four bores with which I am now dealing had been reported to have passed through soft blaes by a competent borer—and in fact he had encountered at each of them a layer of rock—the contractor would have had to bear the additional cost without redress. Similarly, if the bores turned out to be accurate, but the intervening strata, instead of being soft were entirely hard, the whole extra cost of excavation fell upon the contractor. It was therefore essential that the actual reports of the borers with regard to each bore taken should be fully before him so that he might be at liberty to draw his own inferences as to the difficulties which he was likely to encounter. It is not in accordance with good faith or fair dealing that the defenders should induce a contract for a slump sum on the footing that, with regard to one of the most important cuttings on the line, the contractor would only have to excavate in soft material, when the defenders' engineer had just as reliable information that the material between the bores was largely of a rocky character; for of the nine bores actually put down in that cutting four disclosed black band described as "a hard black substance," the remaining five disclosed rock. How is it possible to say that the result of the five bores might be legitimately suppressed as apt to be misleading, and the contract based upon the other four, when all the nine bores were taken by the same borers? The course adopted by Mr Melville could, I think, only be justified by its having turned out that the four bores which he selected were an accurate index of the character of the ground; and that the five which he suppressed were of no importance. But even the defenders admitted that posts of rock which required blasting occurred in the strata lying between bores 7 and 9; and this is precisely what the check bores, if they had been disclosed, would have led a contractor to expect.

I note in Lord Atkinson's opinion that he puts great reliance upon the evidence of the four expert engineers who were examined on behalf of the defenders, and who supported Mr Melville in his proposition that, in contracts for railway construction such as this, blaes or shale is not treated as rock "solid, broken, or loose," but is properly described as "soft." This evidence was of course important on the only question his Lordship was then considering, namely, whether Mr Melville had acted fraudulently. I cannot, however, accept it as proving the fact. No concrete illustration is given by any of these engineers. Their evidence was perfectly general and vague, and is consistent with the view that, where soft blaes is for the most part encountered, no extra allowance is made for harder layers of the same material which occur in the strata. But, what is much more important, no notice whatever was given of this line of defence in the cross-examination of the pursuers' witnesses. A custom to treat material as soft which is as hard to excavate as rock cannot be established in the absence of averment; and still less in the absence of cross-examination of the witnesses of the party whose interest it is to maintain the contrary. Besides, the evidence is contrary to the method actually adopted in the construction of the line. What was described as "black blaes" was not in fact excavated to the batter appropriate to soft material, but has been left at a batter in some cases steeper than that usually employed for solid rock. It is vain for these engineers to say after an

interval of years that in their opinion the batter at which the hard black blaes has been left is too steep. The competency of Mr Melville is not in dispute, and in fixing the batter appropriate in the Kilbirnie Cutting he had to keep in view the safety of the persons using the line. I cannot suppose that he would have left the sides of the cutting at an unsafe angle merely out of consideration for the contractors. It may be true that "black blaes," which is originally as hard as rock, is more liable to disintegrate from exposure to weather than other kinds of rock; but there is no convincing evidence to show that it has in fact done so in this particular case.

I hold, therefore, that the statements in the specification that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office, was a grave misrepresentation of the facts as now ascertained—(1) in respect that all the bores actually taken were not disclosed, and (2) that the journals were not accurate records of the borer's reports. On the evidence I cannot doubt that the contractors were misled by their reliance on the copy journal, and that the slump sum for which they contracted to do the work was affected to a material extent by this reliance. In making their tender I hold they were under essential error, induced by the misrepresentations as to the bores to which I have already referred in detail. I am content on this part of the case to adopt the examination of the evidence which has led Lord Dundas to the same conclusion. I think it is conclusively proved that, instead of the soft and hard blaes which they were led to expect in Kilbirnie Cutting, they found a mass of material consisting mostly of rock, or blaes as hard as rock, which could not be removed by the steam navvy until after a large amount of blasting had been done. The contention of the defenders that what the pursuers actually found was substantially all blaes, is, I think, conclusively negatived by the evidence, for (1) in the five check bores the borers had described the material as rock, and in the four bores it was disclosed as black band which was substantially of the same hardness; (2) throughout the contemporaneous documents, such as the progressive sections, level books, cross sections, and inspector's reports, it is described as rock; (3) it was so treated in fixing the cross sections; and (4) it was so paid for. This payment, which is now described as an *ex gratia* payment, made no distinction between the parts of the strata which consisted of blaes as distinguished from freestone or other rock; and the suggestion that it was made out of consideration for the contractors appears for the first time in the defences. Whatever may have been the motives which influenced Mr Melville to certify for this material at the extra price of rock, the fact that he did so is a practical admission of the pursuers' statement as to what they found in the cutting.

The defenders admitted that, if a contract is entered into under essential error induced by misrepresentation however innocent, it may be rescinded by the injured party; but they strenuously maintained that this remedy is not open in the case of an executorial contract after the work has actually commenced. They said that according to our law it is a condition of rescission of a contract that the party rescinding shall be able to make *restitutio in integrum*, and that so soon as work has been done under the

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contract such rescission becomes impossible. If this were so the remedy would for all practical purposes be of no avail, for the cases must be very few in which the error is discovered before work has been commenced. I do not think that this is the law of Scotland. The cases in which a remedy has been refused on the ground that restitution was no longer possible are not numerous; and in all of them the rights of third parties had intervened, or the pursuer of the action had himself so acted in a matter unconnected with the contract as to debar him from the remedy he sought. The case of the *Western Bank* [1] is a good illustration of the latter class. The pursuer of that action had bought shares in an unincorporated banking company; two years later he was a party to a proceeding whereby the company from which the purchase was made was put an end to; and he accepted shares in an incorporated company which took its place. In the subsequent case of *Hay* v. *Rafferty*,[2] the pursuer did not offer restitution and was not in a position to grant it. On the other hand, in the case of *Adam* v. *Newbigging* [3] the House of Lords found it no obstacle to granting the remedy of rescission that the party who sought it was not able to put those against whom it was asked in the same situation in which they stood when the contract was entered into. The pursuer there had been induced by misrepresentation made without fraud to become a partner with the defenders in a business which belonged to them. The business was carried on for two years with disastrous results; and it was only then that a claim to have the contract of copartnery rescinded was put forward. In the Appeal Court, Bowen, L.J., said, "There ought as it appears to me to be a giving back and a taking back on both sides including the giving back and taking back of the obligations which the contract has created as well as the giving back and the taking back of the advantages." [4] In this sense the pursuers are offering full restitution. They are willing that the work, which they have done under a contract which they would never have undertaken at the agreed price, shall be paid for on its own merits. If they have been paid more than others in full knowledge of the facts would have executed it for at the time, they must submit to repayment of the excess. If, on the other hand, they establish that they have received less than they are fairly entitled to according to the rates which ruled when the contract was made, I do not see any reason why in equity they should not recover. The *quantum meruit* which the Lord Ordinary has allowed them is not I take it to be understood as entitling the contractors to make up an account on a time and material basis, but as giving them a right to claim, *inter alia*, the extra cost in which they were involved owing to their reliance upon reports of bores which have proved misleading. So far as the Kilbirnie Cutting is concerned, which is the only one which I have specifically dealt with, this extra cost may include an allowance for any dislocation of the contract work through the unexpected difficulties encountered, over and above the extra price of removing rock, as compared with other material, which the contractors have already received.

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[1] 5 Macph. (H. L.) 80. [2] 2 F. 302. [3] 13 App. Cas. 308.
[4] 34 Ch. D., at p. 595.

Hitherto I have dealt with the case on the footing of the misrepresentations founded on having been entirely extraneous to the contract. As it happens they form part of the contract; but the result is not different if they are conditions precedent of which it may be predicated (to use the words of Lord Ellenborough in *Davidson* v. *Gwynne*[1]) that "the non-performance alleged in breach of the contract goes to the whole root and consideration of it." I have already indicated that in my opinion the completeness and accuracy of the journal of bores did go to the root of the contract; for it was the only information supplied to the contractors as to the nature of the work which fell to be performed; and, as has already been pointed out by several of the Judges, the inaccuracy of the journal of bores in one cutting did not necessarily affect only the work there but might affect the construction of other sections of the line. The engineers who designed the railway no doubt had in view the use of the soft material excavated from this cutting in making up embankments, and of the hard for building and ballasting. Any disproportion of hard material which was unsuitable either for building or ballasting would obviously affect the contractors' whole calculations in pricing the contract. I need not, however, dwell further upon this aspect of the case, except that I desire to add a few words on the subject of the competency of the borers; for in my opinion it was an implied term of the contract (to use the language of Lord Atkinson, who, however, does not commit himself to this view) "that the Company should appoint or had appointed to do the work of boring skilled persons fully competent for that work." It is true that Lord Atkinson has already expressed the opinion that Mr Melville believed the Cowans (with regard to whom the question arises) to be competent, but that does not conclude the question as to whether they were in fact competent. It may be that for work of this kind the qualifications of a mineral borer were not essential, but I confess that, looking to the importance which attached to the accuracy of the reports, I feel surprised that a man should have been selected by the defenders for this piece of work who had had no previous experience of making bores but had been employed as a superintendent of the permanent way. Such a man, if he did the boring himself, would no doubt be able to say whether the strata through which the boring chisel passed were soft or hard, but so would any workman whom he employed in the actual manual work. More was expected of him than this, for it was his duty to determine the nature of the material through which the bores passed, and to judge of this from the churned-up mass which was from time to time lifted out of the bore-holes. That he was not competent to do this is proved by the results which he obtained at the various bore-holes. He was admittedly in error in reporting whinstone in one of the check bores, and now that we know the actual nature of the strata, which consisted throughout of either rock or bands of rock and clayband ironstone through blaes, I think it difficult to hold that any one of his reports as to the nature of the material encountered in the bores was reasonably accurate. The manner in which his reports were treated by Mr Melville contrasts with the latter's un-

[1] 12 East. 381, at p. 388.

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contract price on that head. It was the pursuers' misfortune that the serious mistake which the borer made materially increased the expense to which they were put in removing the material in the cutting to which it applied; but this was just one of the matters against which the defenders had taken care to protect themselves. There is therefore no ground for the application of the doctrine of *Bush's* case,[1] assuming it to be a binding authority. On the whole matter, therefore, I concur in the decision at which I understand the majority of your Lordships have arrived, and substantially on the same grounds.

Lord Guthrie.—The summons in this case is appropriate to an ordinary petitory action; but I deal with it as if it contained a conclusion for reduction of the contract of 1900 entered into between the parties, with an appropriate petitory conclusion, and an alternative conclusion for damages. It was not denied, however, that the averments must be relevant, and the proof sufficient, to infer reduction.

The original condescendence and pleas ignored the contract entered into between the parties under which the work commenced, and asked payment for work done on the footing of *quantum meruit*. On the defenders putting forward the contract and relative documents, with its lump sum, its exclusion of claims on the ground of the defenders' errors or omissions, and its arbitration clause, the condescendence and pleas were amended, and the pursuers formulated their claim on alternative grounds, claiming either, ignoring the contract or at least treating it as rescinded, that they are entitled to the sum claimed on the footing of *quantum meruit*, or, assuming the contract to stand in whole or in part, that they are entitled to that sum, or a part or parts of it, in name of damages.

In their condescendence the pursuers founded on three matters as a basis, in one view, for payment *quantum meruit* apart from the contract, and, in another view, for damages for breach of contract, express or implied, namely, first, the bores, or some of them, taken by the defenders antecedent to the contract; second, the operations, including the construction of Bridge 12A, caused by the unexpected presence of Paisley water-pipes; and, third, certain difficulties due to water-courses. Evidence was led in regard to a fourth matter not referred to on record, namely, the presence of boulder clay (misnamed "conglomerate" by the pursuers' witnesses) in Castle Semple Cutting, but this is not dealt with in any of the opinions in the Outer House, the Second Division, or the House of Lords as involving a separate question. So far as their attack on the defenders in regard to these matters was based on the ground of fraud, actual or constructive, their claim either for *quantum meruit* or for damages has been negatived by the House of Lords. As I read their Lordships' opinions nothing else was actually decided, and any opinions on any other question expressed by Lord Atkinson, who gave the leading judgment, while entitled to great weight, must be considered as *obiter*. Another ground which bulked largely in the proof was based on an alleged agreement between the defenders and the pursuers that the pursuers should

[1] Hudson on Building Contracts, (3rd ed.) vol. ii. p. 118.

be paid in the manner now claimed by them. This ground was abandoned at the hearing before us.

Fraud and agreement being out of the case, I shall first consider the claim of the pursuers to be dealt with apart from the contract, and then their alternative claim under the contract for damages in respect of the defenders' alleged breach of it.

In support of their claim to be paid apart from the contract, two grounds stated in the summons remain, which form heads (*b*) and (*c*) of Plea III. for the pursuers. "Plea III.—The contract founded on by the defenders is inapplicable as the basis of charge for the work executed by the pursuers, and is no longer binding on the pursuers in respect . . . (*b*) that said contract was entered into by the pursuers under essential error induced by the misrepresentations of the defenders; (*c*) that the work as executed by the pursuers proved to be entirely different from that contemplated by the contract." In addition to these grounds for being dealt with apart from the contract, the pursuers maintained that the defenders had failed to fulfil certain obligations in reference to the bores, which they contended were conditions precedent to the operation of the contract.

As the pursuers' main case, that connected with the bores and the Paisley water-pipes, is now presented, it is a singular, and the defenders suggest a significant, fact that it depends on correspondence between the defenders' engineer and his subordinates and on a certain Parliamentary plan, the existence of said correspondence and plan being unknown to the pursuers until they discovered them under a diligence granted after the record was closed.

I deal first with the pursuers' claim to be paid irrespective of the provisions of the contract. They claim right to payment without regard to the contract—first, because they are entitled to ignore it; and second, because if not, they are entitled to treat it as rescinded.

I.—Are the pursuers entitled to ignore the contract? The pursuers claim to be entitled to ignore the contract, first, because it contained conditions not fulfilled by the defenders, the fulfilment of which by them was necessary in order to render it binding on the pursuers; in short, conditions precedent. They allege that the defenders, not having complied with these conditions, must be held to have repudiated the contract from the first, and therefore cannot found upon it. Second, they say that the work as executed was so "entirely" (they also use the adverbs "totally," "materially," and "essentially") different from that contemplated that it would not be equitable to apply the provisions of a contract framed in contemplation of different operations.

(1) *Conditions precedent.*—These deal with the bores taken by the defenders and referred to in the contract, and with the construction of Bridge 12A and its alleged consequents, and with the discovery of boulder clay in Castle Semple Cutting.

In regard to the bores, it is said to have been a condition precedent that all the results of all the bores taken by the defenders, in anticipation of this contract, should be communicated to the pursuers, and it is alleged that, in connection with bore 7, the results of one check bore, and in connection with bore 9, the results of three check bores, were not

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communicated. I do not read the clause founded on in the specification (App. II., page 265) as importing an obligation to communicate the results of all bores by whomsoever taken, for whatever purpose taken, and with whatsoever results. The defenders were only bound, in my opinion, to communicate the results of such bores as they honestly believed gave a fair indication of the general nature of the ground, and were not bound to communicate the results of bores, which they honestly thought would be misleading, or of check bores, unless, in their honest opinion, these check bores affected the results derived from bores taken in ordinary course. In their whole proceedings connected with the bores, including their appointment of borers, the ground selected for the bores, the method of boring, the method of recording the results of the bores, and their non-communication to the pursuers of the results of check bores, it has been held by the House of Lords that the defenders, acting through Mr Melville, were not knowingly fraudulent, and did not act with such negligence and recklessness as to amount to fraud. Lord Atkinson put it that "Mr Melville honestly thought that he was stating in the journal of bores the information in fact conveyed to him by the borers, and that the change he made in the entry was made for the very purpose of correcting what he honestly believed to be their misdescription of the substances actually found, so that the journal should set forth the absolute truth. For the reasons I have already given I think that, so far from not knowing or caring whether the statements contained in the journal were true or false, he was anxious to state the truth, and took such means as he honestly considered sufficient, for the very purpose of ascertaining what the truth was, so that he might set it forth with accuracy."

But it is also said to have been a condition precedent that what is called a journal of bores should have contained all the information obtained by the defenders from their borers, the Cowans and Brown, and that, in the case of the Cowans, it did not do so. This contention seems to me to mistake the position of William Cowan, the father, and William and John Cowan, the sons. In a question between the pursuers and the defenders, or between Mr Melville and the defenders, his employers, Mr Melville was the borer and the Cowans were his subordinates. Mr Melville did not actually work the boring tools, nor did he record the results of the boreholes. But he made himself responsible for the Cowans, and acted as master-borers usually do who may have a dozen railway, mineral, and miscellaneous boring contracts in progress at one time, except that he did not visit the bores. In these circumstances Mr Melville, whatever his subordinates might report, was not only entitled but bound to see that only the results which he honestly believed to be accurate were recorded as the journal of the bores. For example, in the case of bore 7, Mr Melville got information from John Cowan, by letter of 8th November 1898 (App. II., page 18), that he had found 11 feet of whinstone rock. Mr Melville knew this was a mistake, and that, whatever the substance was, it could not be whinstone. He was bound to correct that obvious mistake. Whether he did so accurately is a different question, which I shall afterwards consider. I may add (in reference to a contention that nothing was kept in the form of a regular journal) that a con-

tractor has no interest in the mere form of the record; what he is concerned with is to have a convenient and accurate statement of the results of the bores, which he had in this case in the so-called journal and in the longitudinal section. Indeed, Robert Forrest, one of the pursuers, seems to attach little or no importance to the journal: "(Q.) Do you recollect whether on that occasion (before the contract was entered into) you were shown a separate record or journal of the bores, apart from what was shown on the longitudinal section? (A.) It was not much difference, seeing that they were indicated on the longitudinal section."

Then it is said it was a condition precedent that the borers should be competent, and that the Cowans were not. This contention seems to me to be met by the same answer as that which I have just given. It is proved that the Cowans could work the boring tools in connection with any kind of boring; and their reports show that they were competent to obtain and record all that was necessary in a contract of this kind, namely, material for the schedule distinction between soft, broken, or loose rock and solid rock, and for the distinction between building and ballasting rock and useless rock. They did not require to make, and it is evident that their experience would not have enabled them to make without more supervision than they got in this case, the detailed records required in mineral boring. There was nothing different in the kind of work involved in this contract (which has more resemblance to the probing contemplated under section 83 of the Lands Clauses Act, 1845, than it has to mineral boring) from what they had done satisfactorily in previous railway boring for Parliamentary plans. It seems to me, as I shall presently explain, that the mistake, as I think it, made by Mr Melville, was due not to the incompetency of his subordinates, or to the faulty information supplied to him by them, but to his drawing a wrong conclusion from their presumably accurate data.

Then it was said that it was a condition precedent that Mr Melville should have taken reasonable means to inform himself of the contents of the bores, and that, in connection with bores 7 and 9, he did not do so. It was certainly a condition precedent that bores should be taken, and in cond. 5, and in the proof by Mr Robert Forrest, at page 20, it was asserted that, at least in certain cases, no bores were in fact taken, a contention which, I understood, was abandoned, or at least not insisted in, by the pursuers' counsel. As the contention is now stated, I think it is a reasonable one; but I do not agree that the condition precedent was not fulfilled. Mr Melville seems to me, in accordance with the evidence of the experts examined, to have acted reasonably when, the original results having left him in doubt, he obtained samples of similar material, and made check bores—See Kyle, 171, C, D. I repeat that the mistake he made was in misinterpreting the material before him, and innocently misrepresenting the facts to the pursuers, thereby leading them into error, which, however, as I shall explain later, was, in my opinion, not essential.

I am therefore of opinion that the pursuers' case, based on the defenders' failure to fulfil conditions precedent, is not well-founded, and that the pursuers are not entitled on this ground to ignore the contract.

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But they also claim to be entitled to charge on the footing of ignoring the contract, on the ground that the work as executed was entirely different from the work contracted for, and that, for this reason also, the contract never came into operation.

(2) *Work entirely different.*—It is not said that what was constructed was not a railway (as, for instance, if, on the ground taken under the Act, a canal had been constructed, instead of a line of railway) or that the route was altered so as to involve material to which the bores taken would be no guide, or that material was encountered (running sand, for example, or rock, in a contract where the bores showed nothing but clay, and the schedule only specified "soft") essentially different in nature and difficulty in working from what was contemplated and provided for, or that the pursuers had unexpectedly to incur cost in procuring special workmen or special machinery. The complaints (of a kind familiar in working out such contracts, although in degree the difficulties may have been greater than usual), are, first, that a greater amount of solid rock was encountered than was expected, and, second, that the unforeseen presence of Paisley water-pipes running across the line of the track not only led to delay and extra cost, but caused expense by a general dislocation of the whole works. Both these elements would be for the arbiter to consider, the first as an answer to any claim by the defenders for penalties for delay, and the second under the head of "extras," if the pursuers thought the extra payments already made by the defenders inadequate.

(*a*) *Bores.*—If any circumstances could warrant either employers or contractors in ignoring the terms of a contract, because the ground had turned out entirely different from the anticipation reasonably created by bores, taken by the employers and referred to, as here, in the contract, I do not find any such circumstances here. The nature of the undertaking, as well as the terms of the contract, demonstrate that it involved hazard, on the one hand to the employers of having to pay much more than the value received, and on the other hand to the contractor of incurring heavy loss. But I cannot proceed on the assumption that, in fact, there was either the immensely increased amount of solid rock, alleged by the pursuers, beyond that contained in the schedules, or that, even if there was, its presence necessarily resulted in the large loss now averred. That Mr Melville paid as rock for large areas of what had been scheduled as soft is proved, and this may be fairly held to show that the material so paid for was much more costly to take out than was expected. But, in view of "hard black blaes," which is as hard, although not as solid, as many rocks, being journalised (although it is only "black blaes" in the longitudinal section) under that name, and scheduled as "soft," it does not follow that the material thus paid for as rock was, as a whole, actually "solid rock" in the sense of the contract, although it may have had posts of solid rock running through it. As to resultant loss, the evidence suggests that it may turn out that the pursuers had themselves to blame for much of the loss said to have been incurred. I shall deal later with the precise relation of the alleged loss to the work as a whole, when considering the question of innocent misrepresentations alleged to have induced

essential error. I think the facts there dealt with are relevant to the present issue, although it is no doubt true that, on the question of entire alteration of work, attention cannot be confined only to bores (7 and 9) challengeable on the ground of misrepresentation.

On the question of misrepresention, the pursuers sought to make a separate point of the existence of boulder clay in the Castle Semple Cutting, which it is said none of the bores in that cutting disclosed. This point seems to me inseparable from the "rock" and "soft" question. Mr Blyth says at page 522, F (App. I.):—"Boulder clay is invariably dealt with as soft. That is about as stiff as anything to take out; it generally requires to be blasted." It is not suggested that the defenders made any misrepresentation in regard to the existence or amount of this substance.

(*b*) *Paisley Water-Pipes.*—On the question of fact, I do not think the dislocation of the work, alleged to have been produced by this cause, so far as proved to be necessary, resulted, in any reasonable sense, in entirely altering the work contracted for.

If the law involved in the opinions of the learned Judges in *Bush's* case[1] refusing to disturb the verdict of a jury is sound, and is applicable to Scotland, the facts in that case were entirely different. It is sufficient to quote, from the judgment of the Master of the Rolls, the statement of what his Lordship took to be the plaintiff's case:—"The result of that, if it is true, is this, that the original contract is made with regard to a different subject-matter from the subject-matter which was dealt with by the parties. If that finding stands, then the condition of things, with which the parties dealt ultimately, was so very different from the condition of things with regard to which the original contract was made, that the circumstances with regard to which the original contract is made have ceased to exist." In *Bush's* case,[1] every part of the work was affected by the change from summer work to work in winter.

But if, contrary to my opinion, the pursuers are entitled to ignore the contract, either on the ground of the defenders' failure to fulfil conditions precedent, or on the ground of the work being entirely different from the work in the contract, it necessarily follows that the defenders can obtain no benefit from the protecting, any more than from any of the other, clauses in the contract.

If, however, the pursuers are not entitled to ignore the contract as never having had any application, they say they can treat it as rescinded.

II.—Are the pursuers entitled to treat the contract as rescinded? The pursuers' claims, based on fraud, having been negatived by the House of Lords, the only other ground of rescission is essential error, induced by the misrepresentations of the defenders. The plea as originally stated may or may not have been intended to cover the case of innocent misrepresentations, as an alternative to a case of fraudulent misrepresentation; but, in any view, it must now be so treated and limited.

The law might have recognised three classes of misrepresentation, and might have assigned different legal effects and remedies to each, first,

[1] Hudson on Building Contracts, (3rd ed.) vol. ii. p. 118.

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fraudulent misrepresentation, second, misrepresentation, careless and negligent, but not so careless and negligent as to be equivalent to fraudulent misrepresentation, and third, innocent misrepresentation with no element of carelessness or negligence. But it was admitted that there is no legal distinction between the second and the third, although, in a certain sense, there is fault in the one case and not in the other. The view of the law was thus expressed by Lord Adam in *Woods* v. *Tulloch*[1]: "As [the misrepresentations] are not said to have been fraudulent, they must be assumed to have been innocent statements of the defender's honest belief." Therefore, even if the Court think the alleged misrepresentations by Mr Melville were careless and negligent (short of fraud), no remedy can be given to the pursuers, in respect of them, different from what would have been given had they been associated with the most scrupulous care. I shall, therefore, use the expression "innocent misrepresentation," and ignore the element of carelessness, it being in law indifferent whether it existed or not, so long as it is not equivalent to fraud.

It was further admitted, first, that there is no case in the books, in which the point was deliberately considered, where misrepresentation, inducing essential error (even fraudulent misrepresentation, *Smyth* v. *Muir*[2]), was allowed to afford a remedy, without it being possible to give *restitutio in integrum*—that is to say, as Lord M'Laren puts it in his edition of Bell's Commentaries, vol. i. p. 466, note 2, "returning things to their original position,"—although it may be in a condition diminished in value or even worthless at the time (*Adam* v. *Newbigging*[3]); second, that to warrant a remedy, the error induced must be so essential, in the sense of grave and far-reaching, as to induce the reasonable conclusion that, but for its existence, the contract would not, or at least might not, have been entered into; and third, that (except in two cases, the one statutory and the other at common law, which have no application to the present case) the only remedy which the law gives for innocent misrepresentation (careless or not careless) is rescission of the contract, and not damages for the breach of it (*Manners* v. *Whitehead*[4]).

I shall first deal with the question of restitution. In this case *restitutio in integrum* in the ordinary application of that expression is, of course, impossible. But it was contended that the ordinary rule ought not to be applied in a case like the present, where it was only after the work began that the misrepresentation could be discovered. At first sight this contention seems reasonable. But it ignores the basis on which a remedy is allowed against an innocent misrepresentation, and the fact that, while the law provides a remedy in every case where there is fraudulent misrepresentation, the remedy is limited and conditioned in the case of innocent misrepresentation. An innocent misrepresentation may arise in many ways, for instance from a clerical error, from forgetfulness, from the use of ambiguous language, from neglect to obtain sufficient information and from a conclusion from consequently insufficient premises, or from the employment of an apparently competent agent or messenger,

[1] 20 R. 477.
[2] (1891) 19 R. 81.
[3] 13 App. Cas. 308.
[4] 1 F. 171.

who misapprehends his instructions. In these cases, the person responsible for the misrepresentation, being considered innocent, has done no legal wrong; innocence is incompatible with fault; therefore actions of damages, which always involve fault, are excluded. But it is considered reasonable that the misrepresenter should not profit by his misrepresentations, however innocent, provided always his own interests are safeguarded. "When a pursuer only desires to set aside a contract of sale on the ground of innocent misrepresentations, he may obtain relief, but only on condition of making *restitutio in integrum*. While the other party may thus be deprived of the benefit of a bargain which he considers advantageous to him and is desirous of retaining, yet he receives compensation in the shape of restitution"—*per* Lord M'Laren in *Manners* v. *Whitehead*.[1]

But the defenders' interests will not be safeguarded, and the defenders will not be compensated, unless they can be restored to the position they occupied before the misrepresentation, and that for two reasons, first, because they never would have entered into a contract for payment *quantum meruit*, and second, because if it be assumed that the Railway Company had known that the construction of the railway line would cost them £378,254, instead of the contract price of £243,090, a difference of £135,000, it may reasonably be inferred that it would have affected their plans, and induced them to recast the details, and cut down the costs of their undertaking, except those that were absolutely indispensable. It seems to me that the same reason, namely, absence of fault, which excludes actions of damages for innocent misrepresentation, leading to essential error, makes restitution indispensable. It follows that a works contract, where a substantial part of the work has been executed, cannot be rescinded on the ground of innocent misrepresentation, because *restitutio in integrum* is impossible. The suggestion that, in a case of this kind, restitution can be made in the shape of money, or money's worth, is fallacious. It is the pursuers who must make restitution, if they are to get rescission of the contract, and they are not proposing to restore in any shape whatever. Instead of restitution, they propose a complete subversal of the whole relations between the parties, to the serious detriment of the defenders.

I am not moved by a suggestion thrown out by the pursuers' counsel, in the effort to meet the objection of unfairness to a person who has in the eyes of the law done no wrong. He suggested that, in the end, the pursuers might possibly not be found entitled to ordinary profit but only to be recouped for loss. But neither principle nor authority was stated for invoking the law of recompense in a question of essential error and *restitutio in integrum*. Nor was I impressed by a proposal, foreshadowed in cond. 4, to deal with the contract as severable and to treat the charges as inapplicable while allowing the other stipulations to stand. This contract seems a typical instance of an agreement, the provisions of which must stand or fall together (*Sheffield Nickel Company*[2]).

I am, therefore, of opinion that the pursuers are barred from asking rescission of the contract by their inability to give *restitutio in integrum*.

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[1] 1 F. 171.

[2] 2 Q. B. D. *per* Lush, J., 223.

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Suppose this view is unsound, the questions remain—first, was there innocent misrepresentation on the part of the defenders; and, second, if there was, did it result in essential error, warranting rescission of the contract at the instance of the pursuers?

So far as bores 7 and 9 are concerned, I agree with your Lordships that there was misrepresentation: I differ from the resulting conclusion at which you have arrived, because I think that the error thereby induced was not essential in the sense of giving the pursuers a right to reduce the whole contract. The question is a difficult one. As Blackburn, J., puts it in *Kennedy* v. *Panama Mail Company*[1]:—"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." But in considering this question the distinction must be kept in view which the same learned Judge draws in the previous paragraph of the same opinion: "There is a very important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained; it is enough to show that there was a fraudulent misrepresentation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but, where there has been an honest misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."

Two courses were open to Mr Melville in connection with the bores actually taken by the Cowans, for which he was directly responsible. He might either have given the contractors the information about the bores as he got it from the actual borer, with or without observations by himself, or he might have put the information into convenient shape so as to convey what the borer truly meant, although not exactly in the language used by the borer. He took the latter course, as I think he was entitled, on one condition, to do. That condition was that his reproduction was accurate. It seems to me that the information got from the borer in regard to bores 7 and 9 left it doubtful whether the "black ban" in the case of bore 7 (App. II. p. 311) and the "black band" in the case of bore 9 (App. II. p. 312) interpreted and stated by Mr Melville as "hard black blaes" in the case of bore 7 and as "black blaes" in the case of bore 9, and classed by him as "soft" should have been so interpreted, stated, and classed. The practice to treat all blaes as soft seems sufficiently proved, although the question should have been directly raised in the cross-examination of the pursuers' witnesses, and it would have been more satisfactory if the defenders had led evidence on this point from contractors. Apparently in classing certain hard material as "rock" or "solid rock," and other hard material as "soft," regard is had not only to the hardness as affecting the mode and difficulty of working, but also as to

[1] L. R., 2 Q. B., at p. 588.

whether the material will be of value for building or ballasting purposes; and blaes, which in many cases is hard but not solid, is of no value, or little value, for either of these purposes. The contractor was informed by the documents shown or available to him that all blaes, whether called "black blaes" (bores 8, 8A, 9, 53, 54, and 55), or "hard black blaes" (bore 7) was being treated as "soft." And I keep in view that the mere fact that material is hard, and may to a greater or less extent require blasting, does not necessarily imply that it is to be classed as "solid rock." But if, as in the case of bores 7 and 9, "black ban" or "black band," in addition to being reported in bore 7 as "a hard black substance," is referred to in both cases by the man actually making the bores as "rock," it appears to me either that more inquiry should have been made beyond obtaining samples from a bore 800 yards from bore 7 to ascertain into which category the material fell to be scheduled, or that, if Mr Melville did not choose to make more inquiry, his information was such as ought to have certiorated him that some at least of the material which he scheduled as "soft" fell to be scheduled as "hard." Mr Melville either drew a conclusion from insufficient premises, or he misrepresented the results of these bores, in either case innocently. That his subordinate, in reporting whinstone rock, was manifestly wrong in calling the rock found by him whinstone did not entitle Mr Melville to think he was also wrong in describing the substance as rock. The fact that Cowan thought the substance whinstone showed that, whatever it was, it must be of a very dense and therefore solid nature. The explanation of clerical error cannot be accepted as proved when Cowan was not asked about it in the witness-box. No doubt it might still have happened that Mr Melville's representation, although not the natural deduction from his information, was in fact accurate. Here the misrepresentation being proved, the onus of proof was on the defenders. I do not think they have discharged this onus. Their contention may be correct; but, looking to the evidence led by the pursuers and to the extraordinary variety of material in the ground, I do not think the defenders' case is established by the rate of progress of the works shown by the wagon lists, or by the progressive sections, or by the material found at the date of the proof at the sides of the cuttings, or by the slope at which the cuttings stand or were intended to stand.

But, as already stated, I do not think this innocent misrepresentation of a "hard" material as "soft" led to any essential error on the part of the pursuers. It is common ground that the accuracy of the bores was among the essentials of the contract. The defenders did not defend their statement in answer 5,—"The Journal of Bores mentioned in this article formed no part of the contract, and the pursuers were not entitled to rely on it in any way." But it does not follow that every inaccuracy in the bores, however insignificant, and however small a number of bores it may have affected, will produce essential error in the other contracting party, warranting rescission of the whole contract. In *Woods* v. *Tulloch*,[1] already quoted, Lord Adam, referring to the innocent misrepresentations of which the pursuer complained, said:—"Though they may have affected

[1] 20 R. 477.

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his mind to a certain extent, they cannot be said to have done so to the extent of inducing essential error."

In this connection it is necessary to compare the case originally made by the pursuers on the bores with the case now presented. The original case of misrepresentation in regard to all the bores, except one, in the three cuttings has shrivelled to a complaint about bores 7 and 9. Yet the pursuers still speak in a general way about the material in "the bores" being misrepresented, and rely upon evidence, which proceeds on the footing of all the bores in all the cuttings, or most of the bores in most of the cuttings, being inaccurate. The matter stands thus :—

Over the whole contract of 12½ miles there were 65 bores, of which Brown, the professional borer, made 47, and William Cowan senior and John Cowan, railway employees, acting under Mr Melville's instructions, made 3 and 15 respectively. Brown's bores, being made by an admittedly competent man, whose results were recorded without alteration, are unchallengeable on the head of misrepresentation. Therefore, for the present purpose, the 65 bores are reduced to 18.

Taking the matter in another way, the pursuers' challenge is limited to the bores taken at Kilbirnie Cutting, Whirlhill Cutting, and Castle Semple Cutting. Out of the 65 bores, 23 were in these cuttings, namely, 8 in Kilbirnie, 11 in Whirlhill, and 4 in Castle Semple. But of these 23 bores, 5 were made by Brown. Therefore, again, the number for consideration is 18.

In cond. 5 the pursuers say :—"Of 44 (23) bores represented by the defenders to have been taken in the three cuttings in question, 22 are substantially inaccurate, and a large proportion of these are entirely false and misleading. Reference for illustration may be made to bores 8, 16, and 27 . . . Further, in a number of instances the result of bores taken by the defenders and set forth in said journal is in the plans and schedule falsely and fraudulently set forth, hard shale, blaes, and rock found by the bore being therein represented and scheduled as "soft," and *vice versa*. Examples of this are to be found, *inter alia*, in bores 7, 8, 8A, and 9." Seven bores are thus referred to as illustrative examples of false and misleading bores.

In opening the case for the pursuers, their counsel intimated that he proposed to challenge the following 22 bores, namely, 7, 8, 8A, 9, 10, 11, 11A, and 12 in Kilbirnie Cutting, being all the bores in that cutting, except bore 6 ; and in Whirlhill Cutting bores 13, 14, 15, 16, 16A, 17, 18, 18A, 19, and 20, being the whole bores in that cutting ; and in Castle Semple Cutting bores 26, 27, 28, and 29, being the whole bores in that cutting. He added that he laid chief stress on bores 7, 8, 8A, and 9 in Kilbirnie Cutting, bores 14, 16, and 18 in Whirlhill Cutting, and bore 27 in Castle Semple Cutting, being 8 in number. He also added that his strongest point arose on bore 9. In the case of five bores thus challenged by the pursuers' counsel in opening the case, namely, bores 13, 15, 18A, 20, and 26, it will be found, on reference to pages 300 to 305 of App. II. that all these bores are actually accepted by the pursuers as "correct." Farther, referring to bore 18, another of those not only challenged by pursuers' counsel in opening the case, but put forward by him as one of those on which he laid chief stress, Mr Robert Forrest, one of the pursuers, de-

poned (page 18 G):—"There was not much wrong with bore No. 18. In that case the Railway Company showed me 1 foot soil, 9 inches yellow clay, 4 feet 9 inches dark clay, 9 inches broken whin, and 32 feet whinstone. In fact, I found 2 feet 6 inches clay, and all the rest whinstone. We did not consider that that was anything out of the ordinary, and we said nothing about it. At the same time it showed that the borer (Brown) did not know what he was doing, as he might have seen the whinstone sticking through the ground. If we have only 2 feet 6 inches of clay, or 5 feet of clay, that does not make much difference to us, because we cannot use the digger. That had to be taken off by hand. In regard to any difference in the measurement, I would have to take my chance." Bore 14, another bore on which chief stress was to be laid, was not further alluded to. In the end pursuers' counsel made no detailed reference to any of the 22 bores enumerated by him, except bores 7, 8, 8A, 9, 16, and 27, the two latter being taken by Brown, a professional borer, and passed on by the defenders unedited.

Looking to the importance of the bores as the basis of the contract, and to the practical impossibility of the contractor checking or supplementing the results supplied to him by the defenders, I do not doubt that innocent misrepresentation as to the relative proportions of rock and soft, materially affecting, to the contractors' serious prejudice, the whole 65 bores, or, confining attention to bores in the three cuttings, the whole 23 bores in the cuttings, or even the 8 bores above mentioned (seeing that these 8 are scattered over all the cuttings) would have produced essential error entitling the pursuers to rescission of the contract; and I accept the pursuers' evidence based on one or other of these views. Mr Robert Forrest, for instance, deponed, page 33, A-B: "I told Mr Melville that we could not carry out the contract at the price, that the stuff was not as represented, and that everything was grossly misrepresented." The case is very different when the proved misrepresentation affects only two bores in the same cutting, and these within 500 to 600 yards of each other. Without evidence, it is not obvious that, if Mr Melville had journalised and scheduled "rock" in both these cases instead of "hard black blaes" in bore 7, and "black blaes" in bore 9, the contractors' views of the contract as a whole would have been in any way affected. In the proof I find no evidence bearing on that question. The pursuers have directed their proof to an assumed state of facts, which they have failed to establish, and have neither made averments, nor led evidence nor cross-examined the defenders' witnesses directly on what seems to me the real question in the case, namely, suppose Mr Melville had entered "rock" instead of "hard black blaes," and "black blaes," in his report of bores 7 and 9 respectively, and adjusted his schedule accordingly, what effect, if any, would that have had on the contractors? As Lord Abinger indicated in *Cornfoot* v. *Fowke*,[1] there must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all, or at least not on the same terms.

[1] (1840) 6 M. & W. 358, at p. 378.

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It might have been different if Mr Melville had kept back the discovery of such an obstacle as old mineral workings, or some material like running sand, or some specially intractable material, which had been found by him in these bores and the presence of which in the ground it so happened the other bores had failed to disclose. But it appears from App. II., page 288, that, between pegs 45 and 67, in which space bores 7 and 9 were sunk, 41,765 cubic yards of "solid rock" are scheduled, as well as 275,560 of "soft." This entry may be contrasted with the results between pegs 6 and 13, and five other similar cases, where "soft" only is scheduled.

Not unnaturally the pursuers themselves (and the fallacy was not absent from their counsel's speeches) fail to keep in mind the distinction between their being misled by the defenders' misrepresentations as to the contents of the bores (which did not go down to formation level, a fact which vitiates the pursuers' comparisons of the whole material found at and near a bore with the contents of a bore), and their being misled by the failure of the bores to give them a fair idea of the strata between the bottom of the bore and formation level, and of the intervening strata. The proof is conflicting, but it may well be that the pursuers were misled by the bores, and their calculations upset, because the underlying and intervening strata contained more solid rock, or at least material more difficult to work by the digger than the contents of the bores could have led one to expect. In any view of the defenders' action in calling certain material "rock," in treating it as such, and in paying large sums to the contractors for it either as rock, as the contractors say, or "as for rock," as the defenders say, this seems probable. But even if the contractors' representation of that transaction must, in view of the contemporary documents and of the unexplained absence of the defenders' chairman and general manager to confirm Mr Melville's statement, be taken as correct, this of itself does not prove that the bores were not accurately taken and accurately reported. It only establishes a not infrequent experience, that the bores were not reliable guides to the rest of the ground unbored. The case might have been reversed, and the defenders might have been required to pay a sum largely in excess of any value received by them. And, on the assumption that a large loss has been suffered, the whole alleged loss might have happened although the bores had been taken with the highest skill and reported with perfect accuracy. In almost all contracts of this kind parts of the ground are found harder, and therefore (except in the case of valuable stone) dearer, and other parts turn out to be easier, and therefore cheaper, to work than contemplated. The contractor hopes that, on a balance, the easier parts will be much more extensive than the hard, and he will make a large profit. The opposite may have been the case in this contract. But the mere fact that the underlying and intervening strata turned out different, in several, or in many instances, or even all over the contract, from what the bores foretold as probable proves nothing.

But if, contrary to my opinion, misrepresentation is proved, and essential error is proved, the protecting clauses applicable to bores will not avail the defenders. These seem to be designed as an answer to claims of damage.

Accordingly, I hold that the pursuers are not entitled to rescission of the contract on the ground of essential error, caused by the defenders' innocent misrepresentations in connection with the bores, first, because, although innocent misrepresentation by Mr Melville is proved with regard to bores 7 and 9, it is not proved that essential error was caused thereby, entitling the pursuers to rescission of the contract; and, second, because, if essential error is proved, the pursuers are barred, by their inability to give *restitutio in integrum*, from the only remedy open to them, namely, rescission of the contract.

I come to the same conclusion in regard to the alleged dislocation of the pursuers' whole work caused by the discovery of the Paisley water-pipe running across the railway, and the delay thence arising, the necessity for overland routes, and the construction of Bridge 12A. In this case, however, I do not find anything proved in the nature of a misrepresentation. The defenders had no doubt the Parliamentary map and book of reference in their possession, which, had they read the two together, would have enabled them to ascertain the existence of the water-pipe. It is not alleged that they did consult this information; and, in these circumstances, I do not think the facts amount to misrepresentation. But suppose they do, the evidence does not satisfy me that this question can, in any view, go to the root of the contract, as, in one sense, the question about the bores undoubtedly does. Therefore I cannot affirm essential error on this head any more than on the question of the bores.

There remains the alternative claim for damages, founded on breach of contract in respect of the bores and Bridge 12A, and also certain water-courses.

III.—Are the pursuers entitled to damages? The proof allowed to the pursuers by Lord Salvesen's interlocutor of 14th July 1908 was "of their averments so far as bearing on their third plea in law." Damages form the subject of the fourth plea in law. The defenders contended that no proof on the question of damage was before the Court, and, in these circumstances, objected to the competency of using the same set of facts for alternative purposes. They further pointed out that there was no conclusion for damages and no relevant averment of loss. Technically sound as these objections are, I think, looking to the history of this case, they should be overruled, and the question of damages considered on its merits.

In regard to the bores, I have already indicated my opinion that the defenders have not broken any provision of the contract, express or implied, relative to bores. The onus in this part of the case being on the pursuers, I am further of opinion that the pursuers have failed to prove any material inaccuracy in any of the bores, and that on similar grounds to those which induced me to hold that the defenders, where the onus was upon them, had not discharged the onus. The pursuers attempt to locate boreholes 8 and 16, which they say they opened and found, contrary to the journals, to be in rock, seems to me to have failed, I say the same about the alleged finding of a broken jumper in borehole No. 8. The jumper, which may have been used for other purposes, is not produced, and the borehole is not satisfactorily located. If, however, any material inaccuracy in any of the bores has been proved, I am of opinion

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that on a just construction of the protecting clauses, the defenders are exempted from liability for any such inaccuracy or omission.

The pursuers complained of the severity of these and other clauses in the specification, and asked that they should be construed with special strictness. But, neither separately nor in combination, do these clauses seem different from those usually present in contracts of this kind. There is nothing in them to take the case out of the ordinary rule, thus expressed by Lord President Boyle in *Smail* v. *Potts*[1]: "The contract is subject to a rational not a judaical construction; but, if it is conceived in plain and explicit terms, it must form the rule, by which the rights of parties are to be fixed."

In regard to Bridge 12A, I do not find any breach of any of the stipulations of the contract, express or implied. Under the powers of their Act, the defenders were in a position, subject to the conditions specified in the Lands Clauses Act, 1845, to give possession to the pursuers of all necessary ground, despite the presence of the Paisley water-pipes. The construction of the bridge was not and could not be expressly provided for in the contract, but provision was made for extras, under which the pursuers have been paid £5000 in connection with the bridge, and, if this sum is inadequate for construction, the matter can be brought before the arbiter. I further think that this is a typical case for the application of the protecting clause covering "inadvertent omissions." Water-pipes are expressly mentioned in the contract (App. II. page 259), and in the specification at page 270, and in the incorporated Act of 1845, at page 282. A similar point arises with bridges, of which the contract embraced more than a dozen, a number increased by one in respect of Bridge 12A. No case was cited in which the operation of omission clauses has been limited to small omissions.

In regard to the water-courses, these were as visible to the contractors, and as well known to them, as to the defenders. If, however, there might have been any obligation on the defenders such as is alleged, the case seems to me to be covered by the protecting clauses.

Nor can I see any ground for claiming damages in respect of the boulder clay in Castle Semple. The bores, which did not disclose it, were taken by a professional borer, and were not edited. The defenders were unaware of its existence, and committed no wrong against the pursuers. Besides, the case is covered by the clauses as to omissions.

A point made about some undefined amount of delay in giving plans in connection with Bridge 12A and the water-courses, is not on record, and is too vague to be dealt with as a substantive ground of damage.

On the whole matter, I am of opinion that the defenders are entitled to absolvitor.

THE COURT pronounced this interlocutor*:—"The Lords having heard counsel for the parties on the remit from the House of Lords for further procedure, dated 3rd April 1913: Find that the pursuers entered into the contract libelled

[1] 9 D., at p. 1045.

* The interlocutor was signed on 7th March 1914.

under essential error, induced by misrepresentation and concealment on the part of the defenders; Find further that the defenders were in breach of obligations under the said contract, and that the breaches committed went to the root and consideration of the contract: Therefore sustain branches (*b*) and (*e*) of the third plea in law for the pursuers; Repel branches (*c*) and (*d*): Find further that the pursuers are entitled to be paid for the work done by them for the defenders on a basis of *quantum meruit:* Further find the defenders liable in expenses since 5th February 1908, the date of closing the record, except in so far as these have already been disposed of under the judgment of the House of Lords dated 3rd April 1913, and remit the account of said expenses to the Auditor to tax and report. *Quoad ultra* continue the cause."

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PRINGLE & CLAY, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

JAMES KEEVANS, Appellant.—*Fenton.*
JOHN MUNDY, Respondent.—*D. P. Fleming.*

No. 57.

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Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (3) *and Second Schedule* (9)—*Compensation—Wage-earning capacity—Partially incapacitated workman—Employer's offer of full wages for light work—Refusal of offer by workman—Recording of memorandum—Suspension of compensation.*

An injured workman, who had been receiving compensation in pursuance of an agreement with his employer, recovered from his injuries sufficiently to be fit for light work. His employer thereupon offered him such work, and offered to pay him therefor the same wage as he had been earning before the accident. The workman refused this offer, and presented for registration a memorandum of the agreement with his employer. The Sheriff refused to record the memorandum, and ended the compensation.

Held (1) that the workman was barred from receiving compensation by his refusal of work, at full wages, suited to his capacity; (2) that the proper course for the Sheriff was to have recorded the memorandum, but, in respect of the employer's offer to pay the workman full wages, to have suspended compensation by sisting procedure *hoc statu.*

1ST DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Glasgow warrant was sought by John Keevans, labourer, to record a memorandum of agreement between himself and his employer, John Mundy, structural engineer, Glasgow.

The memorandum set forth that the applicant was injured by an accident arising out of and in the course of his employment with the respondent and became totally incapacitated for work, and that an agreement was made on 3rd December 1912 as follows:—"That the respondent should pay compensation to the claimant from the date of the accident at the rate of nine shillings and sixpence sterling per week, to continue during the claimant's incapacity for work or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act."

The respondent on 7th April 1913 lodged a minute of objections

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in the following terms:—"The said John Mundy craves the Court —To find that the said James Keevans, who seeks to record said memorandum of agreement, has now recovered from his incapacity for work, and is able to resume work and to earn the same wages as he did before the accident to which the said memorandum of agreement relates, and was so able to resume work as at the 20th day of March 1913, and that the compensation should be ended as at that date; and that the said memorandum is accordingly unnecessary, and ought not to be recorded; and to direct the Sheriff-clerk accordingly."

The Sheriff-substitute (Fyfe), after a proof, refused to order the memorandum to be recorded, and, at the request of the workman, stated a case for appeal.

The case set forth:—

"The following facts were proved:—(1) That the appellant was employed as a general labourer with the respondent, and was earning an average weekly wage of 19s. (2) That on 19th November 1912, in the course of his employment, appellant was engaged at the roofing of buildings within Harland & Wolff's yard at Govan. (3) That on said date he fell a distance of about 20 feet, and thereby sustained injury, which then incapacitated him for work. (4) That the respondent paid the appellant agreed compensation at the rate of 9s. 6d. a week from 3rd December 1912 up to 20th March 1913. (5) That on or about 20th March 1913 the respondent offered to give the appellant employment, at the same wage as he had been earning before the accident, commencing him with light work. (6) That the appellant was then fit for the employment so offered. (7) That he refused it.

"I found in law that in respect the appellant had been paid compensation up to 20th March 1913, and was then offered employment which he was fit for, at the same wages as he had had before the accident, recording the memorandum was unnecessary.

"I therefore refused to order it to be recorded; and ended the compensation as at 20th March 1913; and found no expenses due to or by either party."

The question of law for the opinion of the Court was:—"On the facts found proved was I entitled to refuse to order the memorandum to be recorded, and to end the compensation payable to the appellant as at 20th March 1913?"

The case was heard on 22nd October 1913 before the First Division; and on 15th November 1913 the Court pronounced an interlocutor in the following terms:—"*Hoc statu* recall the determination of the Sheriff-substitute as arbitrator appealed against in the stated case, and remit to the said arbitrator to consider and decide whether the wage-earning capacity of the appellant was at 20th March 1913 as good as before the accident, and also to consider and decide the question of wage-earning capacity as at any subsequent date which the employer may aver in a further application for review to be lodged by him, and to proceed as accords."

On 20th December 1913 the Sheriff-substitute pronounced an interlocutor containing, *inter alia*, the following findings:—"(5) That at 20th March 1913 the claimant was not yet fit for the work of a labourer, at which he had been engaged before the accident, but he was fit for the lighter work of a spare-job man, for which he was offered the same wage of 19s. as he had been paid whilst

engaged as a labourer; (6) that at 20th March the claimant refused this offer of work as a spare-job man; (7) that by 20th August 1913 the claimant was fit for the work of a labourer, and obtained employment as such at a higher wage than 19s.: Finds further, in response to the remit from the Court of Session of 15th November 1913, that, in respect before the accident he had been earning 19s. per week, and that at 20th March 1913 he was offered employment for which he was fit, which would also have enabled him to earn 19s. per week, the wage-earning capacity of the claimant was at 20th March 1913 as good as before the accident: Finds in regard to the second question remitted that it is not now necessary to review the compensation of 9s. 6d., the claimant having at 20th August 1913 obtained a situation as a labourer at a higher wage than 19s.: Finds, therefore, in the circumstances, that the claimant is not entitled to have a memorandum of agreement recorded; and refuses to order the recording thereof."

The case was further heard before the First Division on 13th and 17th March 1914.

Argued for the appellant;—The respondent having agreed to pay compensation during the appellant's incapacity, and there being no finding that his capacity in the open market was restored at 20th March 1913, the Sheriff-substitute was not entitled to refuse to record the memorandum and to end the compensation agreed upon at that date. The work and the wage offered by the respondent were not evidence of the appellant's restored capacity, because the wage offered would not have been an earned wage but merely a receipt of charity. His earning capacity might be only 9s. 6d. a week, though he was offered 19s. by the respondent; and the liability of an employer could not be ended by an offer of full wages which did not represent the workman's earning capacity. It was the duty of the Sheriff-substitute to determine what was the appellant's earning capacity in the open market, and the onus was upon the respondent to prove that it was such as to enable him to earn "the same wages as he did before the accident."[1] That onus not having been discharged, the appellant was entitled to record a memorandum of his agreement with the respondent, seeing that its genuineness was not disputed,[2] and that his incapacity had not ceased when the application to record was made.[3] The Sheriff-substitute should have granted warrant for recording the memorandum of agreement as a declaration of the respondent's liability, leaving the amount and duration of any subsequent compensation to be determined in course of law upon application by the respondent.[4] Apart from the ending of compensation, the respondent's offer to pay the appellant as odd-job man the same wages as he was earning before the accident did not even affect the question of the amount of compensation; that

[1] Workmen's Compensation Act, 1906, Second Schedule (9) (*b*); C. A. S. 1913, L. xiii. 12.

[2] Coakley v. Addie & Sons, Limited, 1909 S. C. 545.

[3] Popple v. Frodingham Iron and Steel Co., [1912] 2 K. B. 141; Petrie v. Smith, 1913 1 S. L. T. 470.

[4] Freeland v. Macfarlane, Lang, & Co., (1900) 2 F. 832; Fraser v. Great North of Scotland Railway Co., (1901) 3 F. 908; Clelland v. Singer Manufacturing Co., (1905) 7 F. 975, Lord President Dunedin, at p. 981, Lord Adam, at p. 983; Ball v. William Hunt & Sons, Limited, 1912 S. C. (H. L.) 77, footnote, Lord Shaw, at p. 85.

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[2] Coakley v. Addie & Sons, Limited, 1909 S. C. 545.

[3] Popple v. Frodingham Iron and Steel Co., [1912] 2 K. B. 141; Petrie v. Smith, 1913 1 S. L. T. 470.

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question depended solely upon the appellant's wage-earning capacity in the open market.[1] Between 20th March and 20th August, the appellant had not recovered his wage-earning capacity; he was still an injured workman, and as such was entitled to compensation.[2] During that period he was not bound to accept the respondent's offer of full wages for less than full work, and thereby to prejudice his position, for the respondent could then have applied to have the compensation ended.[3] The Court should answer the question of law in the negative, and remit to the Sheriff-substitute to order the memorandum to be recorded, and to suspend the payment of compensation from 20th August 1913.

Argued for the respondent;—In respect of the respondent's objection, the Sheriff-substitute was not bound to grant warrant to record a memorandum *de plano* without awaiting the result of the inquiry.[4] It had to be admitted in light of the facts disclosed that probably his proper course at 20th March would have been to have ordered the memorandum to be recorded, but, in view of the respondent's offer, to have suspended payment of compensation.[5] As the appellant's wage-earning capacity was fully restored at 20th August, the memorandum could not now be recorded,[6] and it would be idle to order an *ex post facto* recording for the period between 20th March and 20th August, for nothing could follow thereon. The appellant's wage-earning capacity in the open market was not the only thing that the arbitrator had to consider in the present case; he was entitled and bound to consider the respondent's offer of full wages for work which was suitable.[7] It was the policy of the Act to encourage an injured workman to return to work of a suitable kind as soon as he was able for it.[8]

At advising on 17th March 1914,—

LORD PRESIDENT.—The whole procedure in this case seems to me to have been deranged, and can only be put in order by revision from beginning to end. The facts, as they are now disclosed to us by the stated case and by the report which we have from the learned Sheriff-substitute on a remit from us, are comparatively clear and simple. The precise chain of events was as follows: On the 19th November 1912, the workman was the victim of an accident which arose out of and in the course

[1] Birmingham Cabinet Manufacturing Co. v. Dudley, (1910) 3 Butterworth's W. C. C. 169, 102 L. T. R. 619; Cory Brothers & Co., Limited, v. Hughes, [1911] 2 K. B. 738.

[2] Workmen's Compensation Act, First Schedule (1) (*b*) and (3).

[3] Clelland v. Singer Manufacturing Co., 7 F. 975, Lord M'Laren, at p. 983; Malcolm v. Bowhill Coal Co., Limited, 1910 S. C. 447.

[4] M'Ewan v. William Baird & Co., Limited, 1910 S. C. 437; Hanley v. Niddrie and Benhar Coal Co., Limited, 1910 S. C. 875.

[5] Chandler v. Smith, [1899] 2 Q. B. 506.

[6] Irons v. Davis & Timmins, Limited, [1899] 2 Q. B. 330.

[7] Workmen's Compensation Act, First Schedule (3); M'Namara & Co., Limited, v. Burtt, (1911) 4 Butterworth's W. C. C. 151; Furness, Withy, & Co. v. Bennett, (1910) 3 Butterworth's W. C. C. 195; Higgs & Hill, Limited, v. Unicume, (1913) Gordon's W. C. R. 263; Gray, Dawes, & Co. v. Reed, *ibid.*, 127.

[8] Carlin v. Stevens & Sons, Limited, 1911 S. C. 901, Lord Salvesen, at p. 908.

of his employment. His employers acknowledged liability and made an agreement with the workman, on 3rd December 1912, by which they became bound to pay him compensation at the rate of 9s. 6d. per week, to continue during the claimant's incapacity for work, or until such time as the same should be ended, diminished, or redeemed in accordance with the provisions of the Act.

Now, as I pointed out in the course of the discussion, it is obvious that this agreement was made with reference to the provisions of the statute, and that the expression "during the claimant's incapacity for work" is elliptical, and the ellipsis must, I think, be supplied thus: "total or partial, due to the result of his injury." By the 20th March 1913, apparently his employers had come to the conclusion that he was completely restored from the effect of his injury and was not only in a position to receive 19s., but was able to earn it—was worth the money. For on that date, as the stated case expressly bears, the employer offered to give the workman employment at the same wage as he had been earning before the accident, commencing him with light work. Now, that offer was not clogged, so far as we see, with any condition of any kind. If the workman accepted the employment and found later that the result of his injury had not ceased and that he was not fit really to earn 19s. a week, or if the employer had ceased to pay him 19s. a week on having discovered that he was not able to earn that money, the workman would of course have been entitled to go to the arbitrator and ask that his agreement should be registered and that the compensation should be resumed which had been fixed in the agreement. But, as the stated case expressly bears, that offer of full wages, with work for which it was found that the workman was quite fit physically, was refused, and, on the following day, the 21st March, the memorandum of agreement which we have before us was apparently framed, and application was made, on the 22nd, to the Sheriff-clerk to record this memorandum of agreement, dated 21st March 1913.

Now, when the case was called in Court on 7th April 1913, the employer gave in a minute craving the Court to refuse to register the memorandum on the ground that the workman had recovered from his incapacity for work, and that he was, as at 20th March 1913, quite able to resume his former employment and to earn the same wage as he had earned before the accident, and he accordingly craved the arbitrator to end the compensation as at that date, namely, 20th March 1913. It is apparent from the way in which the minute is framed, that the employer, on 7th April, retained the view which he had formed on the 20th March—that the workman had completely recovered from the effects of his accident, that there was no partial incapacity remaining, and that he was able to earn his full wages.

In these circumstances the Sheriff-substitute took the view that, if the workman was in a position to receive 19s. a week, the same wage as he had received before the accident, it proved, finally and conclusively, that his incapacity had ceased, and accordingly he refused to order the agreement to be recorded, and ended the compensation. Thereupon the workman brought an appeal to this Court, and invited us to send back the case to the Sheriff-substitute in order that he might investigate the facts and find out, upon the evidence, whether or no the employer's contention was

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well founded, viz., that the results of the injury had ceased altogether. We acceded to that request. We sent back the case to the Sheriff-substitute, and we now have before us his findings and conclusions upon that all-important fact. They are clear and decisive. At 20th March 1913 the workman was not completely restored from the effects of the injury due to his accident. Whereas, prior to his accident, he had been employed as a general labourer, earning 19s. a week, on the 20th March, in consequence of his accident, he was not fit for the work of a labourer, and was only fit for the lighter work of a spare-job man.

Now, if the Sheriff-substitute had undertaken that investigation at the prior stage of the case, there can be no doubt what was the proper order for him to pronounce. If he had come to the conclusion which he has reached on the evidence led, he ought to have ordered the memorandum to be recorded, but, in respect of the offer made by the employer to give the man full wages, he should have superseded consideration of the employer's minute—refused, in short, to consider the question of compensation, or the continuance or the reverse of the agreement which he had ordered to be recorded. The course which the learned arbitrator thought proper to take was, I am of opinion, entirely wrong. He ought not to have ended the compensation. He ought not to have refused to order the memorandum to be recorded. And accordingly I come, without hesitation, to the conclusion that, upon the question of law which is submitted to us, namely, whether on the facts proved the arbitrator was entitled to refuse to order the memorandum to be recorded, and to end the compensation payable to the appellant as at 20th March 1913, our answer ought to be in the negative.

We have still however to consider what is the position of a workman who is offered by his employer full wages for light work, and whether or no he is entitled absolutely to refuse that offer and to demand that compensation should continue to be paid in terms of the agreement. I am of opinion that a workman is not entitled to refuse such an offer as that. And the way in which I look at the question is this—when the arbitrator comes to consider the question of the amount of compensation to be paid under the statute for partial incapacity, he is enjoined by the 16th paragraph of the First Schedule to strike a balance, as it were, between the amount of the wage which the workman was able to earn, and did earn, prior to the accident and the amount of wage which he is able to earn subsequent to the accident. By "able to earn" I mean not merely that he is fit for and worth the amount that is offered to him, but that that amount is offered to him for the work which he is able to perform; and having struck that balance, the arbitrator is enjoined to have the difference in view in awarding compensation. In this case the amount of the wage which the man was able to earn before the accident was precisely equal to the amount of the wage he was able to earn after the accident by his employer's offer. And, therefore, the arbitrator was not entitled, in my opinion, having in view the provisions of the 16th section, to award any compensation in the meantime.

The situation, therefore, now is that we have to consider the practical question whether or no the workman is to have his compensation from the 20th March till the 20th August,—when, it is conceded, his capacity was fully restored, and he no longer suffered from the injury he had received.

I think he ought not to have any compensation during that period. If he had chosen, he might have been earning full wages at light work for which he was physically quite fit. At 20th August, as I have said, the incapacity totally ceased, and, therefore, it is wholly unnecessary to record the memorandum. But the conclusion at which I arrive is that, although we do not direct the memorandum now to be recorded, we find that, as at 20th March 1913, the proper procedure for the arbitrator was to have ordained it to be recorded, and, for the reasons I have given, to have sisted further procedure in the case meanwhile.

Lord Johnston.—I concur in the judgment which your Lordship proposes. The question before us really is, when it is reduced to its practical form, whether from 20th March to a certain date in August this workman is to be entitled to his compensation as if the agreement which he had made with his employer was then in force. That question, it seems to me, can only be determined in favour of the workman upon charitable considerations, and I regret to say that I do not think such considerations are applicable in construing this statute. There was a time when the matter of compensation for injury was, in very many cases, settled in an amicable and friendly way between employer and workman. The Legislature stepped in with this Act, or its predecessor, and made all that statutory. And the statute unfortunately places master and workman now in hostile camps at arm's length. As such we find them, and, on that footing, we have to reach a conclusion.

The workman here, who was *in petitorio* in the matter, made, at first, a decided error, and for that, I think, he cannot throw responsibility upon his employer. He was offered employment at a wage equal to his former wage. It was open to him to accept that offer on condition—on condition, namely, that his right to raise the matter of his compensation under altered circumstances was not to be foreclosed. He did not take that course. He gave the offer an absolute refusal. He thus put his claim off the rails, and he cannot throw responsibility for that either upon his opponent or upon the Sheriff-substitute, although both of them, I think, have gone wrong at different points. It was open to the workman to take the proper course at any period of the proceedings, but not having done so, I do not think he can complain if he has to take the consequences.

I agree with your Lordship that we must proceed upon the statute alone, and that we cannot, therefore, take a course which would give the workman his compensation, just as if he had adopted the right course from the beginning.

Lord Mackenzie.—I am of the same opinion. There were two matters before the Sheriff-substitute in this case:—one was the application to have the memorandum of agreement recorded, which was presented on 22nd March 1913; the other was raised by the minute of objection to the recording of the memorandum, which was lodged by the employer on 7th April 1913.

Upon the question whether the workman was entitled to have the memorandum recorded or not, I am clearly of opinion that he was, and that for the grounds stated by the Sheriff-substitute in his interlocutor of

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20th December 1913, from which it appears that, at 20th] March, he had not recovered his earning capacity. Before the accident he had been fit for the work of a labourer. As at 20th March he was unfit for the work of a labourer; he was only fit for work as a "spare-job" man. That being so, it was the duty of the Sheriff-substitute to record the memorandum. I consider it of great importance, in the interests of the workman, that this rule should be clearly kept in view—a rule which has been established in more than one case—because thereby the liability of the employer is fixed and continued, whatever the effect of that liability may subsequently be as regards payment in cash.

It is no longer matter of dispute that, by 20th August, the workman had completely recovered his earning capacity. That is established by the terms of the minute lodged for the appellant in which the fact is admitted. I do not think that, in these circumstances, the provisions of the First Schedule (16) give any additional right to the workman in this case, who we are told is a minor, although that is not stated in the proceedings. I do not think that a workman, who is a minor, has any other rights under the provisions of that section, in consequence of his being a minor, than those of an ordinary workman, if he has completely recovered.

The question, however, in this case is what is the position of matters between the 20th March and the 20th August. The workman's contention was that he was entitled to refuse the work offered to him at the wage of 19s., which was as much as he was making before the accident, inasmuch as, according to his contention, part of that was not being earned, part being of the nature of charity and part only of wages which he was able to earn, and that accordingly he was entitled to take up the position that he would do nothing, but that he was entitled to receive the 9s. 6d. per week during this period. I am of opinion that the workman was not entitled to take up that position. Whatever be the relevancy of the question whether the wages are being earned or are merely being paid without being earned in considering whether the payment is to be terminated or whether it is merely to be suspended, I do not think it admits of doubt that the employer's offer is a relevant consideration for the arbitrator to have in view, in discharging his duty under the First Schedule (3), which says that "in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." Such an offer is a relevant element to be considered, and if it be the case that the workman is in point of fact in a position to earn as good wages after the accident as before, then I think the consequence that necessarily follows is that it is the duty of the arbitrator to end the compensation *hoc statu*, or, to use another phrase, to suspend it. By that means the workman is completely safeguarded. He runs no risk by accepting employment, even if he is not actually earning all the wages that are being paid, because, if he loses his job from any cause, either by the action of the employer or for any other

reason whatever, if it be the case that in consequence of the accident he is still suffering from injuries and is thereby unable to earn as good wages as he was before, then, the liability of the employer having been established by the memorandum having been recorded, the workman's right to exact payment of compensation under that ascertained liability is merely suspended.

It appears to me that, if the workman is a loser in this case, it may have been from the fact that the law about the time when these applications were made was perhaps not so well cleared up as it has been by the recent judgments of the House of Lords, and although the judgments were pronounced prior to the actual dates in question, the result of the decisions may not have been so fully reported as to bring them before the legal profession. We cannot consider any questions of equity if the provisions of the statute are clear and distinct. I think, therefore, that the result reached by your Lordships is the only one which is open to us on the facts of this case, on the terms of the statute, and as the result of the authorities which have been referred to.

LORD SKERRINGTON concurred.

THE COURT pronounced an interlocutor in the following terms:—"Find in answer to the question of law in the case that as at 20th March 1913 the proper procedure in the cause was for the arbitrator to have ordered the memorandum to be recorded, but, in respect of the employer's offer of light employment at 19s. a week, *hoc statu* to have sisted further procedure: Further, find that in respect it is admitted that the appellant has completely recovered from the results of the accident it is unnecessary that there should be any further proceedings in the arbitration process. . . ."

T. M. POLE, Solicitor—FRASER, STODART, & BALLINGALL, W.S.—Agents.

JOHN M'VIE, Appellant.—*W. D. Patrick.*
GEORGE TAYLOR & COMPANY, Respondents.—*Moncrieff, K.C.*—*Fenton.*

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Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *Second Schedule* (9) (*d*)—*Recording of memorandum—Agreement for payment of lump sum—Objection to recording of agreement—Lump sum already paid to workman—Validity of Sheriff's order for consignation of sum by workman before disposing of objection.*

An injured workman entered into an agreement with his employers that the weekly compensation due to him should be redeemed for a lump sum of £100, which sum was paid over to him. On the employers presenting a memorandum of this agreement for registration, the Sheriff-clerk refused to record it on the ground of the inadequacy of the sum, and referred the matter to the Sheriff-substitute, all in terms of the Act.

The Sheriff-substitute, holding that further inquiry into the question was necessary, ordained the workman to consign in Court the £100 (less the weekly compensation due to date), as a condition precedent to the inquiry being held.

Held that the Sheriff-substitute was not entitled to make such an order.

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1st Division. Sheriff of Ayrshire.

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Ayr, with regard to the recording of a memorandum of agreement between John M'Vie, miner's brusher, and George Taylor & Company, his employers, the acting Sheriff-substitute (Valentine) pronounced an order for consignation, and at the request of the workman stated a case for appeal.

The case set forth:—

"The appellant, who was in the employment of the respondents, was, by accident arising out of, and in the course of, his employment, injured, on or about 11th April 1912, and, in respect of his injury, was paid compensation by the respondents at the rate of 20s. per week till 17th July 1913.

"A memorandum of agreement, of which the following is a copy, was, on 24th July 1913, received by the Sheriff-clerk of Ayrshire from the respondents for registration in the special register of the Sheriff Court of Ayrshire at Ayr:—'Memorandum of agreement. Under the Workmen's Compensation Act, 1906, between John M'Vie, miner's brusher, Low Road, Whitletts, by Ayr, claimant, and Messrs George Taylor & Company, coalmasters, Annbank, by Ayr, respondents. The claimant claimed compensation from the respondents in respect of injury to knee, caused by accident in the employment of the respondents in their No. 1 Drumley Pit, Annbank, on the 11th of April 1912. The claim was determined by mutual agreement on the 1st of May 1912, and was as follows:—The claimant claimed compensation at the rate of twenty shillings per week, which the respondents agreed to pay, and have paid up to the 17th of July 1913. Both parties being willing that said weekly payments should be redeemed for a lump sum, they, on the 15th of July 1913, agreed as follows:—The respondents agreed to pay, and the claimant agreed to accept, the sum of £100 sterling in redemption and discharge of all weekly payments that might become due in respect of the said accident. It is requested that this memorandum be recorded in the special register of the Sheriff Court of Ayrshire at Ayr. John M'Vie, claimant; for George Taylor & Company, respondents, James Borland; dated this 21st day of July 1913. To the Sheriff-clerk, Court House, Ayr.' The signature, 'John M'Vie,' to the said memorandum, is admittedly the genuine signature of the said John M'Vie.

"The Sheriff-clerk, being of opinion, on information which he considered sufficient, that the sum of £100 was an inadequate sum to be paid by the respondents to the appellant for the redemption of the said weekly payments of 20s., refused to record the memorandum without a special warrant from the Sheriff in terms of paragraph 9 (*d*) of the Second Schedule to the said Workmen's Compensation Act, 1906, and he sent notice of his refusal, and on 2nd August 1913 lodged a minute stating the ground thereof, all in terms of paragraphs 11 and 12 of the Act of Sederunt, dated 26th June 1907.

"On 5th August 1913, the appellant lodged a minute (No. 3 of process) objecting to the registration of the memorandum 'on the ground that it is not genuine, in respect that, in addition to the payment of the sum of £100 sterling, the respondents agreed to provide and maintain the claimant in light work, at the rate of wages usually paid to persons in such employment, until such time as he had recovered from the injuries to his knee.'

"On 9th September 1913, the respondents lodged a minute craving the Court to grant warrant to the Sheriff-clerk to record the said memorandum, and a copy of the minute was, on 12th September 1913, served on the appellant.

"Parties' agents were heard on 9th October 1913, and next day appellant's agent was appointed, within seven days thereafter, to lodge a minute stating (1) whether appellant had received from respondents £100, and (2) if he had received that sum, whether he was willing to consign it with the Sheriff-Clerk before further procedure.

"On 17th October 1913, appellant's agent lodged a minute stating that appellant had received £100, mentioned in the said memorandum of agreement from respondents, but that he was not willing to consign that sum with the Sheriff-clerk before further procedure, and craving to be heard again before any further interlocutor or order was issued. . . .

"On 21st November 1913 parties' agents were again heard. The agent for the appellant appeared in support of his minute of objection (No. 3 of process), and also in support of the objection to the recording of the said memorandum in terms of paragraph 9 (*d*) of the Second Schedule to the said Act, by reason of the inadequacy of the said sum of £100. Parties' agents admitted at the bar that the agreement, of date 15th July 1913, mentioned in the said memorandum, was a verbal one. I, on 9th December 1913 . . . repelled the objections (No. 3 of process) of the said John M'Vie to the recording of the said memorandum. I held also that further inquiry was necessary before disposing of the objection to the recording of the said memorandum in respect of the inadequacy of the said sum of £100, and that the appellant was entitled to appear in support of the said objection. I further held that, as a condition precedent to such inquiry being proceeded with, the said sum of £100, less the sum of £20, said sum of £20 being the amount of compensation *prima facie* due to the appellant (in the event of registration of the said memorandum being refused) for the period from the last payment of compensation down to the said 9th day of December 1913, should be consigned so as to be available at the orders of the Court in the event of registration of the said memorandum being refused; and I further held that, in the event of the appellant failing to make consignation as aforesaid, the said memorandum should be recorded without further inquiry. I accordingly ordained the said John M'Vie to consign £80 in the hands of the clerk of Court within seven days after said 9th December 1913, with certification, and appointed the cause to be enrolled for further procedure on 18th December 1913."

The first question of law dealt with the appellant's objections, No. 3 of process. The second question (which was the only question argued upon appeal) was as follows:—"(2) Whether, having repelled these objections, I was entitled, on the said facts and in the said circumstances, to ordain the said John M'Vie to consign £80 (part of the said sum of £100 paid to him as aforesaid) in the hands of the Clerk of Court before further procedure in the arbitration, with certification as aforesaid?"

The case was heard before the First Division on 17th and 18th March 1914.

Argued for the appellant;—The Sheriff had acted in excess of

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his jurisdiction, and in any case prematurely, in making an order for consignation at this stage and in making consignation a condition precedent to inquiry into the merits of the objection to the recording of the memorandum. It was his duty to deal with the Sheriff-Clerk's minute as if it were an application for settlement of the question raised by it, and to decide upon the merits of this question before making any order.[1] The object of the Act was to secure to the injured workman a fund for his subsistence during incapacity.[2] The provisions of the Second Schedule (9) (*d*) had been introduced into the Act of 1906 in order to further that object by preventing such an improvident bargain as had been considered in the case of *Crossan* v. *Caledon Shipbuilding and Engineering Company, Limited*.[3] The effect of the order pronounced in this case would be to defeat the object of the Act by depriving the workman of the fund which had been paid to him for his subsistence. The Sheriff was not entitled to pronounce an order by default in the arbitration proceedings; it was his duty to proceed with the determination of the question raised before him, even though one of the parties might be in default.[4] The only question before him at the present stage was whether or not the memorandum should be recorded. He must investigate, by inquiry if necessary, and dispose of that question before making an order on any other subject.[5]

Argued for the respondents;—The Sheriff had an absolute discretion conferred upon him by par. (9) (*d*) of the Second Schedule to the Act to make, in circumstances such as the present, any order he might think just, an order as to any sum already paid over being expressly included. There was no suggestion in the words of the Act that this discretion should be exercised only after he had disposed of the merits of the application to record. An order to consign was a matter which was left expressly to the discretion of the Sheriff in ordinary Sheriff Court actions.[6] The Sheriff-clerk's objection to the recording of the memorandum was in substance the workman's objection to the employers' motion to record,[7] and the Sheriff was entitled to adject conditions to his proceeding to establish his objection, especially a condition so just as the one here proposed. For, should the agreement in question not be recorded, it would cease to be of any effect and parties' rights under the statute would revive. But in that case the employers would not be entitled to credit the sum already paid under the agreement against the future weekly instalments to become

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[1] Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule (9) (*d*); C. A. S., 1913, L. xiii. 11 and 12.

[2] Rosewell Gas Coal Co. v. M'Vicar, (1904) 7 F. 290.

[3] (1906) 43 S. L. R. 852.

[4] United Collieries, Limited, v. Gavin, (1899) 2 F. 60.

[5] Mortimer v. Secretan, [1909] 2 K. B. 77, *per* Cozens-Hardy, M.R., at pp. 79, 80; Owners of ship "Segura" v. Blampeid, (1911) 4 Butterworth's W. C. C. 192. Reference was also made, regarding the English practice under this section, to Workmen's Compensation Rules, 1st June 1907, Rule 49, (1) to (4).

[6] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 51. On this point counsel's attention was directed to Park v. Coltness Iron Co., Limited, 1913 S. C. 1163.

[7] *Cf.* Burns v. William Baird & Co., Limited, 1913 S. C. 358.

due.[1] They would have no means of obtaining credit for this sum, but would have to recover it by means of an ordinary action, and would continue meanwhile liable for payment of the weekly sums of compensation. The English Rules of Court were of no value in deciding matters of Scots practice.[2]

LORD PRESIDENT.—I think the arbitrator here has gravely erred in his view with regard to his statutory duty.

On the 11th April 1912, the appellant suffered an injury from an accident arising out of and in the course of his employment. His employer has admitted liability and paid him compensation at the rate of 20s. a week until 15th July 1913, when the parties agreed that the respondents (the employers) should pay, and the workman should accept, the sum of £100 in redemption and discharge of all weekly payments that might become due in respect of the said accident. A memorandum of that agreement was prepared and was submitted to the Sheriff-clerk for registration.

Now, by a certain provision made in the Second Schedule to the Workmen's Compensation Act, the Sheriff-clerk is authorised to interpose in order to protect the workman against improvident bargains. The provision is expressed in the 9th paragraph of the Second Schedule. It runs thus (I read it short): Where it appears to the Sheriff-clerk, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the sum, he may refuse to record the memorandum of agreement sent to him for registration and refer the matter to the Sheriff, who shall, in accordance with the Act of Sederunt, make such order, including an order as to any sum already paid under the agreement, as in the circumstances he may think just.

In this case the Sheriff-clerk, acting upon information which he thought justified his conduct, came to the conclusion that the memorandum of agreement ought not to be recorded in consequence of the inadequacy of the sum which was accepted. Under these circumstances it was his duty—and he performed it—to refer the question to the arbitrator in order that he might inquire into the facts and decide whether or no the sum which the workman had agreed to accept was adequate or inadequate.

The statute, I think, makes it perfectly plain that the first duty—and the only duty—of the arbitrator, in a case such as this, is to consider and decide whether, on the ground of inadequacy, the memorandum of agreement ought not to be recorded. He has that question—and that question only—to consider; for I agree entirely with the judgment of the Master of the Rolls in *Mortimer* v. *Secretan's* case,[3] where he said that "the learned Judge (the arbitrator) had no power or right to do anything more than to say aye or no, this agreement is one which ought to be recorded, or it is one which ought not to be recorded." Now, when the question was referred to the arbitrator in this case, he came to the con-

[1] Hosegood & Sons v. Wilson, [1911] 1 K. B. 30; Ashmead Elliot's Workmen's Compensation Act, (6th ed.) p. 458.

[2] M'Guire v. Paterson & Co., 1913 S. C. 400, *per* Lord Salvesen, at p. 410.

[3] [1909] 2 K. B. 77.

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clusion that further inquiry was necessary before disposing of the objection to the recording of the memorandum in respect of the inadequacy of the said sum of £100. He ought, therefore, having come to that conclusion, to have proceeded to make the inquiry, but, instead of proceeding to make the inquiry, he ordered the workman, as a condition precedent to his (the arbitrator's) performance of his statutory duty, to consign £80 out of the £100 which had been received by him in terms of the agreement. In other words, he deliberately set up an obstacle against the performance of his own statutory duty—an obstacle which, in this case we are told, is fatal and final, but, whether so or not, was one which he was not authorised by the statute to set up.

I do not for a moment doubt that, after he had considered and decided the question which the statute prescribed, namely, whether the memorandum ought or ought not to be recorded, he could deal with the £100 payment that had been made. That is expressly provided in the 9th paragraph of the Second Schedule. If the arbitrator considered, after making such inquiry as he thought necessary, that the memorandum of agreement ought to be recorded—that the lump sum was adequate—then, I presume, he would not deal with the lump sum in his award. It had been paid and there was an end of it. But, on the other hand, if he came to the conclusion that the memorandum ought not to be recorded in respect that the lump sum was inadequate, then—and then only—it would be the duty of the arbitrator to consider what order or finding he should make regarding the payment that had been already made. In other words, he would consider whether or no all or a portion of that payment ought to be set against the compensation which the employers would otherwise be paying. But the arbitrator, as has been pointed out, declined to consider his statutory duty until the workman had performed a condition which the arbitrator had no right or duty to impose upon him.

Accordingly I come to the conclusion, without any hesitation, that the second question put to us ought to be answered in the negative. We are not called upon to answer the first question at all

Lord Johnston.—I entirely agree with what your Lordship says. I think that the learned arbitrator has created a condition precedent to what is set out in the 9th paragraph of the Second Schedule, and that that is the simple answer to the position that he has taken up.

Lord Mackenzie.—I am of the same opinion. It is evident from the argument which we have heard in this case that, if the arbitrator comes to be of opinion that a memorandum of agreement should not be recorded in consequence of the inadequacy of its terms, there may be questions as to the precise effect and extent of any order he may make under the provisions of the Second Schedule (9) (*b*), more particularly with reference to the provisions of the Second Schedule (10), and the provisions of the First Schedule (19). No such questions arise at this stage of the case.

I agree that it was not within the competency of the arbitrator to make it a condition precedent to going on with this inquiry that the workman should consign the sum of £80.

LORD SKERRINGTON.—I concur. Mar. 18, 1914.

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THE COURT answered the second question of law in the negative; recalled the determination of the Sheriff-substitute so far as it found that consignation was a condition precedent to inquiry and ordained consignation; and remitted to the Sheriff-substitute to proceed.

MACPHERSON & MACKAY, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

MRS ROBERTA ANDRENA CALTON OR RENFREW AND OTHERS, Respondents.—*Wilson, K.C.—Aitchison.*
R. & J. M'CRAE, LIMITED, Appellants.—*Horne, K.C.—MacRobert.*

No. 59.

Mar. 20, 1914.

Renfrew v. R. & J. M'Crae, Limited.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Unexplained death—Intoxication—Commercial traveller run over by train while drunk.*

A commercial traveller, in the course of his rounds, arrived late in the day at a town where he had customers. He, however, did not attempt to transact business, but proceeded to get intoxicated, and while in this condition found his way to the railway station (where he could get a train for his home), and when last seen uninjured he was sitting on a seat on the platform. After a goods train had passed, he was found on the line, having been run over by the train and having sustained injuries from which he died. No one saw how he got, or fell, on to the line.

Held that the accident did not arise out of the employment of the deceased.

Question whether the accident even arose in the course of the employment; and *opinion contra per* the Lord Justice-Clerk.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Glasgow between the widow and children of the deceased Robert Renfrew, on the one part, and R. & J. M'Crae, Limited, his employers, on the other, the Sheriff-substitute (Scott-Moncrieff) awarded compensation, and at the request of the employers stated a case for appeal.

The case set forth:—

"The following facts were established:—(1) That the respondents are the widow and the four pupil children of the deceased Robert Renfrew, who died within the Royal Infirmary, Glasgow, upon 6th August 1913, his death being due to an accident sustained by him at Beith railway station upon the previous evening. (2) That the respondents were totally dependent upon the deceased. (3) That deceased was a commercial traveller in the employment of the appellants, that he had a free hand in going his journeys, and could choose his own hours for travelling. (4) That Beith was one of the places included in his district and at which he had customers. (5) That upon the morning of 5th August last he intimated to a witness in the employment of the appellants his intention of going to Paisley, Lochwinnoch, and Beith, and was advised to call upon a customer named Hunter at Lochwinnoch. (6) That he went to Paisley and booked an order there, and afterwards came to Lochwinnoch, where by accident Hunter found him at the bar of a public-house. (7) That they had drink there and at another

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public-house and talked upon business. (8) That Hunter having to go to Beith, deceased proposed to go with him, adding that although late in the day he might see some of his customers, and that it was as easy to get back to Glasgow, where he lived, from Beith as from Lochwinnoch; that accordingly they hired a dogcart and drove to Beith, where they had drink in one hotel, but that at another the proprietor intimated that he would not supply it because of the intoxicated condition in which the deceased then was. (9) That his friend Hunter parted with him in the street of Beith about 9 P.M., and was under the impression that he was then going to visit a customer, but that there is no evidence that deceased transacted any business in Beith upon that night. (10) That deceased was next seen about 9.40 P.M. crossing the footbridge at Beith station, which is about a mile or twenty minutes' walk from Beith. (11) That his unsteady condition was noticed by a porter, the station-master, and others. (12) That after crossing said bridge he walked along the platform upon the side for Glasgow, which was twelve feet wide, and sat down upon a seat some ten feet from the edge of the platform. (13) That, shortly after a non-stopping goods train had passed, he was found by the porter upon the rails with his head outwards and his feet towards the platform, one of his legs being almost severed from the body. (14) That he was removed to the Infirmary and died within a few hours. (15) That no one saw deceased go or fall upon the rails, but that it is a reasonable inference that, while waiting for the Glasgow train, he had either fallen off the edge of the platform or been knocked off by the engine of the passing train, while standing on the edge. (16) That the night was dark and the station not fully lit, as some of the lamps had been lowered or put out. (17) That deceased was short-sighted, and had recently complained of his spectacles as unsatisfactory.

"I found in law that a commercial traveller when out upon his travels continues in employment until he returns home, and that as deceased was at Beith station, which was one within his circuit, for the purpose of returning to Glasgow after transacting business, the accident arose out of and in the course of his employment. I found, therefore, that the respondents were entitled to compensation, and awarded the sum of £300 to them, with expenses."

The question of law for the opinion of the Court was—"Whether upon the evidence as stated above I could competently find that the said accident arose out of and in the course of the employment of the deceased within the meaning of the Workmen's Compensation Act, 1906."

The case was heard before the Second Division (without Lord Dundas) on 6th and 28th February 1914.

Argued for the appellants;—There was no proof that the accident which caused the death arose either out of or in the course of the deceased's employment. It did not arise in the course of his employment, because the deceased went to Beith on pleasure and not on business, and that town was not on his direct road home from the last place where he had been working. At any rate, even if he went to Beith in the course of his employment, while he was there he left his employment and became occupied with his own affairs. There was no proof how the accident happened. For all that was known, he might have been trying to get on a train while it was

in motion, in which case he would have been as much outside the scope of his employment as the messenger boy who tried to board the moving tramway car.[1] Having failed to discharge the onus of proving how death occurred, the respondents could not recover compensation.[2] The most likely hypothesis was that the direct cause of the accident was the man's intoxicated condition, which could not reasonably be said to be a risk arising out of his employment.[3] Even if he had been sober, his employers would not have been liable in compensation, because the danger of falling in front of a train was not "specially connected with his work and employment,"[4] or one to which "his employment in any way subjected him"[5]; but was one to which all persons travelling by train were exposed.[6] This consideration distinguished the present case from those of *Fraser* v. *Riddell & Company*[7] and *Millar* v. *Refuge Assurance Company, Limited*.[8]

Argued for the respondents;—There was evidence to support the inference which the arbitrator had drawn, and in such a case the Court would not disturb his finding.[9] The business of a commercial traveller being to travel, it followed that he continued to be in the course of his employment from the time he left his own home until the time when he returned there.[10] For the same reason the particular class of accident which caused his death was incidental to the employment of the deceased, and was a danger to which he was more exposed than a person whose business did not require him to travel.[11] There was no finding to the effect that the man's intoxication was the proximate cause of his death, but, in any event, drunkenness, while it might be "serious and wilful misconduct," was no bar to a claim for compensation in a case where death had resulted.[12] Further, since it was well known that commercial travellers had to treat customers, accidents following on drunkenness were risks incidental to a commercial traveller's employment.

At advising on 20th March 1914,—

LORD SALVESEN.—The Sheriff-substitute has stated with much fulness and precision the facts which he found to be established. I would only

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[1] Symon v. Wemyss Coal Co., Limited, 1912 S. C. 1239.

[2] Lendrum v. Ayr Steam Shipping Co., Limited, 1913 S. C. 331; Marshall v. Owners of s.s. "Wild Rose," [1910] A. C. 486.

[3] Frith v. Owners of s.s. "Louisianian," [1912] 2 K. B. 155.

[4] Kitchenham v. Owners of s.s. "Johannesburg," [1911] A. C. 417, *per* Lord Chancellor Loreburn, at p. 418.

[5] Rodger v. Paisley School Board, 1912 S. C. 584, *per* Lord President Dunedin, at p. 587.

[6] Warner v. Couchman, [1912] A. C. 35; Blakey v. Robson, Eckford, & Co., Limited, 1912 S. C. 334; Butt v. Provident Clothing and Supply Co., Limited, (1913) 6 Butterworth's W. C. C. 18.

[7] *Supra*, p. 125. [8] 1912 S. C. 37.

[9] Owners of s.s. "Swansea Vale" v. Rice, [1912] A. C. 238; Richardson v. Owners of s.s. "Avonmore," (1911) 5 Butterworth's W. C. C. 34; Lee v. Stag Line, Limited, (1912) 5 Butterworth's W. C. C. 660.

[10] Dickinson v. "Barmak," Limited, (1908) 124 L. T. 403.

[11] Pierce v. Provident Clothing and Supply Co., Limited, [1911] 1 K. B. 997; M'Neice v. Singer Sewing Machine Co., Limited, 1911 S. C. 12.

[12] Fraser v. Riddell & Co., *supra*, p. 125.

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refer to one or two of his findings in order to explain how I construe them. In finding 3 it is stated that "deceased was a commercial traveller in the employment of the appellants; that he had a free hand in going his journeys, and could choose his own hours for travelling." I assume that this freedom of choice depended on his being engaged on his master's business and not in furtherance of his own affairs or amusements. In finding 8 the arbitrator omits to state the hour at which the deceased left with Hunter to go to Beith, but I infer that it was after business hours; and that when they arrived in Beith it must have been at or after 8 o'clock in the evening.

Shortly stated, what happened was this: The deceased in the course of his employment as a commercial traveller arrived at Lochwinnoch sometime in the afternoon or evening of the 5th of August, and had a meeting with a customer called Hunter. They visited two public-houses, and had some form of alcoholic refreshment at each; and the deceased thereafter accompanied Hunter to Beith in a dogcart which Hunter had hired. At Beith he did not attempt to transact any business but instead got intoxicated, and while in this condition found his way to Beith Station, where he was last seen alive sitting upon a seat some ten feet from the edge of the platform. A non-stopping goods train passed, and shortly after he was found lying upon the rails with his head outwards and his feet towards the platform, having received injuries from which he died within a few hours. The Sheriff-substitute has held on these facts that the accident with which the deceased met arose out of and in the course of his employment; and the question of law which he has stated for us is whether he could competently so find in view of the evidence before him?

(1) The first question that arises is whether the deceased was in the course of his employment when he met with the accident. It may be that, when he accompanied his friend Hunter to Beith in the dogcart which Hunter had hired, he was in the course of his employment as a commercial traveller, if he intended to call on customers of his employers or otherwise desired to further their business interests. He appears to have expressed some sort of vague intention of this kind to Hunter, but what follows shows that he did not act upon it. Instead of doing business the deceased incapacitated himself for business by having drink in one hotel to such an extent that, when he went to a second, the proprietor refused to supply him because of his intoxicated condition. During his stay in Beith he was not, in my opinion, in the course of his employment but was giving himself over to self-indulgence. It may be that, when he proceeded to Beith Station in order to return to Glasgow, he returned to his employment; but it is obvious that he would never have been at Beith Station at all but for the jaunt which he took with Hunter; and that, at all events, he need not have been there at so late an hour. If the case, however, depended only upon this question I should not have been prepared to interfere with the result at which the Sheriff-substitute arrived.

(2) Did the accident arise out of the employment? An ordinary person would, I think, unhesitatingly reach the conclusion that the accident arose not from any of the risks to which a commercial traveller is specially exposed by his employment, but from the circumstance that he was intoxi-

cated. He might just as easily have hurt himself by falling on his way to the station as by falling off the platform of the station. It does, no doubt, at times happen that people fall off the edge of a railway platform, or are struck by a moving train and knocked off the platform when standing on the edge; but these are contingencies (rather unusual and remote) to which all persons who frequent railway stations are exposed. It was argued, however, that commercial travellers in the course of their employment have to frequent railway stations oftener than the majority of the public; and that thus their employment exposes them more frequently to risks of this nature. Perhaps this would be of importance if the risk was one caused by the fault of employees of the railway company; as for instance, if the deceased had been knocked down by a luggage barrow or injured when entering or leaving his compartment, or while he was in the compartment itself. These are risks which are associated with railway travelling; but surely it cannot be affirmed that, if a man falls off the platform in a railway station for no other reason than that he was so intoxicated as not to be able to keep his balance or to see the obvious danger ahead of him, that is a risk arising out of his employment. If it were, one would have to affirm that, when a messenger got drunk in the course of executing a message for his master and fell upon the street, the accident arose from his having been sent to execute the message. There is no case to support such an extreme proposition. Where it is a messenger's duty to use a bicycle and he is run over in the street by wheel traffic, I entirely assent to the view which has been laid down in two cases—that the accident arose out of his employment. One of the risks of using a bicycle in the public streets, and one which may occur to a careful as well as to a careless rider, is that of coming in contact with other traffic. But suppose the bicyclist got drunk and fell off his bicycle because of his condition, can it be affirmed that the accident was one which arose out of his employment? Surely in this case he had voluntarily undertaken an added risk, to wit, that of riding a bicycle in an intoxicated condition.

The case of *Rodger*,[1] was the case of a messenger being overcome by giddiness or faintness brought on by heat and falling while conveying a message on his employers' business. It was held that the accident did not arise out of his employment. In that case Lord Kinnear said that, in order to satisfy the condition that the accident arose out of his employment, "it must be shown that the injured man suffered in consequence of a risk incidental to his employment—that is to say, a risk beyond what ordinary people incur in the ordinary course of their business, but one to which he was specially exposed by the nature of his employment"; and further on in his opinion he says that it was a risk which attended anyone whose business or pleasure took him into the street. Now, if that can be said of a fainting fit for which the unfortunate man is not in any way to blame, it seems to me to be still more applicable to the dizzy condition which is brought about by over-indulgence in drink. The deceased's employment here did not take him near

[1] 1912 S. C. 584.

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the edge of the railway platform until the train with which he was to travel had stopped at the station and made it relatively safe for him to approach the edge of the platform. The risk from which he suffered was just the risk which every intoxicated man exposes himself to if he goes to a railway station. To the ordinary sober person the use of the station is not attended with any more risk than the use of the public street, if indeed the risk be as great.

We were referred to the case of *Fraser* v. *John Riddell & Company*,[1] where it was held in the case of a driver of a traction-engine, who while driving the engine fell from the footplate and was killed, that the accident arose out of his employment, although the arbitrator had found that he was under the influence of drink and unfit for his work at the time of the accident. I think that case is quite distinguishable from the present. As the Lord President said it was just such an accident as might happen to him if he slipped his foot accidentally while perfectly sober and fit for his work. Once that conclusion was reached his intoxicated condition could only be described as serious and wilful misconduct which, under the Act, does not debar the representatives from claiming compensation.

The case of *Kitchenham*[2] appears to me to be very much in point. There a sailor, who had been on shore with leave, while returning to the quay fell into the water and was drowned; it was held that the accident arose in the course of, but not out of, the deceased's employment. Lord Chancellor Loreburn said: "I think the accident arose from a risk common to everyone, namely, that of falling from the quay into the water, and was not specially connected with his work and employment." The case indeed seems to be *a fortiori* of the present, because a sailor in getting to his ship requires as a rule to walk along quays; and, if it be said here that a commercial traveller has to go oftener to railway stations than the bulk of mankind, it may be said with even more force that a sailor's employment brings him more frequently into the neighbourhood of quays from which he may fall. The injured man in *Kitchenham's* case[2] appears to have been sober. I cannot imagine that the case would have been any stronger for his representatives if he had been intoxicated. On the contrary, I think that it might well be said that he perished not from a risk incident to his employment, but from one to which he had chosen to expose himself as the result of over-indulgence. I am accordingly of opinion that there are no facts here from which the Sheriff-substitute could competently infer that the accident arose out of the deceased's employment.

(3) Even if in some circumstances the fall of a commercial traveller from the edge of a railway platform, to which he had occasion to go, might be an accident arising out of his employment, it of course does not follow that every such accident would necessarily be so. If, for instance, he had been larking with another occupant of the station, and, in the course of doing so, had slipped and fallen in front of a passing train, it is plain that the accident would have had no relation to his employment. Now here there was no evidence at all as to how the accident happened. The arbitrator conjectured that he must either have been standing at the edge

[1] *Supra*, p. 125

[2] [1911] A. C. 417.

of the platform and been knocked over by the engine of the non-stopping goods train; or that he must simply have fallen off the edge of the platform. These two conjectures do not exhaust the possible modes in which the man may have met his death. He may, for instance, have proceeded to cross the line, having some vague notion in his intoxicated state that he was on the wrong side of the station; or he may have attempted to join the moving train under the idea that it was a passenger train which he had observed too late. He certainly had no occasion at the time to be near the edge of the platform, for the train by which he intended to travel had not arrived at the station. Now, if he attempted to join a moving train or to cross the line on the level, he would be in breach of the railway company's bye-laws, and would be deliberately incurring a risk which was in no way incidental to his employment. The onus is upon the respondents to show that the particular accident which he met with was one which arose out of his employment, and this onus, I think, they have failed to discharge. I am therefore for answering the question of law in the negative.

Lord Guthrie.—I am of the same opinion. On the question of whether the death arose in the course of the deceased's employment, I doubt the soundness of the arbitrator's inference; but I cannot say that there is no evidence to support it. I am inclined to think, looking to the late hour and the class of goods for which the deceased travelled, that his statement that he might see some of his customers in Beith was a mere excuse for going with Hunter on what was nothing but a drunken jaunt or spree. But I accept the arbitrator's judgment on this point.

On the question of whether the occurrence arose out of the deceased's employment, I think the evidence all negatives this view. A case may be conceived where the fall of a commercial traveller from a railway platform would be an accident arising out of his employment. Suppose, for instance, that he travelled for a diamond merchant, and was obliged to carry the bag containing his diamond samples in his hand. If, thus encumbered, he slipped when getting into a carriage, and fell between the platform and the train, that accident would arise out of his employment, because, as compared with ordinary passengers, he was unable to part with personal possession of this part of his luggage, and thus ran a special risk incidental to his employment. In this case I cannot see that, as a commercial traveller, the deceased ran any risk incidental to his business greater than that of any ordinary traveller. I do not think it necessary to consider the question of intoxication. In the case I have figured of the commercial traveller for a diamond house it may be, on the authority of the case of *Fraser* v. *Riddell & Company*,[1] that, even although such a person was under the influence of drink and unfit for his work, the accident which I have figured would still have arisen out of his employment. But I do not desire to indicate any difference of opinion on the matter of intoxication from the views expressed by Lord Salvesen.

Further, I concur in thinking that the respondents have not proved, either by direct evidence or by a process of exclusion, how the accident

[1] *Supra*, p. 125.

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happened. It may have happened in one or other of the two ways suggested by the arbitrator. But there are other ways, in which it is just as likely, if not more likely, to have happened, in which it would be impossible to hold that the deceased met his death through an accident arising out of his employment.

LORD JUSTICE-CLERK.—On the facts as stated by the Sheriff-substitute, compensation must be payable to the respondents, even though there was such misconduct on the deceased's part as would have debarred him from compensation had he survived, if it is a fair deduction in law from the facts that the accident occurred in the course of his employment, and arose out of his employment. Thus the true question to be decided is whether the facts found established justify in law the inference that when the accident occurred the deceased was in the course of his employment. and that the accident arose out of his employment. On the day in question he went out by train from Glasgow in the course of his employment; and if, after completing his business work, he had gone to a station to make his way home, he would still have been in the course of his employment. All this is clear, for if he had to journey out in his employment, his return journey to his place of residence would still be in the course of the employment. The question is whether his actions on the occasion in question must be held to be inconsistent with his being still in the course of the employment when the accident occurred. I confess that when I look at the circumstances I find it extremely difficult to hold that he acted in the course of his employment when at Beith and afterwards. If he thought of doing business there, there is no statement of fact that he did any. The only statement of fact regarding his being there is that he got himself into such a state of intoxication that, when he went to a second public-house, his condition was such that, when he asked for drink, it was refused because he was intoxicated. He was therefore unfit for business, and was not in the course of his employment. He had chosen to take to a course of conduct which was inconsistent with his actions being in the course of his employment. I cannot for my part accept the idea that, having gone out of the course of his employment, he entered it again that night, because he set off in his staggering drunken state to endeavour to get home. To me it appears just to say that a man, the course of whose ordinary employment would cover his return home after a journey, may break off from the course of his employment, and that it is entirely a question of circumstances whether he can be held to have taken up the course of his employment again, merely because he proceeds later to make his way home. It is easy to conceive many circumstances where it would be out of the question to accept the argument that, whatever he did in the interval, the mere fact that he tried to make his way home re-set up the course of his employment. The present case seems to me a very marked one for rejecting such an idea. The man had given himself over to self-indulgence, and had got himself into a thoroughly drunken state in doing his own pleasure, and in that state, and while he remained in it, he could not, as I think, be held to be in the course of his employment. For although the course of a man's employment may in particular cases—such

as travellers—last till he completes his journey, that surely cannot cover conduct done, before he reaches home, which has nothing to do with his employment, and is inconsistent with it. That such cases may occur cannot be doubted, and the present is, as I think, as marked a case as can be conceived. I would therefore be inclined to hold that the accident here did not take place in the course of the employment.

But your Lordships not being prepared to hold that the circumstances preclude the idea of the accident being in the course of the employment, I agree with the opinions expressed that it did not arise out of the employment. It appears to me that the deceased lost his life in consequence of a direct risk to which he exposed himself by bringing himself into a drunken state, with the result that the risk he ran was not the ordinary risk of a traveller—possibly careless or rash—but a special risk, made for himself and by himself, by so indulging in intoxicants that he had not reasonable control of his movements. That being so, I cannot hold with the Sheriff-substitute that the accident arose out of the employment. It appears to me that the case of *Kitchenham*[1] is a strong authority against the respondents. The risk of falling off a platform in the case of a traveller is a common risk, just as the risk of falling off a quay is a common risk. And if that is so in the case of one who is sober, the case cannot be more favourable to one who has aggravated the risks by taking such a quantity of intoxicating drink as to be unable to take care of himself. He by his own wilful act exposed himself to that increased risk. We do not know how the accident happened. All we know is that a man staggering drunk having got on to a railway somehow or another was killed by a passing train. There is nothing in that to make it an inference in law that the accident arose out of the employment. I therefore concur with your Lordships in answering the question unfavourably to the respondents.

THE COURT answered the question of law in the negative.

BALFOUR & MANSON, S.S.C.—ROBSON & M'LEAN, W.S.—Agents.

No. 60.

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MacArthur v. Mackay.

A. J. MACARTHUR, Reclaimer.—*M. J. King.*
JAMES ROBERT MACKAY (Liquidator of the Motor Brougham and Cab Company, Limited), Respondent.—*M. P. Fraser.*

Company—Winding-up under supervision—Process—Reclaiming note—Failure to present reclaiming note within fourteen days of order reclaimed against—Companies (Consolidation) Act, 1908 (8 *Edw. VII. cap.* 69), *sec.* 181 (3).

The Companies (Consolidation) Act, 1908, enacts, section 181 (3) that any order or judgment pronounced by a Lord Ordinary, to whom a winding-up has been remitted, "shall be subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or judgment."

Where a reclaiming note against such an order had not been presented until after the expiry of fourteen days it was maintained that the provisions of the section were directory and not peremptory, and

[1] [1911] A. C. 417.

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that, as in the circumstances no prejudice had been suffered, the reclaiming note should be allowed.

Held (after consultation with the Judges of the Second Division) that the reclaiming note was incompetent.

Observed (*per* the Lord President) that the reclaimer might find a remedy in the Court of Session Act, 1808 (48 Geo. III. cap. 151), section 16.

1st Division. Lord Cullen.

JAMES ROBERT MACKAY, chartered accountant, Glasgow, the liquidator of the Motor Brougham and Cab Company, Limited, presented a note to the Lord Ordinary to whom the voluntary winding-up of the Company had been remitted, craving his Lordship to sanction the "A" list of contributories of the Company. The "A" list contained the name of A. J. MacArthur as a holder of shares, and he lodged answers, in which he submitted that his name had been wrongfully included in the list.

On 12th February 1914 the Lord Ordinary (Cullen) pronounced an interlocutor sanctioning the list.

On 5th March 1914 MacArthur presented a reclaiming note against this interlocutor.

On the reclaiming note coming up in Single Bills of the First Division (without Lord Mackenzie) on 6th March 1914, counsel for the liquidator objected to the competency of the note on the ground that it had not been presented within fourteen days as required by section 181 (3) of the Companies (Consolidation) Act, 1908.[1]

Argued for the reclaimer;—This section was directory, not imperative. It was in the same position as section 18 of the Judicature Act, 1825,[2] which had been construed by the Court as being merely directory.[3] Accordingly, as the liquidator had suffered no prejudice, the reclaiming note should be allowed.

At advising on 20th March 1914 the opinion of the Court was delivered by the

LORD PRESIDENT.—We have consulted with our brethren of the Second Division and have come to the conclusion that this reclaiming note is incompetent. But I desire to call the attention of the reclaimer's counsel to the fact that he may find a remedy in the Court of Session Act, 1808, section 16.[4] I would also refer him to the opinions delivered in the case of *Watt's Trustees* v. *More*.[5]

THE COURT sustained the objection and refused the reclaiming note as incompetent.

SIMPSON & MARWICK, W.S.—HARRY H. MACBEAN, W.S.—Agents.

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[1] Quoted in rubric.
[2] 6 Geo. IV. cap. 120.
[3] Burroughs & Watts, Limited, v. Watson, 1910 S. C. 727.
[4] 48 Geo. III. cap. 151.
[5] (1890) 17 R. 318.

THE STEAMSHIP "GLENSLOY" COMPANY, LIMITED, Appellants.—*Horne, K.C.—C. H. Brown.*
DAVID CALLUM LETHEM (Surveyor of Taxes, Glasgow), Respondent.—*Sol.-Gen. Morison—R. C. Henderson.*

No. 61.
Mar. 20, 1914.
Steamship "Glensloy" Co., Limited, v. Inland Revenue.

Revenue—Income-Tax—Method of assessment—Trade commenced in year preceding year of assessment—First balance-sheet struck during year of assessment—Competency of considering profits earned during year of assessment—Income-Tax Act, 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D., First Case, Rule First.*

A company commenced business on 13th September 1911, and its first balance-sheet was struck at 20th November 1912, thus covering a period of 434 days' trading. The Inland Revenue assessed the company for income-tax for the year 5th April 1912 to 5th April 1913 on the basis of the profits disclosed for this period of 434 days, by taking $\frac{365}{434}$ of that sum as representing one year's profits.

The company contended that it was incompetent to take into consideration any profits earned after the commencement of the year of assessment, and accordingly that the year's profits, on which they fell to be assessed, must be estimated on the basis of the profits actually earned by them during the period 13th September 1911 to 5th April 1912.

Held (*diss.* Lord Johnston) that the method adopted by the Inland Revenue was right.

Exchequer Cause. 1ST DIVISION.

ON 17th February 1914 a case was presented for the opinion of the Court under the Taxes Management Act, 1880, on an appeal by the Steamship "Glensloy" Company, Limited, against an assessment for income-tax made upon the Company for the year ending 5th April 1913.

The case stated:—

"At a meeting of the Commissioners for the General Purposes of the Income-Tax Acts, and for executing the Acts relating to the Inhabited House Duties for the division of the City of Glasgow, held at Glasgow on the 9th day of June 1913, the Steamship 'Glensloy' Company, Limited, 31 Saint Vincent Place, Glasgow (hereinafter referred to as the appellants), appealed against an assessment under Schedule D of the Act 16 and 17 Vict. cap. 34, for the year ending 5th April 1913, in the sum of £7363 less depreciation £1434 = net £5929 made in respect of the business carried on by them as shipowners.

"I. The following facts were proved or admitted:—(1) The appellants were incorporated on the 13th September 1911, under the Companies (Consolidation) Act, 1908, as a company limited by shares. (2) The appellants purchased a new steamship named the 'Glensloy,' which was delivered to them on the 20th October 1911, and is the only ship owned by them. (3) The first accounts submitted to the shareholders, which embraced a profit and loss account and balance-sheet, were made up to the 20th November 1912, which accounts, although described in the heading as 'from date of incorporation to 20th November 1912,' being a period of a year and sixty-nine days, are stated by the managers in their report to the shareholders to be the accounts for the first year's work of the

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Company. The said accounts were duly certified by the auditors of the Company, and showed a profit of £7976, 11s. 7d. These accounts were submitted to the shareholders and approved by them at a meeting, held on 19th December 1912. (4) The assessment for the period from the incorporation of the Company to the 5th April 1912, which fell within the income-tax year ending 5th April 1912, being the year previous to that dealt with in the present case, was computed by the additional commissioners at the sum of £3386, under the provisions of the first rule of the first case of Schedule D, section 100, of the Income-Tax, Act, 1842, and the sixth case of Schedule D of the same Act by taking a proportion of the profits shown by the said accounts to 20th November 1912, but the said assessment was subsequently reduced by the General Commissioners to £1795, being the actual profits and gains arising from the trade in the year of assessment, under the provisions of subsection (2) of section 24 of the Finance Act, 1907. (5) The Company's practice is to ascertain the profits of the ship at the close of each voyage, but no accounts in respect thereof are submitted to the shareholders, and the profits to 5th April 1912 were ascertained to the satisfaction of the commissioners by taking the profits of the first voyage, which ended on the 11th March 1912, and a proportion of the second voyage, which ended on the 25th July 1912. (6) The assessment of £7363 for the year ending 5th April 1913, which forms the subject of this appeal, was computed under the provisions of the first rule of the first case of Schedule D aforesaid by taking the average for one year of the profits and gains of the Company as shown by the above-mentioned balance-sheet and accounts to 20th November 1912, on the basis that the trade was commenced on 20th October 1911, the date when the vessel was delivered to the Company. (7) It was proved that the trade was set up and commenced on the 13th September 1911 (the date of incorporation), trade transactions having been entered into by the Company prior to the delivery of the ship to them on 20th October 1911. (8) The appellants were on the 20th April 1912 duly served by the assessor with a form on which to make the statutory statement of the profits for the said year ending 5th April 1913, which form was in due course returned to the assessor, endorsed with the following statement:—'This Company only started operations on 20th October 1911, and the profits will not be ascertained till the end of this year.' On the 9th January 1913, the audited accounts made up to the 20th November 1912 as aforesaid having been submitted to and passed by the shareholders on 19th December 1912, the appellants filled up a second form for the same year and returned their profits at the sum of £2950 for the said year. (9) The said return was in due course considered by the additional commissioners who were of opinion that the amount returned was computed on an incorrect basis, and duly certified an assessment in the sum of £7363 computed on the basis of the Company's first printed accounts, as set forth in paragraph six above.

"II. Mr James A. French, chartered accountant, Glasgow, on behalf of the appellants, contended:—(1) That the profits shown in the printed account which covered a period of 434 days, and was made up to a date sometime subsequent to 5th April 1912, should not, so far as subsequent to said date, be taken into account as the basis of assessment for the year 1912/13. (2) That the liability for

the year 1912/1913 should be arrived at from the voyage accounts as follows:—

	Profits.
Voyage 1. Closed 11th March 1912 .	£2753 0 0
12th to 31st March 1912, ship laid up at Hull owing to strike of coal miners .	nil.
Voyage 2. April 1st to 5th (proportion of £3194 being the profit of voyage No 2 lasting 116 days and terminating 25th July 1912) .	138 0 0
	£2891 0 0
Less Expenses (including £370, 17s. 8d. charges while vessel laid up at Hull during coal strike when there were no earnings)	1096 0 0
Profit for 205 *days from* 13*th September* 1911 *to* 5*th April* 1912 . . .	£1795 0 0

(3) That the profit for one year on this basis was £3196 less depreciation £1434 = £1762 net, which was the correct amount to be assessed for the year 1912/13, the computation being on profits made *prior* to 5th April 1912 as required by Rule 1 of the first case, Schedule D, section 100, of the Act 5 and 6 Vict. cap. 35. (4) That the principle for the assessment of trading profits under Schedule D of the Income-Tax Acts is based on an average of the results of the business preceding the year of assessment and where three years are not available that the computation should be made on the average for one year of the balance of the profit or gains earned in the period preceding the year of assessment from first setting up of the same; that this was not the case of a first assessment governed by the sixth case in Schedule D, which leaves the matter at the discretion of the Commissioners, and that the method of computation is definitely fixed by the first proviso in the first rule; that the nature of the business carried on by the appellants was not a season's business generally speaking and that the profits accrued over the whole year, but that if there was one period of the year which had more than another it was the months from September until the end of March when the grain harvest was being carried by the shipping trade.

"III. The Surveyor of Taxes, Mr D. C. Lethem, contended:—(1) That the charge was made under section 2 of the Act 16 and 17 Vict. cap. 34, which dealt with *annual profits*. (2) That it was provided by the first rule to the first case of Schedule D, that in cases where the trade, manufacture, adventure, or concern shall have been set up within the period of three years preceding the year of assessment the computation was to be made for one year on the average of the balance of the profits and gains from the period of first setting up the same. (3) That there was no provision that the profits for the year of assessment should be computed on the basis of the profits of the period preceding the year of assessment as contended by the appellants, nor was there any provision for computing the liability from accounts for a period less than a year except in cases where the trade was set up within the year of assessment, and in such cases the rule in the sixth case has to be invoked, a procedure which

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was unnecessary in the present case when a full year's accounts were available. (4) That the appellants' contention would in many cases produce an absurd result, as in the case of a business set up a few days before 6th April, or in that of a seasonal business established in the winter months in preparation for a summer trade. (5) That a fair estimate of the *annual* profits, which were the subject of charge, could only be obtained from the account to 20th November 1912, described in the manager's report as 'for the first year's work,' and this was the obvious method of estimating the annual profits for the year ending 5th April 1913 in the absence of any provision to the contrary.

"IV. After full consideration of the facts and arguments the Commissioners decided that the assessment for the year ending 5th April 1913 should be based on the profits shown in the first printed account covering the period of 434 days from 13th September 1911 to 20th November 1912, and they accordingly reduced the assessment to £6708 ($\frac{365}{434}$ths of £7976, 11s. 7d.) less depreciation £1434 = net £5274 in respect of the substitution of 13th September 1911 for 20th October 1911 as the date when the trade was set up and commenced." *

The case was heard before the First Division on 13th March 1914.[1]

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* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, enacts:—"First Case—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act. Rules. First—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed; provided always, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same: provided also, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the year of assessment, the computation shall be made according to the rule in the sixth case of this schedule. . . ."

"Sixth Case—The duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act. The nature of such profits or gains, and the grounds on which the amount thereof shall have been computed, and the average taken thereof (if any) shall be stated to the Commissioners, and the computation shall be made either on the amount of the full value of the profits and gains received annually, or according to an average of such period greater or less than one year, as the case may require, and as shall be directed by the said Commissioners; and such statement and computation shall be made to the best of the knowledge and belief of the person in receipt of the same or entitled thereto."

[1] For the respondent reference was made to the case of The Gresham Life Assurance Society v. Styles, [1892] A. C. 309, Lord Watson, at p. 317, Lord Herschell, at pp. 323-4.

At advising on 20th March 1914,—

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LORD PRESIDENT.—The question we have to decide in this case is what is the amount of profits assessable to income-tax of the Steamship "Glensloy" Company, Limited, a one-ship company, for the year commencing 5th April 1912 and ending 5th April 1913. It is agreed that the rule, with which we are familiar, of determining the profits of a trading concern upon a fair and just average of three years is inapplicable to this case; for the Company commenced its trading on 13th September 1911, well within the three years anterior to the year of assessment, and consequently the business had been set up only for a period of 172 days prior to the commencement of the year of assessment.

In these circumstances it is agreed that the rule applicable to the determination of the profits in the case before us is to be found in the first proviso of the First Rule for the First Case in Schedule D in section 100 of the Property and Income-Tax Act, 1842,[1] which runs as follows:—"Provided always, that in cases where the trade . . . shall have been set up . . . within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." So here we have before us a period with a definite commencement—"the first setting up of" the Company's trade; and the question we have to decide is at what date does the period end.

Now, when it is remembered that the setting up of a trade or business always synchronises with the commencement of the trader's first trading and profit and loss account, it is easy to see that the end of the period must be the end of that account. If that be correct—and I think it is—then the decision of the question before us is plain. I regard it as, indeed, the only possible reading of this proviso, for confessedly it is impossible to compute on the average the balance of the trader's profits or gains unless you have before you the trader's balance-sheet—his profit and loss account. For, as Lord Watson observed in the case of the *Gresham Life Assurance Society*,[2] "Rule First of section 100, Case First, prescribes that the duty to be charged shall be computed on a sum not less than 'the full amount of the balance of profits or gains of such trade, manufacture, adventure, or concern.' It plainly contemplates the preparation of a balance-sheet in which proper trading disbursements and liabilities are to be set against trade assets, so that the surplus of the latter, if any, will represent the assessable profits or gains of the concern. All the other rules applicable to Schedule D are framed upon the same footing. . . . If there be one point free from obscurity in the Act of 1842 it is this, that the Legislature intended all traders, whether in groceries, annuities, or other articles of commerce, to be assessed upon the same footing." That is to say, upon the footing that the average of the profits or gains of the trader shall be computed upon his own balance-sheet. And Lord Herschell observes in the same case, at p. 323—"The expression 'balance of the profits or gains' is not a happy one; but the meaning obviously is the balance arrived at

[1] 5 and 6 Vict. cap. 35.

[2] [1892] A. C. 309, at p. 317.

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by setting against the receipts the expenditure necessary to earn them." Lord Herschell adds, speaking of the third rule, "The rule contemplates the making up of a balance-sheet, and deals with what may be put on the debit side of it." Indeed, as it appears to me, it could not well be otherwise. This is the one and only method, so far as I can see, by which you are enabled to ascertain on the average the balance of the profits or gains of the trader, and it has this conspicuous merit, that it puts on an equal footing all traders whose businesses commenced within three years prior to the year of assessment. Each trader is assessed upon his own balance-sheet; and if the result of the assessment is to lay upon him a burden heavier than he ought to bear, in respect that his profits have not been so great as are brought out by his balance-sheet, he has a statutory remedy.

This is the principle and method which has been applied in the present case, for the first profit and loss account of the "Glensloy" Steamship Company, Limited, commenced on 13th September 1911 and ended on 20th November 1912. It embraced, therefore, a period of 434 days, and the Commissioners have arrived at the sum which they have fixed as the true amount of the profits for the year of assessment by performing a simple rule-of-three sum—As 434 days are to 365 days, so is the £7976 of profit shown by the balance-sheet to the answer. And by making the appropriate deductions they reach the figure of £5274 as the profits for the year, on which this trading company ought to be assessed—profits honestly earned and clearly shown by the trader's own books, and to which, in detail at all events, no exception can be taken. And I merely mention in passing that the result of applying the appellants' method is to bring out, for the same period, a profit of £1762—as will be seen, a very material difference which, no doubt, gives the appellants good grounds for attempting, if they can, to secure the application of a different method than that adopted by the Commissioners for the assessment of their profits.

Now, the appellants say that the method adopted is wrong, because to take the trader's own account involves an invasion of the year of assessment to the extent, I think, of some 229 days, for it involves an encroachment on the year from 5th April 1912 to 5th April 1913—an encroachment from 5th April 1912 to 20th November 1912. And they contend that there is an inflexible rule, as I understood their argument, of income-tax law that you must never, in assessing the trading profits for one year, encroach upon that year. Accordingly, to avoid invasion of the year of assessment, a different rule must be applied. The rule they suggest is that the commencing period should be the commencement of their trading account—their ordinary profit and loss account,—and that the close of the period should be 5th April 1912, the beginning of the year of assessment, or rather the end of the year anterior to the year of assessment. That means that you must read into the proviso to which I have referred the words "down to the 5th of April following," or some such words. And that, they say, is essential in order to secure a just method of assessing the profit. The objection that I entertain to that mode of computation is that it involves reading into the statute words which are not there, words which, as I think, have been deliberately left out; and it involves

this principle, that each trader is assessed upon a different footing from every other trader. Each is taken upon a haphazard period which commences at the date when his trading account begins, and ends always on 5th April following. So that, if a trader commences business upon 5th April, he is assessed by computing no profits at all. If he commences business on 6th April, then his profits are computed upon 364 days' trading, and so on with as many variations as there may be between 6th April of one year and 5th April of the following year. That appears to me to make this proviso wholly unworkable, because, in the case of many traders who commence business at or shortly before the commencement of the year of assessment, there would be no profits at all to assess if you are to strike a balance and frame a balance-sheet in every case on 5th April. And the case before us affords a very good illustration of the unworkability of the rule, because it will be seen that, if this Company had commenced business upon 12th March, then a computation of their profits according to the method which they suggest as correct would result in there being no profits at all. And, indeed, when they come to apply their own method—the method which they themselves suggest—it breaks down hopelessly, because, in order to bring out the figure which I mentioned a short time ago was their alternative to the Commissioners' assessment, to wit, £1762, they require to encroach upon this very year of assessment to the extent of 111 days. The Commissioners encroach to the extent of 229 days, and the appellants to the extent of 111 days.

It appears to me, therefore, that if their method were adopted, we should reach not only irregularity but inequality, and, as I think, unworkability. But I desire to make it quite plain that my opinion does not rest upon the consequences of applying the method suggested by the appellants as the appropriate means of assessing income-tax in such a case as we have before us, but upon the inadmissibility, as I think, of introducing into a taxing statute words which are not there, words which I think have been deliberately left out, and words which, if introduced, would involve, as I think, a reading out of the proviso of the important phrase on which I have offered some comment—"the average of the balance of the profits and gains" for the period, which involves the preparation of a balance-sheet.

It is significant that this is the first occasion, since the passing of the Income-Tax Act in 1842, that this proviso has been made the subject-matter of judicial construction. We have been informed by the Solicitor-General that the method adopted in this case is the method which has been followed consistently since the date when the statute passed, and I, for my part—even if I regarded this proviso as ambiguous, which I do not—would hesitate to adopt a construction of the statute which would lead to the destruction of the method which has been followed for upwards of seventy years, apparently to the complete satisfaction of the trading community.

LORD JOHNSTON.—[In his Lordship's absence his opinion was read by Lord Mackenzie]—The question in this case is how to apply Schedule D

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and its rules where a business, though not commenced in the year of assessment, has not yet been long enough in existence to allow for the assessment of income-tax being made on a three years' average.

The facts which raise the question are simple. The Company commenced business on 13th September 1911. It did not, however, close its books for the first time until 20th November 1912. Thereafter its date of balance was presumably to be 20th November in each year.

It had to be assessed for income-tax (1) for the broken period 13th September 1911 to 5th April 1912; (2) for the year 5th April 1912 to 5th April 1913; (3) for the year 5th April 1913 to 5th April 1914, and so on. The assessments fell to be made under Schedule (D), First Case, First Rule, and Sixth Case. The First Case, First Rule, provides for the normal case—that is for a business which has been long enough in existence to admit of an average being struck on three years' working—thus: The duty to be charged is to be computed on the full amount of the balance of the profits of the concern upon a just average of three years "ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade . . . shall have been usually made up, or on the 5th day of April preceding the year of assessment." This is followed by two provisos, the first dealing with the more general exception where the business has been set up within the said period of three years, and the second dealing with the special exception where the business has been set up within the year of assessment.

Returning to the provision for the normal case, it will be observed that it offers two alternatives for the computation, and I think that it was admitted that the choice lay with the Inland Revenue. But if one thing is clear it is this, that the return has to be made, and the assessment to be laid on, as at the 5th of April in each year, for the year which is to come, but that it is to be based upon something which is already past. And this is only consistent with the general conception of the Act. It was passed for the purpose of raising revenue by way of income-tax for, and to come into the Exchequer during, the period from 5th April of one year to 5th April in the year following (Act of 1842, section 176). To enable this to be done effectively it is of course necessary that the returns be made, and the assessment laid on, as soon after the 5th of April which commences the period as possible, in order that the tax may be collected within the year of assessment. Accordingly the three years, on which the average has to be struck, are to end either on the day of the firm's or company's annual balance preceding the year of assessment, or on the 5th of April preceding the year of assessment. Whichever alternative is selected, the last year of the triennium must have concluded before the year of assessment commences.

In the next place, it is clear that the Legislature contemplated that no difficulty would be experienced in striking a balance on 5th April in each year, should the second alternative be adopted, although that might not be the close of the financial year of the firm or company. In point of fact for the first year, in the case of this Company, when the three years' average comes to apply, the average will have to be struck on the three years ending 5th April, though they are not the financial years of the

firm, by reason that the Company's first balance of profits was not struck for a year, but for rather more than fourteen months.

I pass now to the last proviso which deals with the broken period, when the business is set up within the year of assessment. In the present case the assessment had to be made for the period 13th September 1911 to 5th April 1912. The proviso is that the computation shall be made according to the Rule in the Sixth Case of the Schedule. In that Case the computation is to be made "according to an average of such period greater or less than one year, as the case may require, and as shall be directed by the said Commissioners; and such statement and computation shall be made to the best of the knowledge and belief of the person in receipt of" the profits and gains. In the present instance, the return was made and the assessment laid on, as I have said, for a period less than a year, viz., 13th September 1911 to 5th April 1912. No difficulty was experienced in making the return or laying on the assessment. The question relates to the assessment for 1912-13, and it affects in principle those for 1913-14, and 1914-15. The statutory provision is this—"provided always, that in cases where the trade . . . shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same." The assessment is to be on an average, and the dividend is the balance of profit and loss from the period of setting up the business. The *terminus a quo* is thus expressly defined. For 1912-13 it goes back to 13th September 1911, or to a point six months previous to the year of assessment. For 1913-14 it will go back to the same date, or to a point eighteen months previous, and in 1914-15 again to the same date, or to a point thirty months previous to the commencement of the year of assessment. But the *terminus ad quem* of the period on which the average is to be struck is not expressed. I think, however, that it is a matter of irresistible implication:—

1st. From a general consideration suggested by the whole purview of the Act, and of this first Rule in particular. I have already drawn attention to the fact that, consistently with the object and with the necessities of the case, returns must be made and the assessment laid on, as from the first day of the revenue year or 5th April. It follows, therefore, as it seems to me, that the *terminus ad quem* intended was the date at which the year of assessment commenced. The computation can, I think, only be made for the year in question on the average of the balance of the profits and gains of the business from the date of its commencement to the date, as at which the assessment is to be laid on, viz., the 5th of April with which the year of assessment commences.

2nd. Having regard to the grammatical sequence of the Rule, it may be contended that the proviso is not a separate and self-contained enactment, dealing exhaustively with the exceptional case, but is dependent on the principal enactment, so much of which is carried forward with the proviso as is not inconsistent with the terms of the proviso. If so, it may be that the *terminus ad quem* is to be either the date of the Company's last balance preceding the year of assessment or the 5th April with which it begins. Personally, I think that there are difficulties in

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the way of this contention, and that the former consideration is to be preferred. In any view, I am unable to conceive how the computation is to be made as at 5th April 1912 on the average of the balance of the Company's profits and gains from 13th September 1911, when the business was set up, to 20th November 1912 which was seven months after the year of assessment commenced, without writing into the proviso something which is not there and which is wholly inconsistent with the scope of the whole rule. And the same will apply with still greater force when the years 1913-14 and 1914-15 come to be dealt with.

Your Lordship apparently considers that the Act regards the balance of profits and gains as nothing but the balance-sheet made up by the firm or company for its own purpose, and for such financial year as it pleases. Though usual, no business is bound to strike its balance yearly, or at one definite date in the year. That a balance may be made for the purposes of the income-tax as at any date which may be necessary to comply with the provisions of the statute, though it be not the date of closing the books for the purposes of the business, is quite conceivable, and it has already been done for the broken period of the first year of the Company's existence. Further, it would have to be so made in any case in which the Inland Revenue discarded the financial year of the business and required a return as at 5th April.

I do not think that the Court can be influenced in interpreting and applying this rule of the statute, either by the consideration that inequality in the incidence of the tax may occur among young companies, according to the date at which they may happen to begin business, or by the consideration that young companies will escape more lightly for the first two or three years than businesses which have been longer in existence. Whatever construction may be put upon the rule there will be initial inequality, and I can conceive that it was fully contemplated that the tax should bear somewhat more lightly upon the young business at its first start. But the question is not what would be the ideal, but what is the rule as enacted. I think therefore that the Commissioners' conclusion is wrong, and that the appeal should be allowed.

Lord Mackenzie.—I agree with the conclusion reached by your Lordship in the chair. In the first place, I should like to say that, as regards the practice, I am afraid I am not able to attach any weight to that in this case. If the practice was not warranted by the provisions of the statute we could give no effect to it. I put my judgment solely upon the construction of the Act of Parliament.

There is a difficulty in regard to the grammatical construction of the first proviso. The argument which was pressed upon us with considerable force on behalf of the appellants was that you must read into the first proviso one or other of the two dates contained in the enacting words of the clause; and that as no accounts were here made up between the date of commencing the business and the 5th of April, the latter must be taken as the *terminus ad quem*. No doubt, in regard to the grammar, that does raise a question which requires consideration, and is not one wholly without difficulty. I have, however, come to the conclusion that

there is no obligation to read the 5th of April into the first proviso. There are words used in that proviso which indicate that the *terminus ad quem* was the close of the accounts which were kept by the Company, because the words are "the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same."

Now, the word "balance," to my mind, is suggestive of a balance-sheet, and I think that the reasonable construction to put upon that proviso is that the balance-sheet in question was just such a balance-sheet as a trading company will make up for the purposes of its own business; and that, when you find that it is to be a balance for a period commencing with the first setting up of the business, the natural consequence is that the *terminus ad quem* is the close of the first account. It no doubt follows, if a trading company makes up its first balance-sheet for a period ending prior to the 5th April, that that would have been taken for the purposes of the first proviso. Possibly some trading company may think that it is to its advantage to make up its balance-sheet for a short period in order to get some benefit when it comes to be assessed for income-tax. As a rule, however, trading companies make up their balance-sheet with a view to their business and not with an eye to the Income-Tax Acts.

I should say, agreeing with your Lordship, that I do not think that, in dealing with a taxing statute, we are entitled to lay very great stress upon the consequences that will follow from one construction or another. If we are tied up to one construction, then the statute must receive effect according to its exact language. Although the consequences which would follow from the reading for which the appellants contended would have been very anomalous, I put my judgment upon the construction of the words of the Act. It may, however, not be out of place to refer to the provisions of section 24 of the Finance Act of 1907,[1] which enables a person who finds that he has not really earned the profit upon which he is sought to be assessed to go to the Commissioners, and if it is found by them that the figure which has been struck for the purposes of assessment to income-tax is too great, he gets a reduction, so that no trader ever runs any risk of being assessed upon a greater sum than has been earned.

Accordingly I agree with your Lordship.

The Lord President intimated that Lord Skerrington, who was absent at advising, concurred with the judgment of the majority.

Lord Dundas was present when the case was advised.

The Court dismissed the appeal.

J. & J. Ross, W.S.—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue—Agents.

[1] 7 Edw. VII. cap. 13.

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Walker v. Whitwell.

HARRY WALKER AND OTHERS, Petitioners.—*Chree, K.C.*—*T. G. Robertson.*

HENRY EDWARD LEATHAM WHITWELL AND ANOTHER, Respondents.—*Macquisten*—*D. Jamieson.*

Writ—Authentication—Subscription by witnesses ex intervallo—Witness adhibiting signature to testamentary writing after death of testator—Informality of execution—Act 1681, *cap.* 5—*Conveyancing Act*, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

A domiciled Scotswoman was taken ill in London and sent for her son, who was a doctor there, and dictated to him certain testamentary directions which effected a fundamental alteration on her existing trust-disposition and settlement. The document thus written out by her son was signed by her in his presence, and also in the presence of her nurse, who, at the same time, adhibited her signature as a witness. The document was then sealed up and sent to the testatrix's law-agents. Six days afterwards she died. Three weeks after her death the son, at the request of the law-agents, adhibited his signature to the document as a witness.

In a petition under sec. 29 of the Conveyancing (Scotland) Act, 1874, *held* by a majority of a Court of seven Judges (*diss.* Lord Johnston, Lord Guthrie, and Lord Skerrington) that the testamentary writing was duly subscribed by the son as an attesting witness.

Tener's Trustees v. *Tener's Trustees*, (1879) 6 R. 1111, *followed.*

Appeal to House of Lords—Pupil litigant—Expenses—Application by unsuccessful pupil litigant for award of expenses to enable him to prosecute appeal to House of Lords.

The whole beneficiaries under a will, being the six surviving children of the testatrix, presented a petition for declarator that the will was duly subscribed. The petition was opposed by the pupil son of a predeceasing daughter of the testatrix, who would have shared in his grandmother's estate under the provisions of a former will but was deprived of all interest by the will in question. A Court of seven Judges having decided, by a majority of four to three, that the will was duly subscribed, the pupil's father, as his tutor, applied to the Court for an order on the testatrix's trustees to supply the pupil with funds out of the estate wherewith to prosecute an appeal to the House of Lords.

The Court *refused* the application.

Crum Ewing's Trustees v. *Bayly's Trustees*, 1910 S. C. 994, *distinguished.*

1st DIVISION, with three consulted Judges.

ON 17th September 1913, a petition was presented under section 39 of the Conveyancing (Scotland) Act, 1874,* by Harry Walker and

* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), enacts:—

Sec. 38. "It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing-clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for pre-

his four brothers, John, George, Thomas, and Francis, and his sister, Mrs Fanny Brocklebank, being the sole surviving children of Mrs Isabella Thomson or Walker, widow, who resided at Newport, Fife, for declarator that a testamentary writing left by her was duly subscribed.

The petitioners averred:—"That the said Mrs Isabella Thomson or Walker died in London on Tuesday, 1st July 1913, leaving (first) a trust-disposition and settlement, and appended codicils dated respectively 29th June 1886, 6th June 1898, and 10th July 1903, by which she conveyed her whole estate, heritable and moveable, to the trustees, and for the purposes, therein mentioned, the only survivors of said trustees being the petitioner the said Harry Walker, and James Thomson, sometime merchant, Dundee, now residing at Woodlands, Cupar Road, Newport, Fife; and (second) a testamentary writing in the following terms."

This writing, as produced in Court, was as follows:—

"The Empress Club. June 25. 1913.

∧ & worldly goods

"It is my desire that I leave all my means ∧ of whatever kind to be equally divided between my six surviving children with the following special bequests.

"1. Harry to have solid silver tea service consisting of teapot, sugar basin and cream pot.

"2. John to get his great grandfather's old inlaid bureau which stands in the library at Westwood.

"3. Annie Walker my daughter in law my emerald and diamond ring.

"4. To Isabella Thomson Walker my daughter in law my diamond ring with three diamonds given to me by my husband.

Walker

"5. To Kathleen ∧ my diamond and sapphire ring.

Tom and

"6. To ∧ Chrissie my diamond pendant.

"7. To Fannie my ruby and diamond ring and a small ruby and diamond brooch.

"8. To Fred my ~~ruby and~~ two heart diamond brooch.

"9. To Gordon my diamond ring with 5 stones for his wife.

ISABELLA WALKER.

Witness MABEL HAYWARD
Nurse c/o Miss Hartnell, 37 Warwick Avenue,
Maida Vale, London.

Witness J. W. THOMSON WALKER,
Surgeon, 30 Queen Anne Street,
London, W."

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servation, or shall have been founded on in any court, and need not be written by the witnesses themselves."

Sec. 39. "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or

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The petition proceeded:—"The said informal writing was written by the petitioner, the said John William Thomson Walker, to the dictation of the said Mrs Isabella Thomson or Walker. It was signed by the testator of the date it bears in presence of Mabel Hayward, nurse, c/o Miss Hartnell, 37 Warwick Avenue, Maida Vale, London, who subscribed the said testamentary writing as a witness, and also in the presence of the said John William Thomson Walker. The said Mabel Hayward signed the testamentary writing as a witness at the time of the execution thereof, but did not add her designation and address, and as the parties were in ignorance that the subscription of one witness was insufficient, the said John William Thomson Walker did not then subscribe as a witness. The said John William Thomson Walker thereupon closed up the said testamentary writing in an envelope which he endorsed 'Codicil to Will, 25/6/13,' and which was not opened until after Mrs Walker's death. Accordingly, at the date of her death, the said testamentary writing bore to be subscribed by the testator and one witness.

"After the death of the said Mrs Isabella Thomson or Walker, the petitioners were advised that the said testamentary writing was informally executed in respect that it was neither holograph nor tested, but bore *ex facie* to have been subscribed in presence of only one witness. Accordingly, thereafter, the said John William Thomson Walker subscribed his name as a witness to the execution of the said testamentary writing, and the designations and addresses of the witnesses were added to their signatures.

"In these circumstances the present application is made, under section 39 of the Conveyancing (Scotland) Act, 1874, to have it declared that the said testamentary writing was subscribed by the grantor or maker thereof, and by the witnesses by whom the same bears to be attested. The said testamentary writing is produced herewith.

"The said Mrs Isabella Thomson or Walker left heritable estate consisting of feu-duties of the net annual value of about £122, 2s. 6d., and moveable estate of the value of about £20,000.

"The said Mrs Isabella Thomson or Walker was survived by the petitioners, who are her only surviving children, and by a grandson, Henry Edward Leatham Whitwell, residing at Croft, near Darlington, son of Edward Leatham Whitwell, residing there, and his wife, Mrs Winifred Walker or Whitwell, now deceased. The said Mrs Winifred Walker or Whitwell was a daughter of the said Mrs Isabella Thomson or Walker, and predeceased her mother.

"The parties mentioned in the informal writing are the following:—'Harry' is the petitioner Harry Walker; 'John' is the petitioner John William Thomson Walker; 'Annie Walker' is wife of the said Harry Walker, and resides with him; 'Isabella Thomson Walker' is wife of the said John William Thomson Walker, and resides with him; 'Kathleen Walker' is wife of the said George Frederick Walker, and resides with him; 'Tom' and 'Chrissie' are respectively the petitioner Thomas Hood Henderson Walker and

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writing is founded on or objected to, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

his wife, Christine Walker, residing with him; 'Fannie' is the petitioner Fanny Walker or Brocklebank; 'Fred' is the petitioner George Frederick Walker; and 'Gordon' is the petitioner Francis Heathcote Gordon Walker.

"The parties above named are the only persons having or claiming to have any interest in the estate of the deceased. The said Henry Edward Leatham Whitwell is in pupillarity."

The prayer of the petition (as amended at the bar) was for declarator "that the said testamentary writing was subscribed by the said Mrs Isabella Thomson or Walker as maker thereof, and by the said Mabel Hayward and John William Thomson Walker as witnesses attesting the subscription of the said Mrs Isabella Thomson or Walker."

Answers were lodged for the pupil grandson of the testatrix, Henry Edward Leatham Whitwell, and his father as his guardian. In these answers it was averred, *inter alia*:—

"By her trust-disposition and settlement, dated 29th June 1886, Mrs Isabella Thomson or Walker, after making provision for her debts, funeral expenses, and the expenses of the trust thereby created, and also certain provisions for her husband (who predeceased her), directed her trustees to hold the residue of her estate for behoof of all her children, and the survivors and survivor of them, and the issue of any of them who might die, leaving issue. By the codicil of 6th June 1898, the said Mrs Isabella Thomson or Walker provided legacies of £2000 each to her daughters, Winifred Mary Walker (then unmarried) and Fanny Walker (also then unmarried). By the codicil of 10th July 1903, the said Mrs Isabella Thomson or Walker revoked the said two legacies, and the said codicil provided as follows:—'Declaring that it is now my wish that my said daughters or their issue shall only share in my estate equally with my other children and their issue, in terms of my said settlement.' In terms of said trust-disposition and settlement and codicils, the said Henry Edward Leatham Whitwell is entitled to an equal share along with the petitioners of the heritable and moveable estate of the said Mrs Isabella Thomson or Walker—viz., to one-seventh thereof.

"Not known and not admitted that the alleged informal writing of 25th June 1913 was written by the petitioner John William Thomson Walker to the dictation of the said Mrs Isabella Thomson or Walker. Not known and not admitted that same was subscribed by the said Mrs Isabella Thomson or Walker in the presence of Mabel Hayward and the said John William Thomson Walker. It is believed that on the date on which said writing bears to have been executed, the said Mrs Isabella Thomson or Walker was, on account of her age and the condition of her health, not in a fit state to clearly understand the terms and purport of any document she may have executed.

"The said informal writing was not at the date of death of the said Mrs Isabella Thomson or Walker, a validly executed and completed testamentary writing by her, and is consequently invalid and of no effect.

"The prayer of the petition should be refused in respect that—(1) at the date of the death of the said Mrs Isabella Thomson or Walker, the said document was incomplete; (2) that the subsequent addition by the said John William Thomson Walker of his signa-

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ture as a witness attesting the execution thereof, and of the designation of the said Mabel Hayward, was incompetent and invalid; and (3) that in the whole circumstances of the case the said John William Thomson Walker, on account of his interest, was not a competent witness to the execution of the document."

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Mackenzie) on 22nd October 1913, when the Court allowed a proof, to be taken before Lord Mackenzie.

At the proof evidence was adduced, *inter alia*, to the following effect:—

Mrs Walker was taken seriously ill while staying at the Empress Club, London, and on 25th June 1913 sent for her son John, who was a surgeon practising in London, to come and see her. When he arrived she informed him that she wanted to add a clause to her will, and he thereupon wrote out to her dictation the testamentary writing printed *supra*. He read it over to her and, at her suggestion, made certain alterations on it. He then called Nurse Hayward into the room, and in the presence of these two Mrs Walker signed the document, and Nurse Hayward adhibited her signature after the word "Witness," which Dr Walker had already written. Dr Walker deponed that he did not also sign as a witness for two reasons, first, because he believed that, as his name was mentioned in the document, he was not a competent witness, and, second, because he thought one witness was sufficient. Dr Walker then put the document into an envelope, which he gummed, and wrote on the outside, "Codicil to Will, 25/6/13." He placed the envelope in a drawer, and it was sent on 29th June, by the petitioner, Mr Harry Walker, to Mrs Walker's solicitors in Dundee. Mrs Walker died on 1st July, and the envelope was opened and the document produced by Mrs Walker's solicitor at a meeting of the family in Dundee on 5th July. On 24th July the solicitor wrote—his letter being headed "Mrs Walker's Trust"—to Dr Walker, enclosing the document and stating that counsel had advised that Dr Walker should sign it as a witness. Dr Walker accordingly did so on 25th July. The designations of Nurse Hayward and Dr Walker were subsequently added by the solicitor's partner.

The case was further heard before the First Division on 13th and 14th January 1914, when the Court appointed the cause to be heard before the First Division with three Judges of the Second Division. The case was heard accordingly before the First Division, with Lord Dundas, Lord Salvesen, and Lord Guthrie, on 17th and 18th February 1914.

Argued for the petitioners;—The signature of a witness was a purely statutory requirement in a probative deed; it was not a requisite of common law. Statute did not prescribe any particular time within which a witness should sign, though after a deed had entered a public register, or was used in judgment, nothing could be added to the attestation. A witness's signature merely supplied legal evidence that the document had been signed by the granter. After the death of the granter, a testing-clause might be added, which, prior to the Conveyancing Act of 1874, was as much an essential requisite as the signature of a witness.[1] Accordingly, it

[1] Act 1540, cap. 117; Act 1579, cap. 80; Act 1593, cap. 179.

was only necessary, in compliance with the law prior to that Act, for the petitioners to satisfy the Court that the testatrix signed the will in question, and that the witnesses were present and saw her do so. If there was any doubt as to the designation of witnesses, or as to whether those who had subscribed a deed had seen it signed by the granter, it was, prior to 1874, a question of circumstances for the consideration of the Court in each case whether such doubts could be cleared up after the death of the granter.[1] And this was so, because, prior to 1874, the addition of a witness's signature was *in pari casu* with the addition of his designation, or of a testing-clause, after the death of the granter of a deed, since there was before that year no statutory requirement as to the witnesses signing at the time of their seeing a deed subscribed by the granter, although there was a requirement that, in the case of the granter acknowledging his signature, he must do so "at the time of witnesses subscribing."[2] The purpose of the statutory provision made this distinction clear, as it was necessary for a witness to a signature which was acknowledged to subscribe at the time of the acknowledgment, because that was his only means of identifying the signature to be witnessed; whereas a witness who saw a party subscribe would not be subject to the same risk of forgetting the signature which he saw that party write.[3] Apart from the specific case in which the subscription of witnesses was required at the time of acknowledgment of a signature, they might subscribe at any time before a deed was used in judgment. Prior to the Act of 1681, subscription by witnesses was not required at all, their designation being at that time of primary importance.[4] After the passing of that Act it had been held that instrumentary witnesses need not sign in presence of the granter of a deed, but might sign *ex intervallo*.[5] It was not essential that a party subscribing as a witness should be specially called as such by the granter of a deed; and in the present case, as the witness who subscribed *ex intervallo* was the writer of the deed, its identity—any question as to which might have proved fatal—was beyond doubt, and it had been competently completed after the testator's death.[6] A testing-clause had been held to be competently completed after the death of the granter,[7] and even after a deed had entered a

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[1] Colville v. Colville's Executors, (1664) M. 16,882; Falconer v. Earl of Kinghorn, (1665) M. 16,883; Ogilvie v. Bailie, (1711) M. 16,896; Bell v. Lord Mow, (1635) M. 16,882; Hume v. Hume, (1634) M. 16,881; Urquhart v. The Crown, (1753) M. 16,903, (1755) 1 Pat. 586.

[2] Act 1681, cap. 5.

[3] Stair, IV. xlii. 4; Erskine, III. ii. 7, 9, 11, and 13.

[4] Town of Edinburgh v. Town of Leith, (1630) M. 16,880; Duff, Feudal Conveyancing, pp. 5-7; Bell v. Campbell, (1707) M. 16,888; Erskine, III. ii. 13.

[5] Frank v. Frank, (1795) M. 16,824, (1809) 5 Pat. 278, Bell on Deeds, 254, Lord Justice-Clerk Braxfield, at p. 258, Lord Eskgrove, at pp. 261-2, Lord President Ilay Campbell, at p. 267; Hogg v. Campbell, (1864) 2 Macph. 848, Lord President M'Neill, at pp. 854-5; Thomson v. Clarkson's Trustees, (1892) 20 R. 59, Lord Rutherfurd Clark, at p. 63.

[6] Stewart v. Burns, (1877) 4 R. 427, Findings of Lord Ordinary Craighill, at p. 430, Lord Justice-Clerk Moncreiff, at p. 432, Lord Ormidale, at pp. 433-4.

[7] Dick v. Dick, (1798) Hume's Decisions, 908.

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public record in the case of a deed which was void as originally recorded.[1] Accordingly, as the testing-clause was just as much a requirement prior to 1874 as the signature of a witness, the latter could now, on the analogy of these decisions, be as competently added after the death of the maker of a will. It had been held that the signatures of notaries, when required for the execution of a testamentary writing, could be appended after the death of the testator,[2] and it had only been held incompetent for such signatures, or those of witnesses, to be added to testamentary writings after the death of the testator when it was proved that the writing was not intended to be completed.[3] In the present case it could not be doubted that the testatrix intended the writing which she dictated to be completed. When a deed, being produced in judgment, was found to be in conformity with statutory requisites it was irrelevant to inquire when it was completed,[4] and if such a deed was challenged, any informality with reference to the signature of a witness could be remedied by ascertaining the facts as to his signature.[5] The alleged defect in the witness's subscription here was nothing but an informality of execution, and therefore, by force of the provisions of the Conveyancing Act of 1874,[6] which operated precisely to meet such a case as the present, the deed should not be deemed to be invalid by reason of that informality.[7] The Act of 1874 precluded objections relating to a testing-clause; and in the case of *Tener's Trustees*,[7] it was held to afford an answer also to a challenge of a deed in circumstances which were indistinguishable from those of the present case. But even independently of that Act this testamentary writing should be held to have been duly subscribed. That witnesses might sign *ex intervallo* became clear when it was considered that the date of a deed was the date of signature by the granter, not the date of signature by witnesses. Opinions in which the decision in *Tener's* case[7] had been doubted were delivered without submission of all the authorities now before the Court,[8] and that decision should be approved and followed.

Argued for the respondents;—The incomplete document which the testatrix had left was not a will, and no voluntary act on the part of one who saw her sign it could make it a will, because instrumentary witnesses had to be expressly or impliedly called by the granter of a deed for the purpose of subscribing as witnesses.[9] If

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[1] Macleod v. Cuninghame, (1841) 3 D. 1288, (1846) 5 Bell's App. 210.

[2] Gray v. The Lady Ballegerno, (1678) M. 16,296; Trail v. Trail, (1805) M. 15,955.

[3] Campbell v. Purdie, (1895) 22 R. 443; Arnott v. Burt, (1872) 11 Macph. 62, Lord Gifford (Lord Ordinary), at pp. 66-7, Lord Justice-Clerk Moncreiff, at pp. 69-70, Lord Cowan, at pp. 71-2, Lord Benholme, at p. 73.

[4] Hill v. Arthur, (1870) 9 Macph. 223, Lord Cowan, at p. 229; Veasey v. Malcolm's Trustees, (1875) 2 R. 748, Lord Justice-Clerk Moncreiff, at pp. 751-2.

[5] Richardson's Trustees, (1891) 18 R. 1131.

[6] 37 and 38 Vict. cap. 94, sec. 39.

[7] Tener's Trustees v. Tener's Trustees, (1879) 6 R. 1111.

[8] Beattie v. Bain's Trustees, (1899) 6 S. L. T. 277; Brownlee v. Robb, 1907 S. C. 1302, Lord M'Laren, at p. 1312.

[9] Ersk. IV. ii. 27; Dickson on Evidence, sec. 695; Stair, III. viii. 3.

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Dr Walker was impliedly requested to subscribe as a witness he had impliedly refused to accept any mandate to do so, because he doubted whether he was a competent witness. By the time that he found that he was a competent witness, the testatrix who had chosen him as such had died, and accordingly his mandate to sign as a witness had lapsed.[1] The executors of the testatrix under her duly executed testamentary writings could not have compelled Dr Walker to add his signature to the incompleted testamentary writing, and it could not be within his option to control the question whether it should be completed. If such a signature could be added after the death of a testator, it would be within the option of a witness to determine whether a party died testate or intestate. The testatrix in the present case had means of knowing that two witnesses were required for the formal execution of testamentary writings because she had previously subscribed such writings, and as she had seen only one witness subscribe the writing in question it was a necessary assumption that she relied upon the fact that it was not signed by two and elected to leave it incomplete. When such an intention was disclosed the Court would not hold a testamentary writing to have been completed.[2] In the provision of the Act 1681, cap. 5, that no witness should subscribe as such unless he "then" knew the party subscribing the deed, and saw him subscribe, the word "then" referred to the time of subscription by the granter, and subscription by witnesses at any subsequent time did not comply with that express term of the Act. The cases of *Trail* v. *Trail*[3] and *Gray* v. *Lady Ballegerno*[4] had been overruled.[5] The only other cases—except *Tener's Trustees*,[6] which was under reconsideration—where witnesses had signed subsequently and the deed had been upheld, were cases where that signing had been held to be, in the circumstances, *unico contextu* with the signing by the granter. The case of *Stewart* v. *Burns*[7] did not support the petitioner's argument, because the decision there dealt with an *inter rivos* deed upon which there had been *rei interventus*, independently of which the writ would not have been held to be probative.[8] It was impossible to trace the cases referred to by Lord President M'Neill in the case of *Hogg* v. *Campbell*,[9] in which a practice was said to have been recognised in regard to witnesses adhibiting their subscriptions at a subsequent date. There was no distinction between the case of seeing a party sign and hearing him acknowledge his signature.[10] None but a holograph will could be executed without the subscription of witnesses, and no will could be executed after the death of the testator. The completion of a testing-clause after the death of the granter of a deed was not analogous to the addition of a witness's signature after the granter's death, because by

[1] Ross's Lectures on Conveyancing, 147-8; Baillie v. Lockhart, (1710) M. 16,891; Robertson v. M'Caig, (1823) 2 S. 544, N. E. 474; Home v. Dickson. (1730) M. 16,898; Stair, III. viii. 3.

[2] Arnott v. Burt, 11 Macph. 62.

[3] M. 15,955.

[4] M. 16,296.

[5] Campbell v. Purdie, 22 R. 443, Lord Kinnear, at p. 448.

[6] 6 R. 1111.

[7] 4 R. 427.

[8] Home v. Dickson, M. 16,898.

[9] 2 Macph., at p. 855.

[10] Thomson v. Clarkson's Trustees, 20 R. 59, Lord Justice-Clerk Macdonald, at p. 61, Lord Trayner, at p. 63.

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legal fiction a testing-clause was supposed to be written continuously with the deed. The provisions of the Conveyancing Act of 1874[1] had no bearing on the present case, because the Act of 1681 was not repealed thereby. The subscription of witnesses was no mere formality, but was still a statutory requirement; as was by implication recognised by the Act of 1874 in so far as it permitted the addition of the designation of witnesses, whose signatures *ex hypothesi* had been appended in conformity with the Act of 1681. The true intention of the Act of 1681 was that instrumentary witnesses should sign *unico contextu* with their seeing the party whose signature they were witnessing sign the deed, or hearing him acknowledge his signature[2]; and failure to comply with this requisite of that statute was not an informality of execution in the sense of the Conveyancing Act of 1874.[3] In the case of *Tener's Trustees*[4] there was no contradictor, and the decision proceeded upon facts admitted in a special case. Therefore that case did not afford ground for granting the prayer of the present petition, and in so far as it presented difficulty in the way of the contention of the respondents—who neither affirmed nor denied the *bona fides* of Dr Walker—that decision, which had already been doubted,[5] should be overruled.

At advising on 10th March 1914,—

LORD DUNDAS.—This is an interesting and important case. We are asked by the petitioners to declare that the testamentary writing No. 11 of process was subscribed by the testatrix, Mrs Walker, as maker thereof, and by Mabel Hayward and John William Thomson Walker, as witnesses attesting her subscription. The document was written by Dr Walker, on 25th June 1913, to his mother's dictation; it was then and there signed by her; Miss Hayward, the nurse, came into the room and signed her name as a witness—the word "witness" which precedes her signature had already been written by Dr Walker; Dr Walker did not sign his name until 24th July; the word "witness" before his name, and the designations both of Miss Hayward and Dr Walker were afterwards added to the document. The testatrix died on 1st July 1913. There is no doubt that the subsequent additions of the word "witness" and of the designations were competently made, in virtue of section 38 of the Conveyancing Act, 1874; but the point of difficulty is whether the signature of Dr Walker as one of the witnesses is, in the circumstances above narrated, sufficient to satisfy the statutory requisites of a probative writ. The objection is stated by the respondents in a two-fold form—(1) that Dr Walker's signature was not made contemporaneously with that of the granter, but after an interval of twenty-nine days; and (2) that, even if such an interval of time was not in itself fatal to the probative character of the instrument, the fact of Mrs Walker's death before her son adhi-

[1] 37 and 38 Vict. cap. 94, secs. 38 and 39.

[2] Frank v. Frank, referred to in Bell on Deeds, 254, Lord Swinton, at p. 264; Duff on Feudal Conveyancing, pp. 15, 16.

[3] 37 and 38 Vict. cap. 94, sec. 39; M'Laren v. Menzies, (1876) 3 R. 1151; Hogg v. Campbell, 2 Macph. 848, Lord President M'Neill, at p. 855.

[4] 6 R. 1111.

[5] Brownlee v. Robb, 1907 S. C. 1302, Lord M'Laren, at p. 1312.

bited his signature rendered it incompetent for him to do so with any effect thereafter.

The present case cannot, in my judgment, be distinguished in any material respect from that of *Tener's Trustees*,[1] where the Second Division of this Court held the deed to have been validly subscribed and attested; and it is to reconsider that judgment, particularly with regard to some observations made upon it by Lord M'Laren in *Brownlee* v. *Robb*,[2] that this Court of seven judges has been convened. I am of opinion that *Tener's Trustees*[1] was a sound decision, and should be followed.

As regards the first head of the respondents' objection, one must pay close attention to the language of the Act 1681, cap. 5, which made the signature of the witnesses essential to the probative character of writs. This well-known Act, the authorship of which is generally ascribed to Lord Stair, ordains, *inter alia*, that "no witness shall subscribe as witness to any parties subscription unless he then know that partie and saw him subscribe, . . . or that the partie did at the time of the witnesses subscribing acknowledge his subscription." One notices that the words "at the time of the witnesses subscribing," which imply that the witnesses' signatures must be substantially contemporaneous with that of the granter, are only used with reference to the case of acknowledgment, and not to that where the witnesses actually saw the granter sign. I confess that I cannot see any good reason for this distinction, nor do I find one suggested in the books or the decisions; but the words of the Act are definite and precise, and the distinction seems to have been always recognised by the Court—(see *Frank*,[3] and especially the much fuller transcript of the judges' opinions given in Bell on the Testing of Deeds, pp. 256 *et seq.*, *Hogg* v. *Campbell*,[4] *Thomson* v. *Clarkson's Trustees*[5]). Professor Montgomerie Bell[6] states the law and practice thus: "It is usual and right for the witnesses, in all cases, to subscribe at once, and without delay, after the party has subscribed in their presence, or acknowleged his subscription to them. But immediate subscription is not essential on the part of a witness who has seen the subscription of the party adhibited. Such witnesses may sign after the lapse of an interval of time, and the one may sign on one day, and the other on another day." The learned writer goes on to point out that *Home* v. *Dickson*,[7] which was referred to by the respondents' counsel, is not an authority adverse to what he has laid down. What, if any, limit there may be to the interval allowed to elapse between a witness seeing the granter sign and adhibiting his own signature has never, so far as I know, been decided. In *Frank's* case,[3] one finds from the report in Morison, that the interval which had actually elapsed "at most . . . did not exceed a quarter of an hour"; but the decision bears that "although there never ought to be any considerable interval; yet, when such a case occurs, it must be judged of upon its whole circumstances." Mr Duff (Feudal Conveyancing,

[1] 6 R. 1111.
[2] 1907 S. C., at p. 1312.
[3] M. 16,824, *affd.* 5 Paton, 278.
[4] 2 Macph., *per* Lord President M'Neill, at p. 855.
[5] 20 R. 59, *per curiam*.
[6] Lectures, (3rd ed.) p. 52.
[7] M. 16,898.

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p. 16), on the authority of the same case, states that "a considerable interval between the subscription of the party and their" (*i.e.* the witnesses') "subscribing, may leave room for the averment that he had withdrawn his consent before the deed was perfected; but it is not essential that the subscriptions of the witnesses should be added in his presence, or that the deed should not have been lost sight of by them in the interval." The learned author adds that "any deviation from the ordinary practice is, however, to be carefully avoided, as subjecting the deed to suspicion; and it is not to be doubted that a delay to complete the deed until another day had commenced, would be fatal"; but for the last statement he cites no authority. The judgment in *Frank's* case[1] seems to establish authoritatively that contemporaneous signature by the witnesses was not, at any time, a statutory solemnity in cases where they had seen the granter sign; and I think the inference is that the fact of time, longer or shorter, having been allowed to pass before the witnesses adhibit their signatures will never, by itself, render the writ null; but that each case "must be judged of upon its whole circumstances." It is obvious that a material lapse of time may give rise to difficult questions, and may imperil the validity of the writ; but it seems equally clear that, far more important than the mere duration of the interval, are the attending facts and circumstances, the opportunities for substitution of another writ, and the means which the witness has, in each case, of absolutely identifying the document he signs with that which he saw the granter sign. It is certainly the duty of the Court to be vigilant in such a case against anything like fraud; but, in the case now before us, it happens fortunately that Dr Walker, when he signed his name as witness, had the most perfect means of identifying the document as being that which he himself had written to his mother's dictation about a month previously. I am, therefore, of opinion that, so far as the mere lapse of time between 25th June and 24th July is concerned, there would be no obstacle to our declaring this document to be validly attested, even without the aid which it derives from the 39th section of the Act of 1874.

If, however, I should be wrong in this view, I think the provisions of that section would obviate any objection upon the head of mere lapse of time. We have here a "writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing"; and section 39 declares that such a document shall not be "deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such" writing was subscribed by the maker and by the witnesses "shall lie upon the party using or upholding the same." The present petitioners have, in my judgment, discharged this burden. I think the delay which occurred was, at most, an "informality of execution." I respectfully repeat, and adopt as my own, the words of Lord Rutherfurd Clark in *Thomson's* case,[2] where he says that, under the Act 1681, cap. 5, "the attestation of witnesses has no other object than to give assurance that the deed is the deed of the granter. Such regulations as are made with regard to the subscription

[1] M. 16,824, *affd.* 5 Paton, 278.

[2] 20 R., at p. 63.

of witnesses are formalities for attaining this end. . . . The Act of 1874 requires, I think, the Court to sustain all deeds which were signed by the granter, and honestly attested by the instrumentary witnesses. When the formalities of the Act of 1681 have not been observed, it throws the burden of proof on the person who uses the deed. I do not think that it dispensed with the necessity of witnesses. But it requires no more than that the witnesses shall have a warrant in fact and truth for what they attest. They have such a warrant if they saw the granter subscribe or heard him acknowledge his subscription. If the subscription to the deed be the subscription of the granter, and if the witnesses were warranted in attesting that fact, there is nothing lacking in essentials. The rest is mere formality of execution."

The first head of the respondents' objection, therefore, in my opinion, fails. I now turn to the second head, viz., that, apart from mere lapse of time, the death of Mrs Walker before Dr Walker's signature was adhibited made it incompetent for him thereafter to sign as a witness to the instrument.

It was urged, in the first place, that Dr Walker could not validly sign as a witness because on 24th June 1913 he was merely an amanuensis, and was not specially chosen or called in by his mother to be a witness to her signature. This point has, to my mind, no real weight or substance. The authorities referred to by the respondents' counsel do not carry him far; they were mostly concerned to show that the old objections to judicial witnesses, based on interest or character, do not apply to instrumentary witnesses who are chosen by the parties to attest their signatures; the parties are personally barred from stating such an objection; (*e.g.*, Ersk. Inst. IV. ii. 27, Dickson on Evidence, section 695). The point may, I think, be disposed of by quoting what was said—very soundly, I consider—by two of the learned judges in *Tener's* case,[1] where the circumstances under which Mr Tener was present when his wife signed the deed were, in all material respects, completely parallel with those in which Dr Walker attended on the occasion of his mother's signature. The Lord Justice-Clerk (Moncreiff) said,[2] "It was argued with much earnestness that Mr Tener could not be a witness because he was not desired by the granter to attest her signature. But there is no place for that argument in the admitted facts. No doubt, subscription before a casual, an accidental, or a concealed witness may not amount to subscription as required by the statutes. But there is no such case here. We cannot doubt that if Mrs Tener had thought that two witnesses were necessary she would have desired Mr Tener to sign. He was entrusted to do all which was necessary to make the deed effectual, and as to his competency as a witness there can be no question." Lord Gifford (at p. 1117) observed that it was argued that Mr Tener "was not specially called as a witness, and he did not himself intend to act as such, because he thought one witness was sufficient. I do not think this is a good objection. Instrumentary witnesses do not require to be 'called' as such as a solemnity. No formal *invocatio testium* is required—it is enough if the witnesses are legitimately present, and openly stand by and see what is done."

[1] 6 R. 1111. [2] 6 R., at p. 1115.

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But the real gist of the respondents' objection, as I understood it, was that the signature of a witness can only be adhibited by virtue of a mandate from the granter, that such a mandate necessarily falls on the granter's death, and that the subsequent adhibition of Dr Walker's signature was of the nature of a trespass upon the paper which was the granter's property. The argument appears to me to involve some confusion of thought. In my judgment, we are not truly here in the region of mandate properly so called; but I may observe, by the way, that if such is really the case, Dr Walker's mandate would not, to my thinking, fall on the granter's death, for—if mandate it was—it surely extended to the doing of everything which the law might require in order to verify the fact that he had seen her sign, and to make her instrument legally valid and probative. But the true theory seems to me to be that a witness to a deed, like any witness in judicial proceedings, merely testifies to a fact within his personal knowledge; and that, in doing so, he cannot be properly regarded as a mandatary of anyone else, in the one case or in the other. I may refer in this context to Lord Ormidale's observations in *Stewart* v. *Burns*,[1] which appear to me to be well founded. It may well be that Dr Walker would not, during his mother's life, have been justified in signing the document as a witness, against her wish, or without her authority, express or implied. No one has the right to sign his name, or to make any other mark, upon a document belonging to another, to the effect of changing its character, without that other's permission or assent; to do so might well be regarded as a species of trespass. But the only person who could object to his doing so is the lawful owner of it; and all idea of trespass is at once excluded by such owner's request to the witness that he should sign. In the present case, such request was in fact made to Dr Walker by those who, after Mrs Walker's death, were the owners of the paper, and entitled to found upon it. I am not to be understood as suggesting that a writ, which the maker has purposely left improbative as not expressing his completed intention, can be made to be his writ, without his leave, by the subsequent attestation of persons who happened to see him sign it. But, where we have evidence, as I consider we have here, to show that the maker did regard this as a completed testamentary writing, and also the attestation in statutory form of the witnesses who saw her sign, I know of no authority, and I see nothing in principle, which compels us to disregard the attestation, and so to deny effect to the instrument which she signed, and intended to have effect. The second branch of the respondents' objection seems to me to fail, as well as the first.

I do not think it necessary to refer to the cases which were cited to us in regard to the filling in of testing-clauses after the death of the granter of an instrument; or to say anything about the old case of *Gray*,[2] which, if well decided—perhaps a doubtful point, though the decision does not seem ever to have been expressly overruled—appears to go further than anything required by the present petitioners. But I should like to notice an argument strenuously maintained by the respondents to the effect that,

[1] 4 R., at p. 433, foot.

[2] M. 16,296.

if we decide this case in the sense in which I am for deciding it, this grave anomaly would seem to be involved, that it puts it in the power and even the caprice of a third party to decide, in any such case as this, whether a deceased person has in fact died testate or intestate. But the contingency, though it may be anomalous, is not unique. If one who intends to make a testament or other instrument neglects the obvious and proper precaution of seeing that both his witnesses sign at the time, he undoubtedly runs the risk that one or both of them may afterwards fail him; they may die or be lost sight of, or refuse (or become unable) to sign. Life is full of such contingencies; they are not created by, or dependent on, any provision introduced by the Conveyancing Act of 1874. But because he runs this risk, I do not think it follows of necessity that, where (as here) the necessary witness is available and willing to give his testimony, that testimony is to be excluded merely because the witness could not have been compelled—and I do not at present see that he could be compelled—to give it in the form which the statutes require.

For these reasons I am of opinion that we ought to declare that the document No. 11 of process was duly subscribed by the granter and the attesting witnesses.

I find myself unable to agree with those of my brethren who hold that, as matter of statutory solemnity, it is essential that a witness, who has seen a granter sign, must adhibit his own signature substantially at the same time, or that such adhibition of signature is an affair of pure mandate, or that the intervening death of the granter is necessarily a bar to the effectual adhibition of a witness's signature. As already explained, I am of opinion that the contemporaneous signature of any instrument by a witness, who has seen the granter sign it, has never been an essential solemnity of our law; that signature by a witness is not truly an affair of mandate at all, but one of evidence; and that the fact of the granter's death will not by itself preclude the witness from testifying thereafter, in competent form, that he did see him sign. At the same time, I hope that my opinion in this case will never be understood as affording the slightest approval of any unnecessary deviation from the ordinary and proper practice as to the signing of deeds. Any such deviation, in my judgment, is not only irregular, but may be fraught with grave peril to the probative character of the instrument. In every case the circumstances will be for the careful and jealous scrutiny of the Court. But, in the case now before us, where the facts are exceptionally favourable, it seems to me that we cannot justly refuse to declare that the writing in question was subscribed by Mrs Walker, as maker thereof, and by Miss Hayward and Dr Walker as witnesses attesting her subscription; and that, after all,—though one has been led to discuss a variety of questions,—is the sole demand of the prayer of this petition, as amended at the bar of the First Division.

Lord Johnston.—The question raised in this case is one of great importance to the Scottish law in the matter of authentication of deeds, and its decision in the manner proposed by your Lordship, who has already spoken, and those of your Lordships who agree with him, would, I think, give a further shake to the confidence which has justly been re-

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posed for more than two centuries in a practice created and fostered by statute. I cannot help feeling that your Lordships are influenced in your conclusions by a feeling of sympathy for the individual deed, instead of by a consideration of what is best for deeds in general, and that you are opening wide the door to the exception instead of regarding the general advantage of the rule, and are relegating the effectiveness of the attestation and therefore the validity of a will, and equally of any other important document, to a proof of facts and circumstances. I think it not without some use that we consider precisely what you are proposing to do here. The deceased lady left a regular settlement and a regular codicil, both prepared by skilled conveyancers, and duly executed. Within a week of her death, she is alleged to have dictated to her son, a London surgeon, what she is said to have described as an addition to her will, and what he at the time designated as a codicil. This document written on a half sheet of paper consists of three lines, which are not an addition to, but an entire supersession of her former will, and of twenty-two lines of personal bequests, dealing with plate, jewels, and other mementos. Taken as they stand, the first three lines have the effect of disinheriting one stirps among her descendants. It is open at least to some doubt whether the real object of this document, if perfected, was merely to make the distribution to nine selected individuals of jewellery and family possessions, the first three lines, being merely a preamble, shortly narrating what she understood her will already to have done, or whether it was truly to make a re-disposal of her whole estate, in order to cut out the issue of her deceased daughter, with some personal gifts superadded. I only say that there is room for hesitation on the subject, and that the writer, and the witness who is said to have perfected the deed a month after the lady's death, was a son, who benefitted in some degree by the disherison of his sister's issue.

I am glad to concur in what I understand is the view of all your Lordships that, in the present case, there is no ground for the slightest imputation on the good faith of those concerned, and I am confident that Dr Walker in particular never for one moment considered, probably never realised, his personal interest in what was being attempted. But I ask myself where the decision which your Lordships propose is to lead us, and how we are to deal with a case where the circumstances bear a different complexion. I do not pursue the point, which must be clear to anyone engaged in conveyancing practice, nay I should think even to the layman, if he be told that a will ineffectual at the death of the alleged testator, can, after, and it must then be conceded at any time after, the death, be validated by the act of a third party *ex proprio motu*, for though compulsitor has been ventilated none has been suggested.

The subject requires consideration of four points. 1st. The growth of the statutory practice which existed prior to 1874. 2nd. How far the statutory provisions are affected by subsequent decisions. 3rd. The intent and effect of the legislation of 1874. And 4th. The effect of the alleged testator's death while the deed in question was improbative because incomplete.

First, then, as regards the statutory system :—I do not propose to enter

at length upon the subject. But I think that it is important to point out (1) that the moving cause of the interference of the Legislature was the prevention of fraud, more common in times when the art of writing was confined to the few and when the granters of deeds were frequently illiterate, than at the present day; and (2) that the result of this legislative interference was to bring about that valuable legal conception, the probative deed—that is to say, the deed which proves itself, not indeed as being *probatio probata* of its own authenticity, but as producing such a legal presumption of its own authenticity that it stands effective in law, until set aside by direct challenge.

The advantage of the probative deed has hitherto placed our system of execution of deeds in advance of that which prevailed in England. Now I confess that I think we must take a lower place, if the petitioners' contention is to prevail, at least until, what I trust we shall some day see, a statute is passed clearly declaring that to make a will—and, for that matter, any other obligatory document not *in re mercatoria*—effectual, it must be signed as in England in presence of two witnesses, who shall sign as attesting in presence of the testator or granter and of one another. I do not think that we need be ashamed to follow the very excellent example of the English Wills Act of 1837.

The Scottish system was the result of a number of statutes framed between 1540 and 1681, which provided certain forms to be observed in the execution of a deed, if it was to have effect, and so that it might carry "its credentials within itself." Shortly these statutes (1) substituted signature for sealing and made the former imperative; (2) required the writer of the document to be designed at the end thereof; (3) required deeds when written bookwise to be signed on every page, where they consisted of more than one sheet, and the numbers of the pages to be mentioned in the end of the deed; and (4) substituted subscribing witnesses for witnesses not subscribing, and required their designation in the body of the deed at the end thereof. I refer in detail only to the Act of 1681, cap. 5, the last and most important, because it substantially codified, in clearer expression, much that had preceded it. Its terms have been much canvassed in the present case. It, for the first time, so far as I am aware, used the expression "probative" witness. It commences with the preamble: "Considering that by the custom introduced when writing was not so ordinary witnesses insert in writs although not subscribing are probative witnesses and by their forgetfulness may easily disown their being witnesses," and "for remedy whereof" it enacted "that only subscribing witnesses in writs to be subscribed by any party hereafter shall be probative and not the witnesses insert not subscribing." So far is clear. And then it goes on: "and that all such writs to be subscribed hereafter wherein the writer and witnesses are not designed, shall be null and are not suppliable by condescending upon the writer or the designation of the writer and witnesses." In the construction of this Act something has been made, by those desirous of refusing it full effect, of the nullity attached to this last provision, as contrasted with the mere positive enactment of the former. But I again draw attention to the term "probative." The clause excludes recourse to the non-subscribing

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witness—his testimony can have no bearing on the authenticity and effectiveness of the deed. It is only the subscribing witness who can be "probative," or give the deed its "probative" character. The sanction of nullity would thus be not merely unnecessary, but out of place. The statute then proceeds to deal with the detail of attestation, and enacts "That no witness shall subscribe as witness to any party's subscription, unless he then know that party and saw him subscribe . . . or that the party did at the time of the witness' subscribing acknowledge his subscription otherwise the said witnesses shall be repute and punished as accessory to forgery." Controversy has arisen on this passage also as to whether it required the witness, where he sees the party sign equally as where he only hears the party acknowledge his subscription, then and there to append his attesting signature. On the terms of the statute taken by themselves I should have had no doubt that the word "then" covers the witness' seeing the granter subscribe, as well as his knowledge of the individual subscribing, and that it is the same in effect as the slightly different expression "at the time of" in the latter part of the clause, which is rendered necessary by the different collocation. I cannot doubt that the statute intended, though expressing it in the simple and less skilled legal diction of Scotland in the seventeenth century, what is the English practice, of the granter signing in presence of the witnesses and the witnesses in presence of the granter and of one another, and therefore "at the time." And again, I do not think that anything is made in favour of laxity by the contention that there is no sanction of nullity, but only a penalty imposed on the individual witnesses. All is part and parcel of what is necessary to make even the subscribing witness a probative witness.

Secondly, what has been the effect of decision on the legislation of 1681 and prior years? As particularly touching the present question, while it is contended for the petitioners that the Courts have given a wide interpretation to the terms "then," and "at the time of," the only cases cited to us which truly bear upon that question were these:—*Frank's* case,[1] where the witnesses had seen the granter sign, and, by reason of his extreme illness, were then sent into the next room so that he should be no more disturbed, to which place the deed was brought to them by the lawyer, and there signed by them within a quarter of an hour. The important point, of course, was the witnesses having lost sight of the deed, even for such a brief period. The Court, however, sustained the deed, remarking at the same time,—"There never ought to be any considerable interval; yet when such case occurs, it must be judged of upon its whole circumstances," and the House of Lords affirmed. Next comes *Condie*,[2] where the witness went into another room and signed. But in view of the case of *Frank*,[1] the point was not taken. Then *Hogg's* case,[3] where it was held no objection that a signature was acknowledged to the two witnesses separately, and that they attested it separately, and not in presence of one another. But Lord Colonsay, going beyond the question before

[1] M. 16,824 and 5 Pat. 278. [2] 2 S. 432, N. E. 385.
[3] 2 Macph. 848.

him, and drawing a distinction between the case of a signature seen and one merely acknowledged by reason of the words used in the statute, expressed the opinion that there could be no interval in the latter case, though he indicated that practice had recognised that an interval in the former case was admissible. His Lordship, who does not state what he understands under the term "interval," or what he means to be understood by the term "practice" and whether anything more than is derived from the case of *Frank*,[1] at the same time gives the very unsatisfactory reason for the distinction, viz., that the witnesses may not after an interval recognise the deed that they saw acknowledged, whereas the witnesses have no more means of identifying the deed in the one case than in the other. *Thomson* v. *Clarkson*[2] follows. The witnesses came a distance to the granter's house, that a deed already signed might be acknowledged before them. Instead of signing then and there they brought the deed away with them, and took it straight to their employers' office, where they witnessed it at once. They were three-quarters of an hour on the road. Lord Justice-Clerk Macdonald said,[3] "Such a case seems to me to be quite different from one in which there has been an interval in a true sense, where the piece of business has been set aside, other things done, and then the attestation of the witnesses taken up of new, and at a different time," and Lord Rutherfurd Clark held the attestation to have been completed at the time, in the fair and reasonable sense of the phrase,—"The whole is one continuous process." I do not regard the *ex parte* proceeding in *Murray's* case,[4] however extraordinary, as of any value as an authority. And *Brownlee's* case,[5] though the point was raised, proceeds on a different ground. There remains the case of *Tener*,[6] which is under reconsideration. Lord Justice-Clerk Moncreiff expresses the opinion[7] that it is not "necessarily fatal to a deed that the attesting witnesses have signed after an interval." For this opinion—and the interval in the case to which he was addressing himself was more than two years—his Lordship gives no authority, and in view of the other cases both before and since, in the light of which I must read any dicta of text writers, I cannot hold that any extension has been judicially given to the statutory provision in question beyond this, that *provided the whole is a continuous process*, the terms "then" and "at the time" will not be construed so strictly as to affect the statutory regularity of the procedure. If *Tener's* case[6] is to be followed, and the deed under consideration upheld, the result will, I think, be to throw over all previous authority, and, as I have already said, to relegate the authenticity of a will or other obligatory document to a proof of facts and circumstances.

Third, what was the intent and effect of the Conveyancing Act of 1874. This mainly depends upon the provisions of section 39. But I think that some attention must first be given to section 38. This is intended apparently to maintain the probative character of a deed duly executed, but at the same time to reduce the essentials. "It shall be no objection," it says,

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[1] M. 16,824, and 5 Pat. 278. [2] 20 R. 59. [3] 20 R., at p. 61.
[4] 6 F. 840. [5] 1907 S. C. 1302. [6] 6 R. 1111.
[7] 6 R., at p. 1115.

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"to the probative character of a deed . . . that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed . . . or in the testing-clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended" at any time, and by any person, before the deed is recorded or produced in judgment. Which then of the statutory solemnities, that I enumerated at the outset, are left? None but these—1st, that under the Act 1579, cap. 80, the granter must subscribe; 2nd, that under what is left of the Act 1696, cap. 15, where a deed is written bookwise, each page must be signed by the granter; and 3rd, that under the Act 1681, cap. 5, instrumentary witnesses must subscribe, and that when they subscribe they must know the party whose signature they attest, and they must either see him subscribe or he must acknowledge his signature to them. Having then reduced the statutory solemnities to these, the statute provides, section 39, that "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing . . . shall be deemed invalid or denied effect according to its legal import because of any informality of execution." That is the positive enactment. But then it is laid under this condition that "the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same." The rest of the section deals with how such proof may be led, and is not material to the present question.

In studying this section, one must, I think, be struck with the justice of what is said by Lord Neaves in *M'Laren's* case,[1] viz.—"The 39th section is a peculiar clause, and is not very happily framed, I think, nor very harmonious in all respects," and his Lordship then comments on the strange distinction between the introductory words, as they refer to the granter and to the witnesses. Taking them as they stand, the deed must be signed by the granter. It need only bear to be signed by the witnesses. His Lordship says, "I do not understand the meaning of that difference of expression, or whether it has any meaning." I confess that I am equally unable to understand it. But one thing is certain, that it is a condition precedent of the provision applying that the deed shall be signed by the granter and shall bear to be attested by two witnesses subscribing. *Ex hypothesi* there is something about the deed, in aid of which the provision of section 39 is made, which renders it improbative. But it is, nevertheless not to be denied effect because *of any informality of execution*, provided the subscription and the attestation is proved. I would ask the petitioners what is meant by *informality* of execution? I cannot regard it as comprising anything but defect in some prescribed formality, which renders the document *ex facie* improbative. Such defect can only appear *ex facie* of the document. It must be patent. The deed which we are considering—though it does bear a suspicious appearance in the original—if

[1] 3 R., at p. 1159.

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a fair copy is made of it, is found to be in all respects *ex facie* formal and probative according to the present law. What is the objection to it? Not that it is patently informal, but that it has a latent defect, depending on the fact that, though it bears to have two instrumentary witnesses, it really only had one. I cannot accept the somewhat cynical contention of the author of the Act, in *Geddes's* case,[1] that the provision of the section covered, and I suppose was meant to cover, the case where, though it could be proved that the granter's and witnesses' signatures were genuine, the witnesses attested nothing, having never seen the granter sign, nor heard him acknowledge his signature. And to this, I think, Lord Kinnear refers in *Forrest's* case.[2] If the petitioners admit that the informality consists in this that, when the testator died, her will was attested by only one witness, I agree that that was an informality, patent on the face of the deed, but then it was one which could not be cured by the proof allowed by the 39th section. But if they maintain that the informality consisted in this that one witness adhibited his attestation, *ex intervallo*, not to say after the granter's death, then I conceive this is not merely an informality. The deed is formal, and therefore probative. It needs no form to be supplied. If the *ex post facto* and even *post mortem* adhibition of an attesting signature had the legal effect which is attributed to it, it stands, not because of the proof permitted under the 39th section, but because it is formal and probative, and no effectual challenge of it has been established. If the postponed attesting signature had no legal effect, it falls, notwithstanding that signature, and notwithstanding proof of the authenticity of the whole signatures.

Like Lord M'Laren in *Brownlee*[3]—"I am not quite clear as to the ground of decision in the case of *Tener's Trustees*,[4]" and with him "I cannot admit that a witness who does not sign the deed is an instrumentary witness, or that the omission to sign is an informality of execution which can be corrected or supplied after the death of the maker of the deed," and I should have added *ex intervallo*, had I been dealing with the more general question. I can find no more clear expression of the ground of decision in the last-mentioned case than that given by Lord Gifford. The *ex post facto* attestation of the witnesses, "was irregular, and is, I think, indubitably an irregularity of execution, or as the statute calls it an informality."[5] This begs the question. For that is exactly what the statute does not do. I am aware that the matter was considered by the three Judges who decided the case of *Thomson* v. *Clarkson's Trustees*.[6] They were all agreed that the objection that the witnesses had signed *ex intervallo* was not good under the Act 1681, cap. 5, because there had been no real interval. But at the same time they were all of opinion that, had it been necessary, recourse might have been successfully had to the Act of 1874 section 39, because, I must assume, they agreed with Lord Justice-Clerk Macdonald that the objection related to formality of execution. I think it right to refer more particularly to Lord Rutherfurd Clark's opinion, for he proceeds upon the view that the

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[1] 18 R. 1186. [2] 1907 S. C. 1240. [3] 1907 S. C., at p. 1312.
[4] 6 R. 1111. [5] *Ibid.*, at p. 1117. [6] 20 R. 59.

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object of the Act of 1681 was to give assurance that the deed in question was the deed of the granter, and that its regulations were formalities for that end. Most of them are. But, if the subscription of the witnesses is only a formality, the want of it under the Act of 1874 should not have rendered the deed ineffectual. That it does so, shows that it is not a formality merely, but an essential. It was, I think, unfortunate that the important case of *M'Laren* v. *Menzies* [1] was not canvassed at the hearing. It was quoted, but only in answer to a question put by myself on an incidental point, and was not discussed. It was heard before a Court of seven Judges and decided, by a narrow majority, that while the signature by the granter of all the pages of a deed, consisting of more than one sheet, was still an essential solemnity, the failure to attend to which rendered the deed improbative, the defect was an informality—and be it remembered it was patent—which could be obviated by recourse to the 39th section of the 1874 Act. The case is in consequence the most instructive which I have found on the bearing and limitations in application of that section. I do not detain your Lordships by referring in detail to the opinions. I would only particularly refer to what Lord Deas says at page 1158 for a limited purpose. "This leads me," his Lordship says, "to observe that I think the petitioners acted quite rightly in not appending the designations of the witnesses to their subscriptions" (the want of these was another defect in the deed, as it stood, at the granter's death) "before presenting this application, because it was very desirable that the Court should see the deed, untouched, in the state in which it was left by the testatrix." I too think that we are entitled and bound to look at the deed as it stood at, and for a month after, Mrs Walker's death. There is no imputation intended on the subsequent actings of her trustees or her law-agents, whichever of them were responsible for what was done, nor of the witness Dr Walker who acted on their instructions. They were acting *ob majorem cautelam*. But their action does not alter the question which we have before us. And looking at it, as Lord Deas, and I think his brethren, would have looked at it, I am bound to conclude that the deed in question was informal when it came into the hands of the granter's trustees and law-agents, that it was consequently improbative, but that its particular informality, the want of an instrumentary witness, was not one which could be obviated by recourse to the 1874 Act. If, however, it be represented that its informality was not the quondam want of an instrumentary witness, but the *ex intervallo* adhibition of that witness's signature, then I hold that this was not an informality in the sense of the statute, but an illegal irregularity.

I may in conclusion, on this branch of the case, refer for a moment to *Baird's* case.[2] The objection taken by some of the granters of the deed in that case was that the witnesses had not seen them sign or heard them acknowledge their subscriptions. The deed was probative, but was challenged in a multiplepoinding. The Lord President (Inglis) not referring in particular to the 1874 Act, which was inapplicable, uses language which

[1] 3 R. 1151.

[2] 11 R. 153.

has been founded on by the petitioners. While he says [1] in the first half of his opinion "The objection we are dealing with therefore is a technical latent objection. There is nothing upon the face of the deed that can suggest in any way the possibility of its being anything else than a well-tested deed," he uses a different expression [2] in the latter part of his judgment, thus "there is an informality—a technical and undiscoverable informality, known only to" the granters. I cannot think that his Lordship, in this latter expression, meant anything different from what he had said in the former, or gives any real support to the petitioners' contention. Lord Mure speaks of "a technical objection" and Lord Shand of "a latent objection."

It was further maintained by the petitioners that unless the present case fell under the expression "informality of execution," there was nothing to which that expression can be referred. This contention is negatived by the case of *M'Laren*,[3] and by the instances there suggested from the bench, as well as by several cases which have since occurred.

Fourth:—I have dealt with the case hitherto irrespective of the special point that the second instrumentary witness adhibited his signature at the request of the executors or rather of their law-agents a month after the testatrix's death. I desired to explain my view of the subject independently of that specialty. Were it not so I should, with his Lordship's leave, have simply adopted the opinion of Lord Skerrington, which I have had the privilege of perusing and considering. In all that he says I entirely concur, and do not think I need detain your Lordships by dealing separately with this branch of the question. I would only add one remark. I do not regard the *post mortem* adhibition of the witness's signature as in any way justified by the lady's executors' title of property in the *corpus* of the document. But I do consider the *post mortem* adhibition of the witness's signature as an unauthorised interference with that incorporeal abstraction, the testamentary intention which that document, had it been complete at Mrs Walker's death, would have recorded and conveyed, but which it failed to record and convey because it was not complete when she died. It was an accident that she left executors appointed under a regular settlement previously executed. She might just as well have died intestate. But, in point of fact, the signature of the second witness was adhibited, whether with the knowledge of these executors or not, at the instance of the lady's law-agents, acting on their own initiative and on the advice of counsel. How does the witness justify his *post mortem* interference? On the ground of duty to the deceased? Or of his civil duty to bear testimony to what has come under his observation when called upon? Or of his goodwill to some one or more who will benefit by the document when set up? None of these except the first can be seriously maintained. As regards it, in point of fact, the witness was never asked by the lady to attest her signature. As writer of the deed he had delivered it over to her, and had no right to resume the custody. Duty appears to me to imply mandate. Here there was no mandate. Had there been such, it would, in my opinion,

[1] 11 R., at p. 160. [2] 11 R., at p. 161. [3] 3 R. 1151.

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[1] 11 R., at p. 160. [2] 11 R., at p. 161. [3] 3 R. 1151.

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have fallen by the resumption of possession by the granter, and, independently, by her death.

LORD SALVESEN.—I have had an opportunity of reading the opinion which has been delivered by Lord Dundas, and I concur in the result of that opinion, and generally in the reasons which he has adduced. There is only one point on which I do not go entirely along with him, and that is raised by the last observations which have been made by Lord Johnston. I agree with Lord Dundas that the right or, as I should prefer to call it, the duty of a testamentary witness to adhibit his signature after an interval, if he has not done so at the time of execution by the testator, does not depend in any way on the doctrine of mandate. The instrumentary witness is merely a witness to a fact—the fact of the granter's signature—a fact which, according to our law, cannot be established in any other way than by the signature of the witnesses who were present when the granter signed. I do not attach the same importance as Lord Dundas does to the fact that this particular witness was asked to affix his signature by the persons who happen to be the executors of the deceased. It might have been that the deceased would have died intestate if the incomplete deed was not to take effect, and I cannot imagine that the duty of the witness to complete the document would depend upon whether it was in the interest of the heirs, who would then be the owners of the *corpus* of the uncompleted will, that he should do so. It rather appears to me that any person interested in the incomplete will would be entitled to demand that the testamentary witness should at least have an opportunity of signing his name as a witness, and so completing the document the execution of which he in fact witnessed. I do not know whether he might not, under certain circumstances, be ordered by the Court to affix his signature after an interval and so to complete the document; but, at all events, I do not think that the mere accident in this case that the executors were willing that he should complete the document by his signature is of any material importance, or that there would have been anything in the nature of a trespass by him but for the circumstance that he was invited by the owners of the incomplete document to affix his signature.

These are the only observations which I think it necessary to make so as to guard against my being assumed to assent to that part of Lord Dundas's opinion. For the rest, he has expressed the opinion that I hold so much better than I could do that I have nothing to add.

LORD MACKENZIE.—I concur with Lord Dundas, whose opinion I have had an opportunity of reading.

LORD GUTHRIE.—In defining the precise question before the Court, it is necessary to keep in view three dates, all in 1913, namely, (1) 25th June, when Mrs Walker's testamentary writing, written by Dr Walker, her son, to her dictation, was signed by her in his presence and in presence of Nurse Hayward, who were impliedly authorised by the deceased to act as witnesses to her signature of the document, and of whom Miss Hayward subscribed immediately after the testatrix and in her presence; (2) 1st

July, the date of Mrs Walker's death; and (3) 24th July, when Dr Walker, acting under legal advice, signed the writing, thereby intending, by the only method allowed by law, to fulfil the undertaking impliedly placed on him by his mother, and to render the document a valid testamentary writing. Thus the document in question in this case was signed by Dr Walker twenty-nine days after his mother had subscribed it in his presence, and twenty-three days after her death.

In these circumstances, putting out of view meantime the serious and difficult question which arises under section 39 of the Conveyancing Act of 1874, I cannot bring Mrs Walker's act in signing on 25th June as the granter, and Dr Walker's act in signing on 24th July as an attesting witness to his mother's signature, within the category of one continuous transaction. Nor, again, apart from the Act of 1874, can I see how the writing can be supported as a duly tested testamentary writing, even supposing that Dr Walker was entitled to sign not only at any time up to his mother's death but also within such a period thereafter as made it reasonably possible for him to do so; no relevant reason, such as sudden illness, is suggested, to explain why, instead of signing at once after the death, he delayed for twenty-three days. It is not alleged that Mrs Walker gave Dr Walker express instructions to sign, if necessary, at any time after her death; and there was no special circumstance to imply any such instruction on her part. Therefore no question of the relaxations which may be justified from cases like *Frank*[1] and *Thomson*[2] arise in the present case. In these cases, although there was an interval of less than an hour between the testator's subscription and the witnesses' signatures, the two acts might fairly be held parts of one continuous transaction, with no greater interval than the circumstances made reasonable. Had the decision, which, I understand, your Lordships approve, been put on the ground that, although there was an interval of twenty-nine days between the date of Mrs Walker's signature and Dr Walker's signature, the two acts were truly, in the circumstances, part of one transaction, or on the ground that, although twenty-three days elapsed between Mrs Walker's death and Dr Walker's signature, the deed could not, in the circumstances, have been reasonably expected to have been signed sooner, the decision, although I could not have acquiesced in it on the facts, would have had little legal importance. Nor can the question be affected by the fact that the deed was duly signed by Miss Hayward, the other witness. The same issue would have arisen had the deed, as at Mrs Walker's death, borne no signature but Mrs Walker's.

Accordingly, the question seems to me to be whether it is the law of Scotland, as alleged by the petitioners, that a document, requiring for its validity to be attested by two witnesses, is valid, or may be validated under the 1874 Act, if the persons who have received from the maker of the document authority, express or implied, to act as instrumentary witnesses sign at any distance of time after the maker's death. I assume that Dr Walker had express authority, as an amanuensis, to write out the deed to his mother's dictation, and had implied authority as a witness to sign it, or, as an agent, to get it signed.

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[1] M. 16,824, *aff.* 5 Paton, 278.

[2] 20 R. 59.

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The affirmative of the proposition just stated was laid down by a bench of three Judges in *Tener's Trustees*,[1] which was followed by Lord Kincairney in *Beattie*.[2] In *Tener's Trustees*[1] Lord Ormidale said (p. 1116): "I find myself obliged to concur, although not without reluctance; for the result will be that almost everything connected with the solemnities attending the execution of deeds, beyond the actual signature of the party, may be supplied, as in the present case, after the granter's death, and that, too, after the lapse of any number of years provided the deed has not been 'produced in judgment.' But this result is the effect of legislative enactment, which leaves us no alternative. That result is nevertheless somewhat startling, and may open the door to those frauds which it was the aim and, as I think, the effect, of the older statutes to prevent." In that case no attempt was made by any of the Judges to bring the signature of Mrs Tener, the maker of the deed, and the signature of the instrumentary witness, who subscribed more than two months after Mrs Tener's death, into the category of one transaction, or to say that the interval was reasonably necessary.

I am not disposed to accept the opinions in *Tener's Trustees*[1] as expressing the law of Scotland on this matter, unless I am forced by decision or practice. The result seems to me opposed to principle, and likely to bring about results not only grotesque but productive of serious embarrassment and injustice, results, so far as I know, impossible under the law of any other country. Whether an individual has died testate or intestate is a question which the Courts have frequently to consider; the grotesqueness of the situation will arise from the fact that, in circumstances like the present, the question will depend not on the act of the deceased but on the whim or goodwill or avarice of a person called, it may be accidentally, to attest the deceased's signature. In certain circumstances this result will involve grave injury to the public interest, without, so far as I can see, any counterbalancing advantages. In addition to the risks of fraud referred to by Lord Ormidale in *Tener's Trustees*[1] (which might be equally alleged about other cases, such as signature only on the last page, which are undoubtedly covered by section 39 of the 1874 Act—*M'Laren* v. *Menzies*[3]) it may, in trusts, lead to a deadlock; it will encourage laxity of practice on the part of the legal profession in relation to their most important duties; and it will lead to what may be called legalised blackmail. If a document can be signed by a witness at any time after the death of the granter, and so rendered as effective as if signed *unico contextu* with the granter's signature, or at least *unico contextu* with the granter's death, the temptation to depart from the admittedly proper rules to have a document completed at once will be obviously increased. As to direct public interest, persons called to be instrumentary witnesses will be in a position, after a testator is dead, to hold up the administration of a trust indefinitely by refusing to say whether they will or will not sign. This might happen without suspicion of blackmail if the witness, as not infrequently happens, has either entirely forgotten, or has only a hazy recollection, that he was present when the deceased subscribed, or that he heard the deceased acknowledge his signature. In such a case, is the witness, on the assur-

[1] 6 R. 1111. [2] 6 S. L. T. 277. [3] 3 R. 1151.

ance of credible persons that he was present and saw the testator subscribe or heard him acknowledge his signature, bound, or at least entitled, to add his signature? Or there may be delay or refusal if the witness (contrary to what happened in the present case, where it was to Dr Thomson's advantage that the codicil of 25th June should be validated) finds out, on looking at the terms of the document which he saw the deceased sign, that, if he signs, he will seriously injure his own interests or those of his children. A witness's interest to sign or not to sign might even vary according to the period when the request was made. In such a case, is the witness deliberately to injure or ruin his personal or family interests, because, without a word of assent on his side, he has happened to see a deceased testator subscribe, or happened to hear him acknowledge his subscription?

These difficulties, or some of them, might, no doubt, be obviated, if it were competent for the Court, at the instance of those interested in an incomplete will, to dispense, after the death of the testator, with the signatures of witnesses, who refuse, or unduly delay, to sign, and to hold a document as duly tested, which is not tested at all. Contrariwise, the difficulties might be overcome, if it were competent, at the instance of those interested under a previous will or as heirs *ab intestato*, to declare that, if the witness or witnesses do not adhibit their signatures within a certain period, the alleged testamentary writing will be held invalid. Or the witnesses might be forced to sign, if it were competent for the beneficiaries under the incomplete will to sue the recalcitrant witnesses for declarator that they were bound to sign, and a relative crave for an order *ad factum præstandum*, with an alternative conclusion for damages, in the event of their failing to implement the order, the measure of the damages to be the amount of the lost benefits. But it is not said that any of these suggested remedies are competent, and I do not know of any others that are competent; the result being that recalcitrant witnesses could produce an impasse, which in some cases would remain till the witness's death, and in others would be removed by what I have already hinted at, namely, a transaction savouring of blackmail, yet not blackmail. If witnesses could not be forced to sign, either by a decree *ad factum præstandum* to be followed on disobedience by imprisonment, or by an action of damages for refusal to sign, they would be in a position to make their own terms either to sign or not to sign, terms which would probably be arrived at after something in the nature of an auction. In view of the fact that anybody can fill up a testing-clause, the analogy on which the petitioners strongly founded fails in at least one essential particular.

The question thus stated is one of great difficulty, on the common law, under the statute of 1681, chapter 5, and under the 39th section of the Conveyancing Act of 1874. On the whole, I am of opinion that the law is not in the unfortunate position alleged by the petitioners, and that the writing founded upon is not part of the will of the deceased.

As I have indicated in my statement of the question, I do not proceed on the matter of undue interval between the date of Mrs Walker's signature on 25th June and Dr Walker's signature on 24th July. Prior to the passing of the 1874 Act, I think, on the authorities cited to us, that the length and the circumstances of the interval would have been fatal to

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the petitioners' case. But I assume, had Mrs Walker survived 24th July without withdrawing Dr Walker's authority, that the delay, although exclusive of the idea of one transaction and beyond the limits of reasonable delay, would have fallen under the head of informality of execution, which the 39th section of the 1874 Act was designed to cover. But, for the reasons stated by Lord Johnston in the opinion which he has read, and by Lord Skerrington in the opinion which he is about to deliver, and which I have had an opportunity of reading, it seems to me clear that, before the passing of the 1874 Act, the death of Mrs Walker would have made it impossible for Dr Walker thereafter to complete the deed by appending his signature as a witness, and that this obstacle was not removed by the 1874 Act.

The opinion of Lord Rutherfurd Clark in *Thomson's Trustees*[1] was strongly pressed on us by the petitioners' counsel; but I see nothing in that opinion inconsistent with the view I have just expressed. His Lordship had no occasion to consider what seems to me the real question in this case. Section 39 of the Act of 1874 has a negative and a positive clause which must be read together. The words "bearing to be attested" in the negative clause are contrasted with the word "subscribed" in the positive clause. That clause places on the petitioners the burden of proving that the writing in question was subscribed by the witnesses by whom it bears to be attested. In my opinion, in view of the contrast to which I have referred, "was subscribed" must mean was validly subscribed. I adopt, as equally applicable to the question of warrant to sign, Lord Deas's words in *M'Laren* v. *Menzies*,[2] used in reference to a different alleged defect:—"I do not think the proof, competent and requisite under the statute, was intended to be limited to the bare fact that the subscriptions are genuine. On the contrary, I think that the surrounding facts and circumstances attending the subscriptions both of the granter and witnesses,—everything in short tending to satisfy the mind of the Court that the deed was intelligently and deliberately subscribed when in the state in which it appears when submitted to the Court, may be and ought to be elicited in the proof." The petitioners have discharged the statutory burden in the case of Miss Hayward. In my opinion, they have failed to do so in the case of Dr Walker, because it appears from the proof that he signed the writing in question when his warrant to do so had fallen by his mother's death, and because, even if it be reasonable to hold that a signature of a witness appended at the earliest possible moment after the death of a granter ought to be sustained as a valid subscription, Dr Walker's signature was not adhibited so as to fall within this possible exception to the rule that a mandate falls by death. It has been assumed, I think rightly, that surreptitious onlookers would not be entitled to act as instrumentary witnesses, because they have not been, as Erskine (iv. 2, 27) puts it, "called for that purpose." If so, I do not understand under what legal category the relation between the granter of a deed and instrumentary witnesses can be placed if it be not that of mandate, and no other category which seems to me applicable has been suggested. The mandate

[1] 20 R. 59.

[2] 3 R., at p. 1158.

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covers two acts, first to see the granter sign, and second to subscribe. But partial execution does not prevent withdrawal of a mandate as to the portion unexecuted; and Mrs Walker could have withdrawn the mandate which her son possessed to sign as a witness to her signature. If so, I am unable to see why this question should not be solved by an application of the simple and universal rule of law and of common sense, that the effect of the death of a granter is the same as if in life he had expressly withdrawn the mandate, a solution, in accordance with legal principles, which avoids what seems to me the absurd as well as injurious results of the law for which the petitioners contend. I am therefore of opinion that the petition should be refused.

Lord Skerrington.—This petition raises the general question whether a codicil or other testamentary writing which at the testator's death purported to be signed by the testator and to be attested by a single instrumentary witness can be afterwards completed and validated by the signature of a second instrumentary witness who saw the testator subscribe. The question would have been the same if neither of the instrumentary witnesses had signed his name until after the death of the testator.

There is no doubt upon the evidence that the codicil, the formal validity of which is in question, truly represents the final testamentary intentions of the testatrix, and that the irregularity in its execution arose from no hesitation on her part, and from no want of good faith on the part of the persons who attended upon her. One of her sons wrote out the codicil to her dictation when she was ill in bed about a week before her death. At his request a nurse who had seen his mother sign the codicil subscribed it there and then as a witness. Unfortunately he did not appreciate the fact that by the law of Scotland two witnesses are necessary. Three weeks after his mother's death the deceased lady's solicitors, acting on counsel's advice, requested him to sign the codicil as a witness, which he did. I hold it proved on the evidence that, when his mother dictated her codicil to him, she impliedly authorised him to do what was necessary for its formal completion. I doubt, however, whether after he had handed over the codicil to the testatrix, as he did immediately after the witness had signed, he could lawfully, without fresh instructions, have taken the paper out of her possession in order to sign it as a witness. That question does not here arise. What we have to decide is whether, after the testatrix had died leaving the codicil formally incomplete, her son had power to complete it by signing his name as a witness. I attach no importance to the fact that he so acted without the authority of one of the deceased's executors. If he was entitled to sign the codicil as a witness after the death of the testatrix, any person interested in upholding its validity must have had a legal right to insist upon the writing being produced in order that it might be formally completed. The right of a beneficiary under a testamentary writing cannot depend upon the whim of the custodier of the paper.

There is a decision pronounced by three Judges of the Second Division in 1879—*Tener's Trustees* v. *Tener's Trustees*[1]—to the effect that it is

[1] 6 R. 1111.

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irregular for an instrumentary witness to sign his name after the death of the granter of the deed, but that the informality is one that can be cured in terms of section 39 of the Conveyancing (Scotland) Act, 1874. That decision was followed by Lord Kincairney in the Outer House—*Beattie* v. *Bain's Trustees*,[1] but its soundness was doubted by Lord M'Laren in *Brownlee* v. *Robb*.[2] He expressed the hope that the question might in the future be reconsidered by a larger Court, and that has now been done.

Section 39 of the Act of 1874, upon which the present petition is founded, enacts:—[His Lordship read the section]. The question which we have to decide is whether the failure of one of the attesting witnesses to sign the codicil until after the death of the testatrix made it invalid under the law as it stood prior to 1874; and if so, whether such failure is an "informality" which can be cured by evidence in terms of the clause just quoted. The absence of any form which the law requires in order to secure the genuineness of a deed may be described as an "informality," and a challenge of a deed on that ground may be described as merely "technical," if the genuineness of the granter's subscription is admitted. Thus, where an onerous deed admittedly genuine was challenged on the ground that an instrumentary witness had neither seen the parties subscribe nor heard them acknowledge their signatures, the objection was described by Lord President Inglis as a "technical informality"—*Baird's Trustees* v. *Murray*.[3] On the other hand it was conceded by the petitioners' counsel that an informality of this kind (unless cured in the case of an *inter vivos* deed by *rei interventus*) was absolutely fatal, and that the section did not apply to such a case. It was so decided in *Smyth* v. *Smyth*,[4] and although Lord Young expressed a contrary opinion in *Geddes* v. *Reid*,[5] this dictum was disapproved of, and the decision in *Smyth's* case[4] was approved of, in the case of *Forrests* v. *Low's Trustees*.[6] It accordingly becomes necessary to inquire in what light the law, as it stood prior to 1874, would have regarded the failure of an instrumentary witness to subscribe during the life of the granter of the deed which he attested.

The Act 1681, cap. 5, which on this point stands unrepealed, enacts that only subscribing witnesses shall be "probative." There is not much authority as to the time at which witnesses may competently sign a deed in order to attest that they either saw the granter subscribe or heard him acknowledge his signature. But the statute prohibits any witness from subscribing as a witness to any party's subscription "unless he then know that party and saw him subscribe . . . or that the party did at the time of the witnesses subscribing acknowledge his subscription." In the latter alternative it has been held that the Act requires that the witness should subscribe *unico contextu* with the granter (though not necessarily in the same room) or without any avoidable delay. In the case of *Thomson* v. *Clarkson's Trustees*,[7] it was held not to be a good objection under the Act 1681, cap. 5, that the attesting witnesses had not subscribed in the presence of the granter after hearing her acknowledge her signature, but had taken the deed away and appended their signatures in another house

[1] 6 S. L. T. 277.
[2] 1907 S. C. 1302.
[3] (1883) 11 R. 153, p. 161.
[4] (1876) 3 R. 573.
[5] (1891)18 R. 1186.
[6] 1907 S. C. 1240.
[7] 20 R. 59.

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within three-quarters of an hour thereafter. It is important, further, to notice that the Judges expressed the view that, even if the objection had been good under the Act of 1681, it would have been obviated by section 39 of the Act of 1874. I respectfully agree with this view. At the time when the will was subscribed by the attesting witnesses in the case of *Thomson*[1] the testatrix was still in life, and as she had not indicated any wish that her will should not be formally completed, the failure of the witnesses to sign *debito tempore*, if there was such a failure, might fairly be held to be an informality within the meaning and purview of section 39.

If it had not been for the dicta of certain eminent Judges, I should have thought with Lord Trayner[2] that, although the Act of 1681 used different language in the case where the witnesses saw the granter subscribe, it did not intend to draw any distinction as regards the time at which the witnesses must subscribe between that case and the case where they merely heard the granter acknowledge his subscription. On the contrary, I should have thought that the words "then" and "saw" as used in the Act required that the signature of the attesting witnesses should be appended *unico contextu* with that of the granter, and that the statute was not complied with if at the time when he subscribed an attesting witness was merely in the position of a person who had seen the granter subscribe, it may be many years previously. The dicta to which I refer were purely *obiter*. The case of *Hogg* v. *Campbell*[3] was one where the witnesses did not see the granter subscribe but heard him acknowledge his signature, and the dicta of Lord President Colonsay were not necessary for his judgment. In the case of *Frank* v. *Frank*[4] an objection was repelled that the attesting witnesses who saw the granter subscribe signed their names within a quarter of an hour but not in the presence of the granter. Here again the dicta were *obiter* as the witnesses signed *unico contextu* with the testator. Accordingly, I do not think that there is any authority which requires us to draw a distinction between two cases which from the point of view of good sense and expediency are indistinguishable. If a witness who hears a person acknowledge his signature is required by the Act of 1681 to subscribe his name *unico contextu*, no reason can be suggested why a witness who sees the granter subscribe should be entitled to sign his name *ex intervallo*.

If it should be thought that the construction of the Act of 1681 which I have suggested is too strict or is contrary to established authority, there are two other possible constructions which might be suggested, short of the view contended for by the petitioners to the effect that a witness may append his signature at any time before the deed is founded on in Court. In the first place one might construe the Act as permitting a witness to sign his name within a reasonable time after the granter had subscribed. Lord Swinton in *Frank's* case[5] suggested this view as one which would "save the general principle." Practically this formula would require a witness to sign *unico contextu* unless he was taken suddenly ill, in which case he could subscribe as a witness on his recovery. An alternative

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[1] 20 R. 59. [2] *Ibid.*, at p. 63. [3] 2 Macph. 848.
[4] M. 16,824, *aff.* 5 Pat. App. 278. [5] Bell on Deeds, p. 264.

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view would be to sustain the subscription of a witness if adhibited at any time before the deed took effect by delivery or the death of the granter. Even in the case of a delivered deed *inter vivos* the signature of a witness might, on the principle of mandate, be sustained if adhibited *ex post facto* during the lifetime of the granter, and with his authority express or implied. In all such cases the sounder view would be to hold that the witness had not complied with the Act of 1681, but that the informality could be cured by section 39 of the Act of 1874.

The fatal objection, as it seems to me, to the contention of the petitioners' counsel is that it requires us to hold that a deed, which is improbative in respect that it is not subscribed by two attesting witnesses, may yet operate to confer an irrevocable and indefeasible right upon some person to make it probative, and therefore valid and effectual, notwithstanding that (in the case of a delivered *inter vivos* deed) the granter had changed his mind and interpelled the witnesses from subscribing, or, in the case of a *mortis causa* deed, that he had died leaving the deed incomplete and improbative. Such a result seems to me to be contrary to the plain language of the Act 1681, cap. 5, and also to legal principle and good sense. The only argument in its favour is that derived from the analogy of the decisions in regard to the filling in or the correction of a testing-clause setting forth the designations of the writer of the deed and of the witnesses. It was argued quite fairly that the subscription of instrumentary witnesses was a purely statutory requirement, and that the language of the Act of 1681 requiring their subscription was less stringent than that which expressly struck with nullity any writ wherein the writer and witnesses were not designed. If, as the decisions show, the designations may be inserted or corrected at any time before a deed is founded on in Court or placed beyond recovery in a public register, why should the same not hold good as regards the subscription of a witness? The answer is that the decisions in question cannot be reconciled with the language of the Act—*per* Lord Campbell in *Cunninghame* v. *Macleod*[1]—and are "perilous and questionable upon principle"—*per* Lord Jeffrey.[2] In his opinion in the case of *Blair* v. *Assets Company*,[3] Lord Watson emphasised the anomalous character of these decisions, and pointed out the "unpleasant consequences" in which they had involved the Judges of this Court, by committing them to two propositions which were self contradictory. Decisions of a quasi-legislative character were at one time not unusual in construing the statutes of the Scottish Parliament, but in the case in point their expediency has been justified by the fact that Parliament enacted in the Act of 1874 that the designations of the instrumentary witnesses may be appended or added to their subscriptions "at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any Court, and need not be written by the witnesses themselves"—(section 38). There is, however, neither precedent nor expediency in favour of holding that an instrumentary witness may validly subscribe

[1] 5 Bell's App. p. 257. [2] 3 D. p. 1295, footnote.
[3] (1896) 23 R. (H. L.), at p. 47.

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his name at any time before a deed is founded on in Court or placed beyond recall in a public register. Accordingly, I decline to affirm the proposition that, although a will is null and void if not attested by two subscribing witnesses, it is at the same time valid and operative in certain respects.

But for the passing of the Act of 1874 a new and difficult question would have had to be decided at some time, viz., whether any person interested in upholding a deed could compel its production in order that he might make it probative by filling in the testing-clause. On this subject Lord Neaves said in *Hill* v. *Arthur*,[1]—"Powers have been claimed over a testing-clause which are very extensive, and, in my opinion, not a little anomalous. In the case of a deed *inter vivos* executed before witnesses, it is competent to fill up the testing-clause *ex intervallo*. The cases of *Blair*[2] and *Shaw*[3] show this. As to *mortis causa* deeds I cannot doubt that the same power exists to a certain extent. The case of *Macleod* v. *Cuninghame*[4] settles that a testing-clause in such a deed may be corrected after the death of the granter. A deed without a testing-clause, therefore, is not a nullity. If otherwise well executed it is capable of being made a good deed, and the question thus arises, who has the power to do so? Can the next of kin do so or not as he pleases, or as it suits his interest? Is it competent for the person in possession of the deed to fill up the testing-clause if he be honest, and to refrain from doing so if he pleases? I greatly doubt if that can be the law. I should be inclined to think that there is a duty to perfect the deed where there is the power to do so. It is not easy to find out the principle applicable to such cases. Very many deeds are signed before the testing-clause is filled in; indeed that is the general practice. Is it held that it may afterwards be filled in in virtue of a mandate to do so? And in whose favour is that mandate granted? In deeds *mortis causa*, it would appear that such a mandate, if it exists, does not fall by death, but then there is the question, can anyone interested take up the mandate and execute it? The justice of the case would seem to require that in a deed well executed, and wanting only the testing-clause, anyone interested in it should have right at least *de recenti* to obtain exhibition of it for the purpose of doing what is right. But no such point has yet been determined. I wish here to leave that question open."

This question can hardly arise now, seeing that any person interested may compel the production of a deed under section 39 of the Act of 1874 in order that he may lead evidence of its having been executed by the granter and subscribing witnesses. But the section assumes as a condition of its application that the attesting witnesses have already subscribed. It provides no machinery for compelling the production of a deed in order that the witnesses may subscribe it. In the case of *Murray*,[5] the Court *ex parte*, and without expressing any opinion, allowed access to a testamentary deed in the Register of Deeds, Probative Writs, and Protests, in order

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[1] 9 Macph. 223, at p. 231
[2] (1827) 6 S. 51.
[3] (1851) 13 D. 877.
[4] 3 D. 1288, 5 Bell's App. 210.
[5] (1914) 6 F. 840.

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that the witnesses might sign their names as witnesses. In view of the decision in *Tener's Trustees*,[1] it was quite right that the petitioner should be allowed to complete the deed *quantum valeat*, but the Court directed a copy of its interlocutor to be added to every extract, so that the effect of the addition remained an open question. In this case the Court followed earlier precedents in regard to testing-clauses.[2]

The best authority in favour of the view contended for by the petitioners is the following dictum in a case relating to a bill of exchange blank in the name of drawer[3]:—"it was in the reasoning agreed, that, as the creditor's name was in the bill, had it either been of his handwriting, or if the drawer's name had been adjected before it had been produced in judgment, it would have been good; in like manner, as a bond duly signed before witnesses, but not subscribed by the witnesses before delivery, may thereafter be subscribed by them at any time before production in judgment. Whereas where the objection lies to a bill upon the Act 1696, the defect cannot be supplied after delivery." This dictum carries the petitioners the whole length which they require to go, and it is entitled to respect if only from its early date, within sixty years of the passing of the Act of 1681. In the case of *Frank* v. *Frank* (1796) as reported in Bell on Deeds, p. 265, Lord Methven referred to this dictum as "sufficient proof of the practice and of the opinion of lawyers upon that practice." The silence of the other Judges seems to me to be very significant. Not one of them refers to the dictum in question or to the analogy of the testing-clause, though they could not have forgotten the leading case of *The Bank of Scotland* v. *Telfer*,[4] in which only six years previously it had been decided that a testing-clause could be corrected long after the execution of the deed, and after the bankruptcy of the granter. If the law and practice had been understood to be as stated by Kilkerran, the objection to the formal validity of Mr Frank's deed that it had not been subscribed by the witnesses in presence of the granter could not have been seriously debated and decided. There are copious references to the practice in the opinions of the Judges, but the practice to which they refer had to do with cases where the same two clerks subscribed a single time as witnesses to the signatures of a number of different persons each of whom subscribed at a different place. This practice may or may not be permissible, but there is not a suggestion in the opinion of any Judge except Lord Methven that a witness might sign at any time before the deed was produced in judgment. As regards the practice of the nineteenth century it is enough to refer to the statement in Mr Duff's Treatise on Deeds, published in 1838, pp. 16-17, to the effect that "it is not to be doubted that a delay to complete the deed until another day had commenced would be fatal." In *Baird's Trustees* v. *Murray*,[5] already cited, the Lord President quoted from the printed form of particulars "which we all know is constantly in use among conveyancers directing parties who are to subscribe

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[1] 6 R. 1111.
[2] Miller v. Birrell, (1876) 4 R. 87; Caldwell, (1871) 10 Macph. 99.
[3] A. v. B., (1738) M. 1436, Kilkerran, p. 70, Elch. *voce* Bills, No. 19.
[4] (1790) M. 16,909.
[5] 11 R. 153, at p. 157.

deeds how the thing must be done, and how the witnesses as well as the parties are to subscribe." It states that "where the same witnesses attest the subscriptions of parties signing the deed at different times or places, they must repeat their signatures." I refer to this form merely as showing that in the minds of practising lawyers the subscription of a witness was a thing which had to be done immediately, and which could not be left over like the filling in of a testing-clause.

The question whether an instrumentary witness can subscribe after the death of the granter was, so far as I know, raised for the first time in the case of *Arnott* v. *Burt*,[1] but the Court did not find it necessary to decide it. Lord Cowan said (p. 72): "My impression was very strong that except in very special cases, such as were referred to in the discussion, an attempt to raise up a deed and make it a probative deed weeks after the death of the testator, even in good faith, is incompetent and illegal under the statute of 1681. That was my original impression on looking at the case on its merits, but the argument addressed to us by Mr Crichton has a good deal shaken me in that conviction, and I reserve my opinion upon a consideration of the whole circumstances if a similar question were to arise for the judgment of the Court. I do not wish to commit myself finally to that view, but looking at the doctrine stated by the authorities on the subject, I think it would be a very perilous thing indeed were any writer or agent to leave the completion of a deed by the subscription of the attesting witnesses till after the death of the testator." Counsel's argument as reported contains the following passage:—"The objection that a witness might thus have the option of making a man testate or intestate might be got over by the Court compelling an unwilling witness to subscribe, or holding his attestation unnecessary." This argument seems to carry its own refutation along with it. In the case of *Stewart* v. *Burns*,[2] the Lord Ordinary (Craighill), in an action for implement of a written contract of sale of heritage, decided that a writing, which was probative when produced by the pursuer in Court, could not be successfully impugned on the ground that the attesting witnesses had not been intended by either party to act in that capacity, but had subscribed the writing four months after its date at the request of one party—the other having repudiated the bargain. *Separatim* he held that *locus pœnitentiæ* was excluded by *rei interventus*. This interlocutor was affirmed by the Judges of the Second Division. Although they expressed opinions in favour of the view taken by the Lord Ordinary on the first point, they declined to put their judgment on that ground. Lord Ormidale, however, after referring to the law as to testing-clauses, said, "In like manner I am disposed to think he" (any party having a legitimate interest to do so) "may, *ex intervallo*, get the witnesses to adhibit their signatures."[3] The next case, *Tener's Trustees* v. *Tener's Trustees*,[4] is the case which we are asked to reconsider. It is very much in point, as one of the witnesses to a gratuitous *inter vivos* deed signed after the death of the granter. The opinions of the Judges proceeded upon the ground that there was an informality of execution and that every informality may now be cured. Lastly, the petitioners'

[1] 11 Macph. 62. [2] 4 R. 427. [3] *Ibid.*, at p. 433. [4] 6 R. 1111.

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counsel laid great stress on a dictum of Lord Rutherfurd Clark in the case of *Thomson* v. *Clarkson's Trustees*,[1] already referred to, to the effect that the Act of 1874 "requires no more than that the witnesses shall have a warrant in fact and truth for what they attest. They have such a warrant if they saw the granter subscribe or heard him acknowledge his subscription." This dictum covers the case of a witness who was truly "warranted" in subscribing his name as an attesting witness though he had failed to do so *unico contextu* with the granting of the deed or even within a reasonable time thereafter. But, without begging the whole question which we are now called upon to decide, one cannot say that a witness is "warranted" in signing and thus perfecting a deed after his warrant has terminated as in *Stewart's* case[2] by a change of mind on the part of the granter of an *inter vivos* deed, or in the case of a *mortis causa* deed after the death of the testator.

After carefully considering the cases cited by the petitioners' counsel I have come to the conclusion that no authority deserving serious consideration can be cited in favour of the proposition that the Act of 1681 is complied with if an instrumentary witness adhibits his signature at any time before the deed which he attests is produced in judgment. The case of *Tener's Trustees*[3] is no authority to that effect. It is a different question whether an informality of execution arising from the failure of a witness to subscribe his name *debito tempore* can be cured by the procedure pointed out in section 39 of the Act of 1874. In many cases I have no doubt that it could be so cured; but I draw the line so as to exclude at least two cases, viz.—(1) the case where a party to a formally incomplete but delivered *inter vivos* deed upon which *rei interventus* has not followed either dies or, having changed his mind, prohibits the witnesses from attesting his signature by their subscriptions; and (2) the case where a testator dies leaving a testamentary writing which is improbative in respect that it is not subscribed by two witnesses. My reason for excluding these two cases is that the qualification of an instrumentary witness does not consist merely in his having seen the granter subscribe or heard him acknowledge his signature. If he is no more than a witness to the fact of the party's subscription, why should the attestation of a concealed or surreptitious witness be open to objection? And yet the Lord Justice-Clerk and Lord Gifford in *Tener's* case[3] shrank from saying that such an attestation would be valid. The only rational objection to a concealed witness is that he had no authority from the granter which entitled him to attest the deed and so to confer on it a special legal validity. But the very same objection applies to every instrumentary witness, however straightforward and honest, who happens to see or hear something which was not specially intended for his eyes or ears. If the granter did specially intend the witness to see or hear, he impliedly authorised the latter to attest the deed by subscribing it. Accordingly, although no formal *invocatio testium* is required by our law, an instrumentary witness has no right to subscribe as such unless the granter of the deed authorised him either expressly or impliedly to do so. It follows that such authority may be revoked by the

[1] 20 R., at p. 63. [2] 4 R. 427. [3] 6 R. 1111.

granter at any time. No doubt a mandate *in rem suam* is irrevocable, but if one applies this principle to the attestation of deeds one makes an unattested deed as effectual as if it were duly attested. It follows that the right of an instrumentary witness to subscribe a deed depends primarily upon the mandate of the granter, and that such right comes to an end when the mandate is recalled or the granter dies. In my opinion the Court has no power under the Act of 1874 to sustain an attestation made by a witness who never had any authority to attest the deed or whose authority was terminated before he subscribed. If it is thought necessary to sustain the validity of a will in a case where the testator died immediately after subscribing it and before the instrumentary witnesses had time to do so, there is no necessity for being severely logical. One can construe the Act of 1681, which requires the subscription of the witnesses, as impliedly allowing them a reasonable time in which to sign, and as to that extent derogating from the strict principle of the law of mandate.

For these reasons I am of opinion that the prayer of the petition should be refused.

LORD PRESIDENT.—As your Lordships are aware, I have not found the question we are to decide to-day attended with difficulty. In this, as in many other departments of law, a simple recital of the undisputed facts often serves to clear the issue and points decisively to the correct verdict. It is so, I think, in this case. The maker of this writing eagerly desired to execute it. She sent for her son to aid her. He came, and, at her request, he wrote every word to her dictation. She straightway signed it in his presence and in presence of her nurse. They were both competent and soothfast witnesses. They both testify to the fact that they had seen the granter sign the writing by subscribing their own names. It is therefore beyond the shadow of doubt that the granter subscribed the writing, that she subscribed it in presence of two competent witnesses, and that these two competent witnesses attested the fact that they had seen her subscribe in the only way in which the law recognises as sufficient, to wit, by adhibiting their own signatures.

Here, therefore, we have before us a writing subscribed by the granter and appearing to be attested by two witnesses. And all that we are asked to do is, if we are satisfied with the evidence, to declare that this writing was subscribed by Mrs Walker, as the maker, and by Mabel Hayward and John William Thomson Walker, as witnesses attesting her subscription. Why should we refuse, if we are satisfied of these facts? Because, say the respondents, at the date of the death of Mrs Isabella Thomson or Walker, the document was incomplete, and the subsequent addition by John William Thomson Walker of his signature as a witness attesting the execution thereof, and of the designation of Mabel Hayward, was incompetent and invalid.

Now, by the law of Scotland, as it stood anterior to the statute of 1874, I am of opinion that this objection would not have prevailed, and that the validity of the execution of this writing could not have been successfully challenged. The law as it stood at that date upon this point cannot, in the words of Professor Menzies, be better stated than in the

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words of the report of the first case in which it was solemnly determined that the witnesses need not subscribe in the presence of the granter. "The Act 1681 does not require, in point of solemnity, that the instrumentary witnesses should subscribe in presence of the granter, or that they should not lose sight of the deed in the interval betwixt his and their own subscriptions; nor has it been so understood in practice. The presumption of law is, that witnesses will not subscribe a deed unless they are satisfied of its identity; and although there never ought to be any considerable interval; yet, when such a case occurs, it must be judged of upon its whole circumstances." That is taken from the report of *Frank's* case[1]—a decision affirmed in the House of Lords.

The law of Scotland, therefore, anterior to the statute of 1874, may, I think, be summarised thus—that witnesses who have actually seen the the maker subscribe may attest that fact afterwards; that this is an irregularity, the immediate subscription of witnesses being the correct practice which ought always, when possible, to be observed; but that, if the interval is considerable, then the validity or the invalidity of the execution of the deed will be determined upon a consideration of the whole circumstances. And if, upon a challenge of the validity of the execution, it was proved to the satisfaction of the Court that the maker of the deed really did subscribe it, that the witnesses really did see him subscribe, and that they thereafter attested that fact in the only way which the law recognises, the validity of the execution of the deed would be sustained. No doubt, having regard to the aim and object of the statute of 1681 to protect writings against the treachery of human memory and against difficulties of identification, the subscription of the witnesses at the time was the normal and the correct course. Nevertheless, subscription *ex intervallo* was never fatal to the validity of the execution; but it required to be justified by satisfactory evidence, and, if the evidence disclosed elements of doubt or suspicion, fraud or collusion, then the validity of the execution was seriously imperilled and, indeed, the execution might be held to be null and invalid.

That I take to have been the law of Scotland anterior to the statute of 1874, and accordingly, under that law, if it had been proved to the satisfaction of the Court that the maker of the deed subscribed it, that the witnesses actually saw him subscribe it, and that they testified to that fact in the method prescribed by the statute of 1681, then the validity of the execution could not have been successfully challenged. But when we have in view the provisions of the statute of 1874, it appears to me that the case for the respondents is, not unarguable certainly, to use the words of Lord Young and Lord Trayner in the case of *Thomson* v. *Clarkson's Trustees*,[2] but I think very difficult. The scope and effect of sections 38 and 39, the sections devoted to questions of informality of execution, were, I think, never better stated than by Lord Justice-Clerk Moncreiff in the case of *M'Laren, &c.*, v. *Menzies*,[3] to which some of your Lordships have referred, where he says: "It seems to me that these two clauses together were intended to cover the whole of the formalities previously

[1] M. 16,824, at p. 16,826. [2] 20 R. 59. [3] 3 R. 1151.

required in the execution of writs. Some of them are enumerated and dispensed with by the 38th section, leaving the deeds probative under conditions therein expressed. I think the 39th section is intended to exhaust the rest. Two of these, namely, the subscription of the deed by the granter, and the attestation by the witnesses, still remain as essential solemnities; but all the rest (and I think the provisions of the Act of 1696 seem nearly, if not entirely, to comprise all the rest), while not repealed or abolished, admit of being supplied by satisfactory testimony. There is nothing unreasonable in this, or inconsistent with the general spirit of these sections, which seems to be to reduce to the narrowest limits the formalities which are to remain *de solennitate*."[1] Expressed in fewer words, the opinion of Lord Rutherfurd Clark, in *Thomson* v. *Clarkson's Trustees*,[2] appears to me to be in complete harmony with the opinion that I have just read. He says: "The Act of 1874 requires, I think, the Court to sustain all deeds which were signed by the granter and honestly attested by the instrumentary witnesses. When the formalities of the Act of 1681 have not been observed it throws the burden of proof on the person who uses the deed. I do not think that it dispensed with the necessity of witnesses. But it requires no more than that the witnesses shall have a warrant in fact and truth for what they attest"—that is to say, shall have actually seen with their own eyes the granter subscribe. "They have such a warrant if they saw the granter subscribe or heard him acknowledge his subscription. If the subscription to the deed be the subscription of the granter, and if the witnesses were warranted in attesting that fact, there is nothing lacking in essentials. The rest is mere formality of execution." Now, if that law be accepted as sound, as I think it is, it seems to me to apply in terms to this case.

Some of your Lordships seemed to think we are not dealing here with formalities; to which I answer, in the words of Lord Rutherfurd Clark, that under the statute of 1681 "the attestation of witnesses has no other object than to give assurance that the deed is the deed of the granter. Such regulations as are made with regard to the subscription of the witnesses are formalities for attaining this end. It seems to me immaterial whether they are made by injunction or by prohibition. In whatever manner they are expressed, I think that they do nothing else than prescribe the formalities by which the object of the Legislature is to be attained,"[2] to make certain that the granter actually did subscribe the deed.

Others of your Lordships have held that, inasmuch as this deed was left incomplete by the granter, it cannot now be completed, and that as it was left at her death so it must remain. I think a fallacy lurks here. The deed was not left incomplete by the granter. It was completed so far as the granter was concerned. She had done all that the law required. She had subscribed the deed in the presence of two competent witnesses. She could do no more. So far as she was concerned, everything was complete. One witness subscribed at the time, the other subscribed a month later. Why should he refuse to subscribe a month later? Why should his subscription be invalid a month later? Why should

[1] 3 R., at pp. 1174-5.

[2] 20 R. 59, at p. 63.

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it be invalid because of her death? Her death could not alter the fact. The fact was beyond recall. Her death could not in the slightest degree affect the fact that she had subscribed and that he had seen her do it; and when the witness subsequently adhibited his signature, he merely said, in the only way which the law of Scotland recognises, that he had seen the granter subscribe. And it is inconceivable to my mind that the attestation of a fact which could not by any possibility be affected by the death of the maker of the deed, and could be asserted effectively prior to the death of the maker of the deed, could not be asserted subsequently to the death of the maker of the deed. The fallacy seems to me to be this, that attestation is regarded as something different from merely asserting in the only way which the law will deem effective a fact which the writer had actually witnessed. It appears to me, therefore, that signature subsequent to the death of the granter was valid; that the granter's death could affect it no way whatever. The law of mandate I regard as wholly alien to this department of our law. If mandate there was, surely it was a mandate to see her subscribe; it was not a mandate to attest that fact subsequently at any time—properly at the time when the deed was subscribed indeed—but at any time to attest the fact which could not be affected, one way or the other, by the granter's death. It seems to me that to frustrate the known intention of the maker of this deed we should require to find ourselves constrained to hold that the witness was precluded, on the death of the maker of the deed, from asserting in the only way which the law recognises the fact which death did not alter and could not, by any possibility, alter.

Your Lordships have foreseen certain dangers. I foresee no dangers against which the law of Scotland has not provided ample safeguards, and, adopting the words of Lord Justice-Clerk Moncreiff in the case of *M'Laren* v. *Menzies*,[1] I find that, in the case in hand, the operation of the statute will give effect to the unquestionable intention of Mrs Walker as to the way in which her property should be disposed of after her death. With this knowledge, linked with the reflection that the judgment which we are to-day to pronounce is in harmony with the decided cases, with the understanding and practice of the profession, and with the opinions of eight Judges of this Court, more than one of whom was an acknowledged master in this domain of jurisprudence, I feel confidence in the opinion I have just expressed.

I move your Lordships to grant the prayer of the petition as amended at the bar.

THE COURT pronounced this interlocutor:—"Declare that the testamentary writing No. 11 of process was subscribed by Mrs Isabella Thomson or Walker, mentioned in the petition as maker thereof, and by Mabel Hayward and John William Thomson Walker, also mentioned in the petition as witnesses attesting the subscription of the said Mrs Isabella Thomson or Walker, and decern: Find both parties entitled to expenses, taxed as between agent and client, out of the estate of the

[1] 3 R. 1151, at p. 1174.

said Mrs Isabella Thomson or Walker, as the account thereof shall be taxed by the Auditor, to whom remit the same for that purpose."

On 17th March the respondents presented a note to the Lord President in which it was stated:—"Under" a prior testamentary writing of the testatrix "the respondent Henry Edward Leatham Whitwell would have been entitled to one-seventh share of the residue of Mrs Walker's estate. The capital value of said estate amounts approximately to £23,000. By the testamentary writing of 25th June 1913, which has been held to have been validly executed, the respondent Henry Edward Leatham Whitwell is cut out from any share of the late Mrs Isabella Thomson or Walker's estate.

"The respondents have been advised that the decision of the majority of the said Judges is not well founded in law, and the respondent Edward Leatham Whitwell is of opinion that it is his duty to do all he can to prosecute an appeal to the House of Lords on behalf of his son, who is a pupil, but he has no funds wherewith to defray the expenses of such an appeal unless the same can be provided from the trust-estate of the said Mrs Isabella Thomson or Walker.

"In these circumstances he has thought it proper to bring the position of matters before your Lordship with a view to obtaining an order on the trustees of the late Mrs Isabella Thomson or Walker to supply him with the necessary funds to appeal to the House of Lords, and he submits that, in view of the circumstances of the case, such an order should be pronounced."

The prayer of the note was:—"May it therefore please your Lordship to move your Lordship's Court to pronounce an order ordaining the trustees of the late Mrs Isabella Thomson or Walker to make payment to the said Edward Leatham Whitwell on behalf of his pupil son, the said Henry Edward Leatham Whitwell, of £300, or such other sum as your Lordship shall think proper, to enable him to present and prosecute an appeal to the House of Lords on behalf of his pupil son, the respondent Henry Edward Leatham Whitwell, against the judgment of your Lordship's Court and the three Judges of the Second Division, or to do otherwise in the matter as your Lordship may deem fit."

The note having been intimated to Mrs Walker's trustees in accordance with an order of the Court, pronounced on 18th March, counsel for the parties were heard in Single Bills of the First Division (consisting of the Lord President, Lord Dundas, and Lord Mackenzie) on 20th March 1914.

Argued for the respondents;—The present proceedings had been rendered necessary, and the respondents had been brought into Court, by the mistake or carelessness of the late Mrs Walker or of her law-agent. In these circumstances it was only just that the estate should bear the expense of the proceedings. The Court had recognised this when it found both parties entitled to their expenses as taxed between agent and client out of the estate. Similar applications had been granted in similar circumstances.[1] The respondents here were in a stronger position, as regarded the merits of their proposed appeal, than was the curator *ad litem* in *Crum Ewing's Trus-*

[1] Studd v. Cook, (1883) 10 R. (H. L.) 53; Crum Ewing's Trustees v. Bayly's Trustees, 1910 S. C. 994.

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tees,[1] for in the present case there had only been a majority of one in a Court of seven Judges against their contention, whereas in *Crum Ewing's Trustees*[1] there had only been one dissentient Judge in a Court of three Judges of the First Division. It was immaterial that the application was made by the respondent and by his father and guardian. The father was in precisely the same position as a curator *ad litem*, and might have lodged answers for the son and applied for the appointment of a curator *ad litem*. The merits of the case were in no way affected by this circumstance. It had to be remembered that the present application was only for an advance. The Court was not asked to find the petitioners finally liable in the sum which was asked for—the ultimate determination of the liability for this sum, as of that for the whole expenses in the case, would lie with the House of Lords.

Argued for the petitioners and for Mrs Walker's trustees;—The motion was in substance a claim upon one of two parties at arms length to supply his unsuccessful opponent with funds to meet the expenses of an appeal to the House of Lords. There was no precedent for such an application, and no support for it could be found in the cases cited by the respondents. The case of *Crum Ewing's Trustees*[1] was essentially different from the present case. It was a special case in which parents had brought their children into Court, asking for the decision of a question which had arisen between them on the construction of a provision in which both parents and children had an interest, and would have an interest, in whatever way the questions of law were answered. Further, in that case the application was made by a curator *ad litem*, the responsible officer of Court, who had been advised that the decision of the Court of Session was wrong, and that it was his duty to prosecute the appeal, and who, of necessity, had no funds wherewith to prosecute it. The present case presented none of these features. The respondents' remedy was, upon their own showing, to proceed with the appeal *in forma pauperis*.

Lord President.—This is confessedly a novel and unprecedented application. The only specialty in the case, if it be a specialty, is that the judgment against the respondents was pronounced by the narrowest possible majority. If that were to be regarded as sufficient, then every litigant in this Court who had to submit to a judgment against him by a narrow majority would be entitled, it appears to me, to claim a contribution from his successful opponent to enable him to prosecute an appeal to the House of Lords. That, of course, would be entirely out of the question.

The only two authorities cited to us were the cases of *Crum Ewing's Trustees*[1] and *Studd* v. *Cook*.[2] These were cases of parents against children and involved specialties which are not present in the case before us. They cannot be regarded as, in any sense, precedents for this application which, in my opinion, ought to be refused.

Lord Dundas and Lord Mackenzie concurred.

The Court refused the prayer of the note and found no expenses due to or by either party in connection therewith.

Elder & Aikman, W.S.—Sharpe & Young, W.S.—Agents.

[1] 1910 S. C. 484, 994. [2] 10 R. (H. L.) 53.

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THE GOVERNORS OF GEORGE HERIOT'S TRUST, Pursuers (Respondents).—*Murray, K.C.—Chree, K.C.—Thornton.*
THE CALEDONIAN RAILWAY COMPANY, Defenders (Reclaimers).—*Blackburn, K.C.—Wark.*

Superior and Vassal—Casualty—Compulsory powers—Railway—Lands purchased by railway under compulsory powers—Statutory title—Right of superior to demand casualty—Lands Clauses Consolidation (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 80, 107, 111, *and* 126.

A railway company acquired certain lands, being the whole lands held by the same owner under the same title, by compulsory powers under the Lands Clauses Consolidation (Scotland) Act, 1845, and obtained a conveyance thereto, substantially in the form prescribed by section 80 and Schedule A of that Act. This conveyance was not registered until after the expiry of sixty days from its date, and the feudal charges upon the lands remained unredeemed.

In a petitory action by the superiors for payment of the amount of a casualty of composition, the company pleaded in defence that they had completed a valid statutory title to the lands to the effect of extinguishing the pursuers' rights of superiority therein. The pursuers maintained that they were entitled to the casualty in respect that the defenders, having failed to comply with sec. 80 of the Act by not registering the conveyance within sixty days, held only on a common law title; or, whether that were so or not, that casualties were due until redeemed.

Held that the pursuers were entitled to the casualty sued for—

Per the Lord President and Lord Skerrington on the ground that, although the defenders held the land on a statutory title, the feudal relationship of superior and vassal still remained, including the right of the superiors to recover feudal payments until they were redeemed, although the feudal remedy of resuming possession of the lands was abolished.

Per Lord Johnston on the ground that the feudal relationship was extinguished, but that a right was reserved to the superiors to recover feudal payments until they were redeemed.

Observed that when a railway company acquires lands compulsorily the only title it can make up to them is a statutory title.

Authorities commented on.

1ST DIVISION. Lord Cullen.

ON 14th March 1912 the Governors of George Heriot's Trust, the superiors of certain subjects in Edinburgh, brought an action against the Caledonian Railway Company, as the vassals infeft in the *dominium utile* thereof, for payment of a sum of £1576, 10s. 4d., being the amount of a casualty of composition alleged to have become due on 26th October 1910.

The pursuers (Cond. 1, 2, and 3) narrated how the *dominium utile* of the subjects in question became vested, in 1861, in Isaac Scott subject to an allocated feu-duty of 1s. 3d., the entry of singular successors being untaxed.

The averments and answers proceeded:—(Cond. 4) "By conveyance, dated 12th August 1867, and with warrant of registration thereon recorded in the New Particular Register of Sasines, &c., kept for the sheriffdom of Edinburgh and constabularies of Haddington, &c., on the 15th May 1868, the said Isaac Scott, in consideration of the sum of £11,447, 14s., sold and disponed the said subjects [being the whole subjects held by him under his title]

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to the defenders, therein designed as 'incorporated by an Act passed in the eighth and ninth years of the reign of Her Majesty Queen Victoria, cap. 162, entitled "An Act for making a railway from Carlisle to Edinburgh and Glasgow and the north of Scotland, to be called the Caledonian Railway," pursuant to the provisions of the said Act and of another Act passed in the 29th and 30th years of the reign of Her said Majesty, cap. 325, entitled "An Act for enabling the Caledonian Railway Company to alter the terminus of their railway at Edinburgh, to enlarge and improve their station there, and to erect a hotel in connection therewith, and for other purposes."' The pursuers are the immediate superiors of the said subjects, and the defenders are their vassals in the *dominium utile* thereof in virtue of the said conveyance. The defenders are called on to produce said conveyance. The statutes are referred to. *Quoad ultra* the statements in answer are denied. The defenders failed to record the conveyance in their favour in the Register of Sasines within sixty days of its date as provided by the Lands Clauses Consolidation (Scotland) Act, 1845." * (Ans. 4) "The conveyance is referred to for its terms. Under the said recorded conveyance the defenders acquired a statutory title to the lands, and all rights of superiority then vested in the pursuers' predecessors were extinguished and no longer subsist, in virtue of the Lands Clauses Consolidation (Scotland) Act, 1845, which is incorporated in the statutes referred to in the dispositive clause of said conveyance." (Cond. 5) "Since their acquisition of the said subjects the defenders have regularly paid the pursuers the said feu-duty of 1s. 3d. In 1885, on the death of the said Isaac Scott, a demand was made upon the defenders by the pursuers for payment of a composition of a year's rent of the said subjects, and on 26th October of that year the defenders made payment to the pursuers of a composition of £479, being, in terms of the receipt granted at the time, 'payment of the casualty of superiority consisting of one year's rent as adjusted under deduction of the feu-duty for the year and an allowance for taxes and repairs due on the entry of the said Company to the said subjects; declaring that the next casualty shall be payable and exigible on the 26th day of October 1910.' The said receipt is endorsed upon the conveyance in favour of the defenders above mentioned. Admitted that no claim for compensation has been presented by the pursuers. *Quoad ultra* the statements in answer are denied." (Ans. 5) "Admitted, under reference to said receipt for its terms, that the defenders have made said payments, and

* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), sec. 80, enacts:—"*Form of Conveyances.*—Feus and conveyances of land so to be purchased as aforesaid may be according to the form in the Schedules (A) and (B) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances, being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding."

explained that this was done in error. No feu-duty or composition was or could be legally exigible from the defenders at any time since the completion of their statutory title in 1868, when all rights of superiority in or over the said lands were destroyed in virtue of the Lands Clauses Consolidation (Scotland) Act, 1845. Neither at nor subsequent to said date has any claim for compensation been presented to the defenders by any one alleging right thereto." (Cond. 6) "In terms of section 5 of the Conveyancing (Scotland) Act, 1874, a composition of a year's rent of the said subjects became due and payable on the 26th day of October 1910, on the expiry of a period of twenty-five years from the date of the previous payment. The rental of the subjects is believed to be £1854, 16s., and after deduction of the feu-duty of 1s. 3d., and of £278, 4s. 5d., being an allowance of 15 per cent for taxes and repairs, the amount of the composition now due is £1576, 10s. 4d., being the sum sued for. The pursuers have made repeated application for payment of said composition, but the defenders refuse or delay to make payment, and the present action is therefore rendered necessary." (Ans. 6) "Admitted that the defenders refuse to recognise the pursuers' claim. *Quoad ultra* denied. In any event, the rental alleged is a mere estimate and grossly overstated."

The pursuers pleaded, *inter alia;*—(6) The defenders having failed to record the conveyance in their favour within sixty days of its date, as provided by the Lands Clauses Consolidation (Scotland) Act, 1845, have not acquired a statutory title to the subjects thereby conveyed.

The defenders pleaded, *inter alia;*—(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, and the action should therefore be dismissed. (3) The pursuers not being the superiors of the defenders in the subjects in question, which are vested in the defenders under a duly completed statutory title, have no right to demand the casualty sued for, and the defenders should therefore be assoilzied. (4) Alternatively, if the pursuers are the superiors of the defenders in the subjects in question, the action is incompetent as laid.

On 12th December 1912 the Lord Ordinary (Cullen) pronounced this interlocutor:—"Repels the 1st, 2nd, 3rd, and 4th pleas in law for the defenders: Sustains the 6th plea in law for the pursuers: Allows to the parties a proof of the averments contained in condescendence VI. of the record and the answers thereto."*

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* "OPINION.—In this action the pursuers, the Governors of George Heriot's Trust, seek to recover from the defenders, the Caledonian Railway Company, a casualty of composition in respect of a piece of ground belonging to the defenders and situated at their Princes Street Station in Edinburgh. The ground in question was acquired by the defenders in 1867 pursuant to an Act, 29 and 30 Vict. cap. cccxxv., whereby they obtained powers enabling them to alter and enlarge their terminal station, &c. Prior thereto it was held in feu of the pursuers' predecessors. It was conveyed to the defenders in 1867 by Isaac Scott, the then entered vassal, conform to conveyance dated 12th August 1867 and registered in the Particular Register of Sasines for the sheriffdom of Edinburgh, &c., on 15th May 1868.

"The main question raised in the action is whether the defenders, by virtue of this registered conveyance, obtained a statutory title to the

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The defenders reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 4th and 5th March 1914.*

Argued for the reclaimers;—The conveyance which the Railway Company had recorded was substantially in the form prescribed by section 80 and Schedule A of the Lands Clauses Act.[1] The payment of the price was made pursuant to the Company's private Act, in which the Lands Clauses Act was incorporated, and the lands were conveyed subject to their burdens in so far as was consistent with that Act. Accordingly the Lord Ordinary was right in holding that the trifling variations from statutory form were not sufficient to destroy the character of the disposition as a statutory conveyance. That being so, the conveyance did not lose its effect as a statutory conveyance from the fact that it had not been registered within sixty days of its last date, the provision of section 80 of the Lands Clauses Act to this latter effect being direc-

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ground of the species created by section 80 of the Lands Clauses Act, 1845, and now hold it free from the burdens and incidents of the former feu, or whether, on the other hand, the defenders hold the ground in feu of the pursuers as the successors of Isaac Scott, the last entered vassal.

"The first branch of the argument which I heard was directed to the form of the conveyance of 1867. The pursuers, under this head, contend that the deed does not conform to the statutory style of conveyance provided in section 80 and Schedule A of the Lands Clauses Act. The second branch of the argument was directed to the non-registration of the conveyance within sixty days from its date. The pursuers, under this head, contend that, *esto* the conveyance was habile in form to found a statutory title under section 80, registration within sixty days is, under that section, an essential condition of the constitution of such a title.

"When the Lands Clauses Act of 1845 was passed the form of conveyance contained in Schedule A of the Act was broadly distinguished from the common law form of feudal conveyance by the absence from it of the usual executory clauses necessary towards infeftment. The changes in conveyancing forms, however, introduced by subsequent statutes have practically obliterated this broad distinction. In 1867 these executory clauses had ceased to be essential to a common law feudal conveyance, and infeftment was obtained then as now by registering the conveyance itself, with a warrant for registration on it, in the appropriate Register of Sasines. Any distinctive features of the statutory form of conveyance must accordingly be looked for elsewhere. The form of Schedule A of the 1845 Act bears that the consideration paid for the conveyance is paid 'pursuant to an Act passed, &c., intituled, &c., by the (Company) incorporated by the said Act.' And the seller thereby conveys to the Company 'for ever according to the true intent and meaning of the said Act' the land in question. The two sets of words above quoted are pointed to by the pursuers as being the distinctive marks of the statutory form of title under section 80 of the Lands Clauses Act in contrast to

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* In the Inner House the defenders were allowed to amend their record by adding averments to the effect that, by agreement with Mr Scott, the conveyance of 12th August 1867 had not been delivered to them until 15th May 1868 when the price of the subjects was paid; that it had been recorded the same day; and, accordingly, that, as it had been recorded within sixty days of the date when it was first possible to record it, the requisites of sec. 80 had been complied with. This ground of defence, however, was not insisted in at the hearing.

[1] Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19).

tory, not peremptory. The Court was not entitled to hold that nullity of a deed resulted from non-compliance with such a condition in the absence of express provision to that effect.[1] Had the direction been peremptory there would have been, up to the passing of the Titles to Land Act, 1858, no competent method in which a company which had failed to register within sixty days could complete its title. The Company's title was thus a statutory title, and the rights and obligations of parties must be ascertained in terms of the Act of 1845. The general scheme of that Act was to put an end to the feudal relationship between the superior and the concern which acquired the lands for the purpose of their undertaking; to extinguish the superior's right to recurring payments; and to compensate him by a money payment for his loss. It was not the intention of section 107 and the following sections to provide an alternative scheme, and to allow the purchasing company

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the common law feudal conveyance according to the form of such conveyance obtaining in 1867.

"Turning to the conveyance by Isaac Scott of 1867, one finds that the price bears to be paid 'pursuant to the provisions of the Company's Act of incorporation, and of the special Act, 29 and 30 Vict. cap. cccxxv., before mentioned.' So far the deed conforms to the style of Schedule A. Passing on to the clause of conveyance, one finds that the words in that style 'for ever according to the true intent and meaning of the said Act' are not inserted. But following on the description of the subjects conveyed, there is this clause: 'To be holden by the said Company and their successors for ever in terms of the foresaid Acts.' A literal adhesion to the words of the Schedule A style in every case is not required by section 80 of the Lands Clauses Act. The two sets of words which I have quoted from the conveyance of 1867 appear to me, taken together, to serve in substance the same purpose as those which the pursuers contend fall now to be regarded as the distinctive marks of the Schedule style, that is to say, of marking the conveyance as one granted pursuant to the Acts recited and for the purposes thereof.

"The pursuers, however, further point to certain other features of the conveyance of 1867 which, they say, stamp it as a common law conveyance of the *dominium utile* in the feu. The first is the presence of the words 'heritably and irredeemably,' which follow or include the words of conveyance and precede the description of the lands at the place where the words 'according to the true intent and meaning of the said Act' occur in the Schedule A style. They are the words usually employed in a common law conveyance. They are not, however, *inter essentialia* of it. The pursuers next point to the clause whereby the conveyance is made 'with and under the burdens, conditions, and servitudes' specified in an instrument of sasine in favour of Isaac Scott, 'in so far as the same are not inconsistent with the Railway Statutes.' As to what these burdens, conditions, and servitudes were I have no information. But this qualifying clause was proper and necessary to an accurate definition of what Isaac Scott had to convey, and intended to convey, to the Company. The pursuers next point to the clauses assigning the rents and the writs and binding the granter to free and relieve the Company of incumbrances, feu-duties, casualties, and public burdens. It does not seem to me that these are incongruous with the acquisition by the Com-

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[1] *Cf.* Smellhome, (1774) M. 206; Munro v. Fraser's Trustees, (1851) 13 D. 1209; Duchess of Sutherland v. Reid's Trustees, (1881) 8 R. 514; Erskine, II. xii. 26 and 43; A. S. Nov. 2, 1695, "Articles of Regulation," Alexander's Abridgment, p. 34.

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to remain in possession indefinitely without redeeming or paying compensation for the feudal payments so long as they met these payments as they fell due. These sections were only intended to operate temporarily, and to provide for the case of a payment falling due before the statutory title had been completed, and the matter of redemption or compensation had been fully adjusted.[1] The effect of a statutory title, accordingly, was to extinguish the feudal relation,[2] leaving to the superior a claim for compensation in respect of the loss of his feudal dues.[3] The perplexing provision of the earlier part of section 126 did not disturb this argument. Probably the most reasonable explanation of this provision, whose construction had always presented a particular difficulty, was that given by Lord President Inglis in *Magistrates of Elgin* v. *Highland Railway Company*,[4] viz., that it was intended to protect rights of mid-superiority created for political purposes.

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pany of the special statutory species of right and title in the lands created by section 80 of the Lands Clauses Act.

"As against these features of the conveyance founded on by the pursuers, the defenders lay stress on the fact that the conveyance contains no procuratory of resignation, and no clause as to the manner of holding. Both clauses were usual in common law conveyances in 1867. But neither was essential.

"So far, therefore, as the form of the conveyance is concerned, the matter stands thus, if I am right in the views which I have expressed. The conveyance contains what is said by the pursuers to be distinctive of the Schedule A style. On the other hand, it contains some clauses and it omits others which were usual in a common law feudal conveyance, although none of these was essential to the efficacy of such a conveyance. The result, in my opinion, is that the conveyance was habile, in point of form, to found the special statutory right and title to the land introduced by the Lands Clauses Act, although it was equally habile as a common law transmission of the feu.

"Passing from the form of the conveyance, the pursuers, under the second branch of the argument, raise the question whether the conveyance was duly registered in terms of section 80 of the Lands Clauses Act. It was executed on 12th August 1867, and was registered on 15th May 1868, after an interval of over nine months. The pursuers' case here is that, under section 80, registration of a conveyance within sixty days is an essential condition of the constitution of the special statutory right and title which the defenders plead they possess. Section 80 begins by authorising feus and conveyances to be taken according to the styles given in Schedules A and B, and then proceeds as follows:—[His Lordship quoted the section].

"Now this provision does not seem to me to be ambiguous, but plainly to require that a statutory conveyance must be registered within sixty days of its date as a condition of its efficacy to give the said good and undoubted right and title to the promoters of the undertaking. The

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[1] Fraser v. Caledonian Railway Co., 1911 S. C. 145, Lord President, at p. 162; Magistrates of Elgin v. Highland Railway Co., (1884) 11 R. 950, *per* Lord President, at pp. 959-60.

[2] Magistrates of Inverness v. Highland Railway Co., (1893) 20 R. 551, esp. *per* Lord Kinnear, at p. 566; Fraser v. Caledonion Railway Co., 1911 S. C. 145, *per* Lord President, at p. 162.

[3] Magistrates of Inverness v. Highland Railway Co., 1909 S. C. 943, esp. *per* Lord Kinnear, at pp. 949-50.

[4] 11 R., at p. 958.

Argued for the respondents;—The defenders' case was based on the proposition that they had a duly completed statutory title. In fact they had no such title, as the conveyance they had obtained was not in the form prescribed by section 80 and Schedule A of the Lands Clauses Act, neither had it been registered within sixty days of its date. The latter provision was peremptory, not permissive; section 80 gave a purchaser the privilege of obtaining a title in a manner which had not theretofore been possible, and in such circumstances a statutory enactment must be construed strictly.[1] That being so, the Company had not obtained a statutory title, their tenure was the ordinary feudal tenure at common law, and they remained subject to all the feudal obligations.[2] A railway company might competently take such a title, even to lands which had been compulsorily acquired.[3] But assuming that the Company had a completed statutory title, they were still unable to resist the

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answer which the defenders make is that the statute does not contain a sanction, that is to say, does not provide that a conveyance which is not registered within the sixty days shall not be valid and effectual to constitute the special statutory right and title. I am unable to see the force of this contention. The defenders say that the requirement of registration within sixty days presumably reflected the statutory requirement of the registration of instruments of sasine within a like period; and they point to the sanction contained in the Act of 1617 which (as interpreted by decisions) makes a sasine not registered within sixty days of its date null and void. But instruments of sasine were, prior to the registration statutes, valid and effectual to make an infeftment without any registration. It was therefore proper and necessary that the Legislature should not only direct them to be registered, but also nullify them if not duly registered. The case is quite different as regards the special statutory title created by the Lands Clauses Act. This was a species of title unknown to the common law. All that was required was that the statute, in introducing it, should prescribe the conditions necessary to its constitution. And, *inter alia*, the statute does so by conditioning the constitution of the statutory title upon registration of a conveyance within sixty days of its date. Having done so, it would have been superfluous to say that a failure in the observance of this prescribed condition should invalidate the statutory title. The obscure provision occurring at the end of section 80 was referred to in the argument, but neither of the parties professed to be able to derive any assistance from it in the present question.

"I am accordingly of opinion that, in respect the conveyance by Isaac Scott to the defenders was not registered within sixty days of its date in the Register of Sasines, it is not habile to constitute the special statutory right and title to the lands, annihilating the previous tenure, which the defenders plead they possess. And if this be so, there seems to be no doubt that the defenders, in respect of their registered title, are infeft in the ground as the vassals of the pursuers.

"The fourth plea in law for the defenders was not insisted in. Following the views which I have expressed I shall repel the first four pleas in law for the defenders. There remains a question of fact as to the amount of the composition which the pursuers demand, and as to this I shall allow a proof."

[1] Johnston v. Pettigrew, (1865) 3 Macph. 954.

[2] *Cf.* Town-Council of Oban v. Callander and Oban Railway Co., (1892) 19 R. 912.

[3] Hill v. Caledonian Railway Co., (1877) 5 R. 386; North British Railway Co. v. Magistrates of Edinburgh, (1893) 20 R. 725.

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pursuers' demand. The present case was one to which section 107 and the following sections of the Lands Clauses Act applied, in terms of which the Company were bound to meet recurring feudal payments so long as these payments remained unredeemed.[1] This was a case in which the whole of the lands held under one title had been acquired, and therefore it did not fall under the provisions of section 126. The only instance in the cases cited for the reclaimers in which this situation had arisen was that of Smith's lands in the first *Inverness* case,[2] but in that case the form of action was a declarator of non-entry, an action which was clearly incompetent against a company having a statutory title, and not, as here, a demand only for a recurring payment, the right to which had been expressly kept alive by the statute.

At advising on 27th March 1914,—

LORD SKERRINGTON.—This is an ordinary petitory action brought for the purpose of recovering a casualty of composition from the defenders, who are a railway company and a corporation. The defenders purchased the subjects in 1867 from a Mr Scott. He died in 1885, whereupon the pursuers demanded payment of composition. On 26th October 1885 the defenders, as appears from the receipt produced, paid £479 to the pursuers as superiors of the subjects, being "the casualty of superiority consisting of one year's rent as adjusted under deduction of the feu-duty for the year and an allowance for taxes and repairs due on the entry of the said Company to said subjects. Declaring that the next casualty shall be payable and exigible on the 26th day of October 1910." The action is founded upon section 5 of the Act of 1874, which enacts that corporations shall pay a first composition at the date at which it would have been payable if the Act had not been passed and every twenty-fifth year thereafter. The defence is that the payment made in 1885 was made in error, in respect that the defenders had obtained a statutory title in the year 1868, which "destroyed" the pursuers' superiority in virtue of the Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), and which left the pursuers with nothing more than a claim for compensation. The pursuers met this defence with the reply that the defenders had failed to acquire a valid statutory title because the disposition in their favour, which was dated 12th August 1867, was not registered in the appropriate Register of Sasines within sixty days of its date, as required by section 80 of the Act. The disposition, along with a warrant of registration in favour of the defenders, was recorded in the Register of Sasines on 15th May 1868. By the Titles to Land (Scotland) Act, 1858 (21 and 22 Vict. cap. 76), section 1, a conveyance being so recorded along with such a warrant has "the same legal force and effect in all respects as if the conveyance so recorded had been followed by an instrument of sasine duly expede and recorded at the date of recording the said conveyance, accord-

[1] Magistrates of Elgin v. Highland Railway Co., 11 R. 950, *per* Lord President, at p. 959; Magistrates of Inverness v. Highland Railway Co., 20 R. 551, *per* Lord Kinnear, at p. 571; Fraser v. Caledonian Railway, 1911 S. C. 145, *per* Lord Johnston, at p. 153.

[2] 20 R. 551.

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ing to the present law and practice, in favour of the person or persons on whose behalf the conveyance is presented for registration." The Lord Ordinary has held that the disposition was in such a form as sufficiently complied with the requirements of the first part of section 80 of the Lands Clauses Act (which gives a complete title without infeftment) and also in such a form as could have been followed either by infeftment or by its equivalent under the Act of 1858, but that the disposition not having been registered within sixty days of its date did not give the defenders a title without infeftment. He held that they had obtained a valid title under the Act of 1858 by infeftment or its equivalent. The question argued before him was whether the defenders' title was what the counsel on both sides described as a "statutory title," in which case it was assumed that there could be no liability for a casualty, or whether it was what they described as a "common law title," in which case it was assumed that the casualty claimed would be due. The Lord Ordinary decided this question in favour of the pursuers, and allowed a proof as to the amount of the casualty. In the Inner House the defenders were allowed to amend their record, in order to make what seems to me to be the hopeless contention that the disposition was registered within sixty days of its date in respect that it was registered on the day on which it was delivered. The pursuers met this plea by averments of personal bar. I shall not again refer to these two points.

I have come to the conclusion that the Lord Ordinary's interlocutor ought to be affirmed, but on entirely different grounds. The assumption upon which his interlocutor proceeded is one for which neither the Lord Ordinary nor the able counsel who pleaded the case are responsible, because there exists a large body of judicial opinion in its favour. But these are mere opinions, which were not necessary for the decision of the cases in which they were uttered. They are explained, in my humble judgment, by a failure to advert to the nature of a railway company's title to its lands, and a consequent false and exaggerated conception of the meaning and effect of section 80 of the Lands Clauses Act. A railway company, being a statutory corporation, has no power either to acquire or to hold land except what is given to it by its statutes, and every acre which it possesses must be held and disposed of "according to the true intent and meaning" of the statutory provisions applicable to that particular acre. This result follows from the nature of the title, and it is not affected either by the form in which the title may have been completed or by the language in which it may have been expressed. The only exception is that referred to in section 80 of the Lands Clauses Act, viz., where the company's title remains personal and unfeudalised. The lands held by a railway company may, generally speaking, be divided into three classes, viz.:—(1) Lands which it received compulsory power to acquire and which are still required for the use of the railway. Such lands cannot be voluntarily alienated by the company. This proposition seems self-evident, but if authority is thought necessary, the case of *Mulliner* v. *Midland Railway Company*[1] may be cited. If a company has

[1] (1879) 11 Ch. D. 611.

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been armed with compulsory powers it does not seem material whether it purchased by agreement under section 6, or by notice under section 17, of the Lands Clauses Act. Though it was not necessary to decide this question in *Glover's Trustees* v. *City of Glasgow Union Railway*,[1] it is, I think, self-evident that lands which have been dedicated by Parliament to a public purpose, and which are held under an essentially limited title, cannot be adjudged by an ordinary creditor or forfeited by a feudal superior, either permanently for non-payment of feu-duties, or temporarily on account of non-entry. (2) Lands which a railway company had compulsory power to acquire may become superfluous if they are not needed for the primary purpose of the statute. In that case they must be disposed of according to the true intent and meaning of sections 120-124 of the Lands Clauses Act. Once such lands have been validly acquired by a private person he holds them upon a title which is no longer limited by any statutory provision. Accordingly, they may be sold or adjudged or forfeited at the instance of the feudal superior, though of course the latter cannot exact feu-duties or casualties the right to which was, during the ownership of the railway company, either extinguished by section 126 or redeemed in terms of section 107 of the Lands Clauses Act. (3) Lastly, a railway company may be authorised by Parliament to contract with any person willing to sell the same for the purchase of land for extraordinary purposes.[2] Such land is, of course, held by the railway company for a statutory purpose, but the company is left free to sell and dispose of it in such manner and for such considerations as it thinks fit. On principle, it must be held that land which is held on an unlimited title may be adjudged or forfeited.

It was expressly admitted at the bar by the defenders' counsel that the subjects in question formed the whole of the property held by Mr Isaac Scott under the same title. The defenders wanted this property in order to enlarge their station in Edinburgh and as part of the site for an hotel. They accordingly obtained compulsory powers to acquire *inter alia* these subjects by the Act 29 and 30 Vict. cap. cccxxv. The preamble bore that it "would be attended with advantage and convenience to the public and to the Company if the Company were authorised to alter the terminus of their main line at Edinburgh, to enlarge and improve their station at the Lothian Road in that City, and erect a hotel in connexion therewith, and to acquire additional lands for those purposes." Section 2 incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, Part I. (relating to construction of a railway). Section 4 gave compulsory power to acquire certain scheduled lands which admittedly included those then belonging to Mr Scott. Section 5 authorised the Company to enlarge its station and to erect and maintain an hotel on the lands which they might acquire for that purpose under the powers of the Act. The Act did not empower the defenders to purchase land for

[1] (1869) 7 Macph. 338, *per* Lord President Inglis, at p. 340.

[2] Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33), sec. 38; Lands Clauses Consolidation (Scotland) Act, 1845, secs. 12-14.

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extraordinary purposes and it did not incorporate section 38 of the Railways Clauses Act. It does not appear, and it is not material, whether the defenders acquired Mr Scott's property by agreement under section 6 of the Lands Clauses Act or by notice to treat under section 17. The special Act conferred no power upon the defenders to sell the subjects other than what was conferred by section 120 of the Lands Clauses Act relating to superfluous land.

I shall now consider whether the defenders' special Act with its incorporated clauses interfered, and if so, to what extent, with the rights of the superiors of the lands authorised to be compulsorily acquired. By the ordinary feudal law of Scotland the estate not merely of a vassal but also of a subvassal may be permanently forfeited for the vassal's failure to pay feu-duties. A similar forfeiture of a temporary character was enforceable in the case of non-entry, and still is enforceable against both a vassal and a subvassal if the lands would have been in non-entry but for the passing of the Conveyancing (Scotland) Act, 1874. In the case of public undertakings such as canals and railways, the enforcement of such feudal remedies would prevent the due execution of the parliamentary purpose. Nevertheless, in the case of *Todd* v. *Clyde Trustees*,[1] the Court held on a construction of a private Act of the year 1840 that the Clyde Trustees had no power to purchase compulsorily the feu-duties of a property which they were authorised to acquire compulsorily for the purpose of improving the navigation. I doubt this decision, but it is interesting because it proceeded on a clause reserving the superior's rights in language of which section 126 of the Lands Clauses Act is a bungled version. It is printed in full in the report of the case at an earlier stage in 1 Bell's App., p. 462. In *Hill* v. *Caledonian Railway Company*,[2] both parties assumed that the superior's rights continued, and they asked the Court to fix the composition due in respect of a piece of ground compulsorily acquired by a railway company and occupied as part of their line. In the case of *Macfarlane* v. *Monklands Railway Company*[3] (a case of assessment for a manse), both parties assumed in their argument that the railway company's title was non-feudal, apparently because the statutory form of conveyance did not use the word "dispone," and because the company was declared by the private Act not to be liable for feu-duties and casualties. This view received the sanction of Lord President Inglis, though his opinion on this point was not necessary for the judgment. There is, however, no good reason why Parliament should not confer upon promoters a feudal title which shall be reasonably safe from forfeiture or which shall even be indefeasible at the instance of any superior except the Crown. An example of what, on the lowest view, was a reasonably safe feudal title is to be found in the report of the case of *Marquis of Linlithgow* v. *North British Railway*,[4] which shows that the Union Canal Company held its property blench, for payment of a penny Scots if asked only, under registered conveyances in statutory form which were declared equivalent to charter and seisin.

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[1] (1843) 6 D. 108. [2] 5 R. 386. [3] (1864) 2 Macph. 519.
[4] 1912 S. C. 1327, at p. 1330.

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Under such titles the Canal Company could never itself commit a feudal delinquency involving forfeiture either permanent or temporary, and the risk of a forfeiture through the fault of a superior may have been considered negligible. I venture to doubt whether any superior except the Crown could prevail against the parliamentary title. In spite of weighty authority to the contrary, I remain of opinion that a railway company whose special Act incorporates the Lands Clauses Act holds the property which it had power to acquire compulsorily by a tenure which is feudal but which forbids feudal forfeiture, just as it forbids voluntary alienation, so long as the property is required for a statutory purpose. This construction of the Act of 1845 gives effect to the express language of section 80, and to the clear implication to be derived from sections 107 and 120 and from the special Act. There is no inconsistency in holding that the feudal relations and the feudal rights continue although the lands cannot be voluntarily alienated and although the feudal remedies by way of forfeiture are temporarily suspended. The opposite view is that in such cases the relation between superior and vassal ceases to exist as soon as a railway company has completed a title in the statutory form. If this opinion is sound a railway company's title may, with accuracy, be described as allodial.[1] At first sight it may seem to be a mere matter of words whether the property right of a railway company is described as allodial or as a special and limited form of feudal ownership; but the difference is one of considerable practical importance. In the first place, it is difficult to see how an allodial right can be acquired by infeftment on a precept of sasine. Hence the opinion (fallacious and mischievous in my view) that section 80 of the Lands Clauses Act authorises a railway company to elect between an allodial or "statutory" tenure on the one hand and a feudal or "common law" tenure on the other hand. The theory in question is also responsible for the difficulty which has been felt in construing what otherwise would be a perfectly intelligible and workable statute. With each successive decision the conflict of judicial opinion becomes more marked and embarrassing. The theory of a non-feudal title has also a direct bearing upon the substantive rights of the superior, and if applied in the present case would, in my judgment, operate injustice to the pursuers. I shall begin by stating the rights of the parties as I conceive them to have been established by the special Act and its incorporated clauses.

The first part of section 126 of the Lands Clauses Act contains an obvious blunder which any reader may correct for himself, but the general intention is clear, viz., that rights of superiority are not to be affected. But the clause cannot be so construed because it goes on in perfectly unambiguous language to interfere very seriously with the rights of superiors in cases where the lands taken by the promoters are "a part or portion of other lands held by the same owner under the same titles," in which case "the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors; provided always that before entering

[1] Ersk. II. iii. 8.

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into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act." This inconsistency might create a difficulty if we did not know on the high authority of Lord President Inglis in the *Monklands* case[1] and of Lord Chancellor Hatherley in *Inspector of St Vigeans* v. *Scottish North-Eastern Railway Company*,[2] that the purpose of the legislation embodied in the first part of section 126 was political and that its object was to preserve superiority franchises. An example of its working in the Registration Court will be found in *Raeburn* v. *Geddes*.[3] We may therefore lay aside the first part of the clause and confine our attention to the latter portion. In the cases to which it applies section 126 extinguishes once and for ever the right of a superior to his feu-duties and casualties. It does not, however, extinguish the feudal relation, otherwise it would have been idle to absolve the company from its obligation to enter with the superiors. If we read only section 126 the superiors' right to feu-duties and casualties would cease as at the date of the compulsory taking, but section 80 says that the company's title is to be "regulated by the ordinary law of Scotland" so long as it remains personal. The compensation must therefore be assessed according to the rental of the subjects at the time when the company completes its title to them. The proviso at the end of the clause does not make the extinction of the superior's right to feu-duties and casualties or his substituted right to compensation conditional on the Company's not having entered into possession. Obviously neither feu-duties nor casualties can be claimed by the superior in respect of the period after these rights have been extinguished. Sections 108 to 111 are ministerial clauses applicable both to cases falling under section 126 and to cases falling under section 107. This latter section regulates cases like the present one where the whole lands held under one title have been taken. The group of sections 107 to 111 is headed "And with respect to any lands which shall be charged with any feu-duty, ground-annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for, be it enacted as follows." Section 107 enacts, "It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands, without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same." The redemption here spoken of is one form of compensation, and it is so described in sections 108 and 110. I do not need to consider whether in a fitting case a superior may not be entitled to claim compensation under section 117 of the Lands Clauses Act or section 6 of the Railways Clauses Act. The salient difference between section 126 and section 107 is that in the latter section the superior's right to his feu-duties and casualties is regarded as subsisting until these rights have been

[1] 2 Macph. 519.

[2] (1870) 8 Macph. (H. L.) 53.

[3] (1870) 9 Macph. 20.

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severally redeemed by the Company. If I am right in thinking that section 107 like section 126 applies to casualties in general, including untaxed composition, the value of such a casualty must be fixed according to the rental of the subjects at the date when redemption is demanded and not as at the date when the Company completed its title. No demand for redemption either of the feu-duty or of the casualty has yet been made by either party in the present case. The section further assumes that until these charges have been severally redeemed the Company in common with other owners of feudal property must pay or perform as they fall due or prestable the feudal obligations arising out of the titles of the subjects which it acquires. It is easy to apply this enactment to feu-duties, taxed casualties, and (possibly) obligations as to the maintenance of buildings. The superior can compel payment or performance of each obligation as it becomes exigible by means of any competent remedy which does not involve a forfeiture or the attachment of the Company's rolling stock, &c. The position, however, was different as regards untaxed casualties when prior to 1874 heritable subjects fell into non-entry. Upon the death of the last-entered vassal no pecuniary claim of any kind accrued to the superior, and I cannot construe section 107 as creating a statutory right of a pecuniary character in lieu of a feudal right which did not exist in the year 1866 when the special Act was passed. Though the Company's obligation to find a vassal was, on my reading of section 107, reserved, the section provided no remedy in lieu of a declarator of non-entry except that the superior could insist upon immediate redemption of the casualty. In such a case the arbiter in assessing the compensation would no doubt keep in view that the subjects were actually in non-entry. On the other hand, there was nothing to prevent the railway company from asking that the heir of the last-entered vassal should be received by the superior on payment of relief, or for bargaining for its own entry on such terms as the parties could agree on. The natural and proper solution was that which the Court held to be incompetent in the first *Inverness* case,[1] viz., for the railway company to purchase a charter of confirmation which bound it to pay a casualty every twenty-five years. Assuming for the moment that the defenders' title was in order, the Conveyancing Act of 1874 automatically entered them as the pursuers' vassals and also made them liable for a casualty on the death of Mr Scott in 1885, and for a further casualty every twenty-five years thereafter, exactly as if a charter of confirmation containing such a clause had been granted under the law as it stood prior to 1874. The parties settled accounts on this footing, as appears from the receipt already quoted. The only difficulty in the way of the pursuers' success is created by the theory that all feudal connection between them and the defenders was severed in the year 1868.

The opinion that the title of a railway company is non-feudal is based upon section 80 of the Lands Clauses Act, a clause which, properly understood, has no bearing or effect upon the rights of superiors. It enacts that "Feus and conveyances of lands so to be purchased as aforesaid may be according to the form in the Schedules (A) and (B) respectively

[1] 20 R. 551.

to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances being duly executed and being registered in the . . . Register of Sasines . . . within sixty days from the last date thereof . . . shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, of the premises therein described, any law or custom to the contrary notwithstanding; provided always, that it shall not be necessary for the promoters of the undertaking to record in any register of sasines any feus or conveyances in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment; and the title of the Company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland, until the said feus or conveyances, or the instruments of sasine thereon, shall have been recorded in a register of sasines." I am quite unable to understand how eminent Judges have been able to construe this clause as creating a novel tenure which is "non-feudal" and "unassailable." They must, I think, have overlooked the fact that it proceeds on the assumption that the granter of the disposition possesses not only an undoubted right to the subjects, but also a valid progress of titles showing, *inter alia*, that the lands are not in non-entry. There has been litigation as to the effect of section 81 and as to who must bear the expense of completing the title of a compulsory vendor—*Graham* v. *Caledonian Railway Company*,[1] *Methven's Executors* v. *Edinburgh, Perth, and Dundee Railway Company*,[2] *Miles* v. *North British Railway Company*,[3] *Thomson* v. *North British Railway Company*.[4] But no one has ever doubted that the compulsory purchaser is entitled (on paying the expense) to have a complete and valid feudal title made up in the person of the vendor. Section 80 does not purport to empower a person who has an incomplete title or a doubtful title or no title to confer an undoubted right and a complete and valid feudal title upon the promoters by the simple method of executing a disposition in their favour which they may register within sixty days. In all such cases the promoters must either insist on a proper title being completed by the vendor or they may proceed (if they competently can) under one or other of sections 74 and 76. On depositing the price, they may be able, by recording a notarial instrument, to put themselves in the same position as if they had received a registered conveyance—presumably from a person possessing an undoubted right and a complete title. Section 80 assumes that the vendor can deliver what every purchaser of land was in 1845, and still is, in substance, entitled to demand, viz., what Mr Duff[5] describes as (1) an "undoubted right" to the subjects; (2) a progress of titles showing, *inter alia*, that the title is "complete" in respect that the lands are not in non-entry; and (3) a "valid disposition," which, if in the ordinary form, must contain or assign warrants whereby the purchaser may obtain a valid feudal title.

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[1] (1848) 10 D. 495. [2] (1851) 13 D. 1262, *per* Lord Ivory, at p. 1267.
[3] (1867) 5 Macph. 402. [4] (1867) 5 Macph. 410.
[5] Feudal Rights, sections 101 and 102.

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Section 80 contemplates that a compulsory purchaser may prefer to make up his title by infeftment in common form, but it abstains from enacting what is obvious, viz., that if the seller's right to the lands is undoubted, his progress of titles valid, the fee full, and the purchaser's infeftment regular, the latter will obtain "a good and undoubted right and complete and valid feudal title in all time coming" for himself, his successors and assigns. But it was necessary to enact all this *per expressum* in regard to the new form of title without infeftment which the section permitted the purchaser to adopt if he chose. So far as I am aware, no special significance has ever been attributed to the words "in all time coming," which mean much the same as "heritably and irredeemably" in an ordinary conveyance. The true meaning and effect of section 80 is illustrated by the fact that it applies with equal legal accuracy to lands of every description which a railway company may happen to acquire and hold under its statutory powers. The section is absolutely silent on the all important question whether the title of a statutory company as regards any particular land is subject to any, and, if so, what, limitations. This question, as I have already indicated, can be answered only by reading the special Act and the whole incorporated clauses. The new statutory form of title permitted by section 80 is admirably and exactly adapted to the case of lands purchased for extraordinary purposes. And yet Parliament cannot have intended to affect in the slightest degree, much less to destroy, the feudal rights of superiors in regard to lands the compulsory acquisition of which it was not asked to and did not sanction. In the case of *M'Corkindale* v. *Caledonian Railway Company*,[1] Lord Low, in the Outer House, decided that section 126 of the Lands Clauses Act did not apply to such lands, but he based his judgment upon the form of the title, which seems to me to be immaterial, rather than upon considerations of a more substantial character. Sections 107 to 111 and 126 are quite general in their language, but their subject-matter shows that they apply only to cases where Parliament has conferred compulsory powers. On similar grounds section 120 has been held not to apply to lands bought for extraordinary purposes—*Caledonian Railway Company* v. *City of Glasgow Union Railway Company*.[2]

If one disabuses one's mind of the assumption that the first part of section 80 of the Lands Clauses Act has in view a non-feudal title, it becomes apparent that the section gives no countenance to the idea that a railway company has an option to hold upon one or other of two distinct tenures the land which it has compulsory power to acquire. Whatever the form and language of the title, such land must and can be held only according to the true intent and meaning of the special Act, save in the one case where the title remains personal. Parliament, acting in the public interest, prohibits railway companies from selling lands acquired under compulsory powers so long as these lands are required for a statutory purpose, and at the same time it protects such lands from forfeiture. It would be extraordinary if directors or their solicitors had an option to

[1] (1893) 31 S. L. R. 561.
[2] (1869) 7 Macph. 1072, *aff.* 9 Macph. (H. L.) 115.

expose to feudal forfeiture subjects which the railway company was prohibited from alienating voluntarily. Three forms are pointed out in section 80 by which a heritable title may be completed. The first two are statutory, but the effect of all three is the same. (1) A disposition may be taken in the statutory form, and may be registered within sixty days of its date in the appropriate Register of Sasines, or (2) a disposition may be taken in ordinary form but, instead of taking infeftment on the procuratory of resignation or precept of sasine therein contained or on an open procuratory or precept carried by the assignation of writs, the promoters may obtain a real right by registering the disposition in the Register of Sasines. In both these cases a title would be completed *vi statuti* and without infeftment. In the second case it was not said, though I think it was implied, that the disposition must be registered within sixty days of its date. Lastly, (3) the promoters might take infeftment and register the instrument of sasine. When the Lands Clauses Act became law on 8th May 1845, such registration, by the Act 1617, cap. 17, had to be made within sixty days of the date of the instrument, but by the Act 8 and 9 Vict. cap. 35, section 3, which came into force on 1st October 1845, an instrument of sasine could be recorded at any time during the life of the grantee.

Before leaving the Lands Clauses Act I may for the sake of clearness point out that in one case, viz., that of feus, it introduces what in substance and not merely in form may be regarded as a new variety of feudal tenure—sections 10, 11, 80, and Schedule B. In this case the subjects are disponed in return for what sections 10 and 11 describe as "a feu-duty or ground-annual," and Schedule B describes as "a feu-duty or rent charge," or "rent." Section 11 enacts that such feu-duties or ground-annuals "shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties," and may be recovered by poinding and sale of the goods and effects of the promoters. Further legislation bearing on this subject will be found in the Entail Act, 1853 (16 and 17 Vict. cap. 94), sections 14-16; the Lands Clauses Consolidation Amendment Act, 1860 (23 and 24 Vict. cap. 106); and the Railway Companies Act, 1867 (30 and 31 Vict. cap. 126), section 4 (Protection of Rolling Stock and Plant). In a statutory feu there is nothing to prevent the feu-duty from being secured upon the ground in the ordinary way, although for reasons already explained the feudal remedies of the superior by way of forfeiture and poinding of the ground may be suspended during the ownership of the statutory company.

When we now examine the title of the defenders it will be found that they did not literally comply with any one of the three alternative methods pointed out by section 80. Their disposition was not registered within sixty days of its date; it did not contain a procuratory of resignation or precept of sasine; nor, as the law stood in 1845, could it have been followed by infeftment. No instrument of sasine was expede and recorded. The special Act which was passed in 1866 did not refer as it should have done to the conveyancing changes operated by the Act of 1858, and did not expressly authorise the defenders to make up a title in

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the form thereby sanctioned. Can it be successfully maintained that the defenders' title still falls to be regulated not by the statutes but "by the ordinary law of Scotland," as would have been the case if the Act of 1858 had not been passed, and the title had remained a personal one? Such an argument seems to me to be far too technical. I agree with the Lord Ordinary that the defenders' disposition, when duly registered along with a warrant of registration in their favour, gave them a valid title equivalent to infeftment, but I also think that the title so completed was attended with the same statutory consequences as if the forms mentioned in section 80 had been literally observed.

Four cases have been decided in this Division of the Court as to the effect of the compulsory acquisition of land by a railway company upon the rights of the superior, viz:—*Magistrates of Elgin* v. *Highland Railway Company*,[1] *Magistrates of Inverness* v. *Highland Railway Company*,[2] *Magistrates of Inverness* v. *Highland Railway Company*,[3] and *Fraser* v. *Caledonian Railway Company*.[4] In the *Elgin case*[1] a railway company had taken part of the lands held by an owner under the same title, and had completed its title in the statutory form. An action for declarator and payment of a casualty in the form introduced by the Conveyancing Act of 1874 as in place of an action of declarator of non-entry was held to be excluded by section 126. Opinions were expressed to the effect that such an action was incompetent against a defender who had by statute a complete and valid title to the subjects, and by Lord President Inglis, to the effect that "the relation of superior and vassal does not subsist between the pursuers and defenders." He further said that in his opinion the 107th section applied where the whole lands held under the same title had been taken. He added, however, that in this case it was not "contemplated that the relation of superior and vassal shall be "created," but that the railway company must pay the superior everything due to him until redemption. In the first *Inverness* case[2] the action again took the incompetent form of a statutory action in lieu of a declarator of non-entry. It ought to have been dismissed on this ground, instead of which decree of absolvitor was pronounced. It related to two parcels of ground, one of which comprised the whole of the ground formerly held by a Mr Smith under the same title, and the other a part only of the land formerly held by a Mr Rose. In each case a title had been duly completed by registered disposition in the statutory form. Lord Kinnear reaffirmed the theory that the defenders' title was non-feudal. Lord M'Laren dissented. The Court disregarded as nullities charters of confirmation obtained by the railway company, though the Lord Ordinary (Kyllachy) and Lord M'Laren were in favour of sustaining the validity of such a charter in the case of Smith's lands. The second *Inverness* case[3] was an action concluding for declarator that the defenders were bound to pay compensation to the pursuers in respect of their having acquired a superiority with the feu-duties and casualties pertaining thereto, or alternatively were bound to redeem the said feu-duties

[1] 11 R. 950.
[2] 20 R. 551.
[3] 1909 S. C. 943.
[4] 1911 S. C. 145.

and casualties. The defenders had acquired part only of the lands held under the same title, and had registered a conveyance in statutory form. The Court allowed a proof as the pursuers' title was disputed and as there was a plea of *mora*. Lord Kinnear again expressed the opinion that the railway company held by statute and not by tenure under a superior. The latest case is that of *Fraser*,[1] which was an action laid upon an alternative award by an arbiter on a claim for compensation made by a superior against a railway company. The subjects formed part of an estate held under the same title. They were compulsorily acquired in 1846, but the railway company did not obtain a title until 1875. It was in statutory form. In 1903 the superior for the first time called upon the company to pay compensation for the loss of his rights as superior. He was held entitled to £885, being the compensation assessed upon the rental of the year 1875, under deduction of £500 paid by the defenders in 1877 in settlement of a casualty claimed by the superior on the death of the former vassal, with interest on the balance from the date of demand in 1903. The interpretations of the Lands Clauses Act presented by the Lord President and by Lord Johnston in this case were widely different from each other, and were also inconsistent with the opinions expressed in the earlier cases. The only occasion on which the Court has had to consider the position where the whole of the lands included in one title had been taken was in regard to Smith's lands in the first *Inverness* case.[2] Although the Court held (erroneously, as I think) that the charters of confirmation in favour of the railway company were nullities, that decision is in no way binding upon us, because it was pronounced in an action which was in itself incompetent. Lord Adam said[3] that the provisions of the Lands Clauses Act "were altogether inconsistent with the competency of a declarator of non-entry against the company, or of the statutory action which has come in its place, seeing that decree in such actions would immediately lead to the disturbance of the company's possession of the ground." Lord Kinnear[4] agreed with Lord Adam that the action was incompetent. The Lord President (Inglis) concurred with Lord Adam and Lord Kinnear. Further, I do not feel myself bound by judicial opinions, however weighty and numerous, as to the non-feudal character of a railway company's title, seeing that these opinions were in no single case necessary for the decision, and, further, were in plain and direct conflict with the language of the Act of Parliament.

I am accordingly of opinion that the pursuers as the defenders' feudal superiors are entitled to recover the casualty sued for. The action is properly laid on debt, and does not claim a feudal forfeiture. The Lord Ordinary's interlocutor should therefore be affirmed.

Lord Johnston.—[In his Lordship's absence his opinion was read by Lord Ormidale]—The material facts are that Isaac Scott by a conveyance dated 12th August 1867 conveyed to the Caledonian Railway Company the site of part of the Company's present Princes Street Station in Edinburgh, being the whole subjects held by him of Heriot's Hospital,

[1] 1911 S. C. 145. [2] 20 R. 551. [3] 20 R., at p. 560. [4] 20 R., at p. 572.

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as superior, under a writ of confirmation dated in 1861. While entry to possession was given at Whitsunday 1867, and the conveyance itself was dated 12th August 1867, payment of the price was postponed at interest till 15th May 1868, and the conveyance was not delivered till the price was paid on the said last-mentioned date. The conveyance was registered in the Register of Sasines on the same day.

The deed of conveyance itself was in such terms that, though not strictly complying, and though there was no special reason for its not complying, with those of Schedule A to the Lands Clauses Act of 1845, it may, and I think must, be held nevertheless to be a statutory conveyance under the 80th section of that Act.

Isaac Scott the entered vassal having died, George Heriot's Trust, in whom was vested the superiority of the lands, in 1885 claimed and received a composition, on the footing that the Company were a corporation, the receipt, which was given and accepted, declaring that the next casualty should be payable and exigible twenty-five years thereafter, or on the 26th day of October 1910. I doubt whether it can now be said with confidence on what footing the parties transacted; but I think that it may be inferred that they misunderstood the statutory position in which they stood to one another. It seems extremely likely that they assumed that the registration of the conveyance of 1867-68 had the same effect as the registration of a conveyance under the Titles Act, 1858, and that by virtue of the Conveyancing Act, 1874, the Company were impliedly entered with Heriot's Hospital, and were due a casualty in respect of the death of Isaac Scott, the last entered vassal, and that that casualty was the casualty payable by a corporation under the Act of 1874, section 5. One of the questions in the case is whether this mistake, if it was a mistake, and was made, affects the pursuers' present claim. George Heriot's Trust, the twenty-five years having expired, now sue for a further payment as at 26th October 1910.

Before considering the general provisions of the Lands Clauses Act I think that it is desirable to examine the conveyance in question with reference to the conveyancing system as at its date. In 1867 the older form of conveyancing had been modified by the Infeftment Act of 1845, the Transference of Lands Act of 1847, and the Titles Act of 1858, and in the light of these Acts the conveyance must be read.

Section 80 of the Lands Clauses Act, 1845, allows, but does not require, lands compulsorily acquired to be conveyed in the form of Schedule A to the Act, and provides that such conveyance, if duly registered in the Register of Sasines, should give a good statutory title. The scheduled form has nothing in the way of a *tenendas*, even in the short abbreviated form. The idea of making title by registering a conveyance was in advance of ordinary conveyancing. A few months after the passing of the Lands Clauses Act, 1845, the Infeftments Act was passed. But this only provided for the taking of infeftment notarially, instead of on the ground, and registering the notarial instrument. In 1847 the Transference of Lands Act was passed, but this only permitted the substitution of abbreviated forms for the ordinary clauses, then essential and in use, such as the obligation to infeft, precept of sasine, &c. In 1858 however the

Titles Act of that year introduced the reform which practically abolished the instrument of sasine, and allowed a title to be completed by the mere recording of the conveyance. This Act provided by section 5 for dispensing altogether with various clauses formerly essential to completing a title by sasine and for which short statutory forms had been provided in 1847. In particular it was enacted that "if the lands shall be disponed to be holden *a me* only, or *a me vel de me*, the clause so expressing the manner of holding shall imply that the lands are to be holden in the manner expressed" in the Transference of Lands Act, 1847, section 2, "with reference to obligations to infeft *a me*, or *a me vel de me*, respectively; *and where no holding is expressed* the conveyance shall be held to imply that the lands are to be holden in the same manner in which the granter of the conveyance held or might have held the same." Turning to the conveyance in question it is found that it does contain a *tenendas*, but in this form,—"to be holden by the said Company and their successors forever in terms of the foresaid Acts," these being the Company's original Act of 1845, and its empowering Act of 1866 incorporating the Lands Clauses Act of 1845. Had the conveyance been silent as regards the *tenendas*, a holding in the same manner as that in which Isaac Scott held might so far as the face of the conveyance was concerned have been implied, and an ordinary title might have been made up. But "to be holden . . . in terms of the foresaid Acts" makes it impossible to regard this conveyance as anything but a statutory conveyance, or as being capable of being used to make up by registration anything but a statutory title. The *tenendas* expressed is surplusage, but innocuous.

I am thus obliged to disagree with the latter portion of the Lord Ordinary's opinion.

Further, in my opinion anything but a statutory title was impossible under the Acts. But meantime the above considerations dispose of the contention that the title taken might be treated alternatively as an ordinary title, having on registration the ordinary feudal effect. I have no hesitation in concluding that the Company never were, by their recorded conveyance and the effect of the Conveyancing Act, 1874, impliedly entered with the Heriot Trust as their superior. This does not however necessarily negative the superiors' claim. For they have prudently discarded the form of action which now comes in lieu of the declarator of non-entry, and state their demand in the form of a purely petitory conclusion for a sum of money, though some of their pleas indicate that they are still under the erroneous impression that they have an entered vassal.

Before proceeding to consider the effect of a statutory title under the Land Clauses Act of 1845, in a question with the superiors, I shall deal with the pursuers' sixth plea—which is that the defenders having failed to record their conveyance within sixty days of its date, as provided by the said Act, section 80, they have not acquired a statutory title to the subjects conveyed. The Lord Ordinary has found that the conveyance in question was one which might be read as a conveyance in statutory form under the 80th section of the Lands Clauses Act, 1845, and the relative Schedule A, but then he has also held that, as it was not registered in the Register of Sasines within sixty days from its date, it did not give the Company the

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benefit of a statutory title under that section. This requires a consideration of the 80th section. It provides that conveyances of lands, purchased by companies proceeding under the Act, may be in or as near as may be in the form of Schedule A to the Act, which conveyances being duly executed, and registered in the Register of Sasines within sixty days from the last date thereof, "shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns to the premises therein described any law or custom to the contrary notwithstanding." What then is the occasion and meaning of the sixty days, and what is to be the effect of failure to register within sixty days? The former I think is easily explained. The Scots statute 1617, cap. 16 (which established the Register of Sasines as a check on the frauds which were apparently rife, by which owners after having sold or bonded their properties fraudulently executed further deeds to the prejudice of those who had already transacted with them), required that sasines should be registered within sixty days, and that if they were not so registered they should "make no faith in prejudice of a third party, who hath acquired a perfect and lawful right to" the subjects, "but prejudice always to them to use the said writs against the party maker thereof." That this was not a perfect safeguard is evident, but at least it prevented the holder of the first writ keeping his sasine latent for more than sixty days, unless he was to run the risk of being ousted by the holder of a subsequent competing writ. Yet it left his sasine perfectly good against his author. Reverting to the 80th section, it is evident that, if a statutory title was to be given to a company by registration of a conveyance without sasine, something must be done to place the company acquiring such conveyance in the same position as the private purchaser or borrower under the old law. Hence I think there can be no doubt that the sixty days' limitation by that section was imposed for the purpose of placing the company *in pari casu* with the private individual. But there was no declaration of absolute nullity on failure to register within the sixty days any more than under the Act 1617, cap. 16.

Now it is somewhat inexplicable that, the Lands Clauses Act having been passed on 8th May 1845, another Act was passed on 21st July of the same year, which practically repealed the above provision of the Act of 1617, and provided that from 1st October 1845 any instrument of sasine may be competently registered at any time in the lifetime of the party taking it. And it is difficult to see why the limitation in question should have been introduced in the Lands Clauses Act, when the two statutes must in all probability have been in preparation at the same time. The only explanation I can hazard is, that this portion of section 80 was a stock clause in use to be inserted in private bills, and found its way into the Lands Clauses Act through inadvertence. The Infeftments Act of 1845, to which I have referred, was followed by the Titles to Land Act, 1858, which made sasine no longer necessary and gave to the registered conveyance the same effect as a charter or disposition and sasine. Section 19 of this Act authorised the recording of the conveyance at any time in the life of the party on whose behalf it was presented

for registration, and therefore carried on the relaxation of the Act of 1847 into the new system of completing title. Accordingly I think that the limitation on registration of the Lands Clauses Act, section 80, became, on the passing of the Infeftments Act of that year, and still more on the passing of the Titles Act of 1858, an obsolete provision, having no longer any meaning. It was no longer required to place the company *in pari casu* with the private individual. I am therefore unable to agree with the Lord Ordinary that the statutory title was ineffectual because not timeously registered.

But further, in my opinion, the Lord Ordinary, even assuming that he is right in holding that the Company's registered conveyance may be regarded as effectual to confer an ordinary feudal title, has misconstrued the latter part of section 80 of the Lands Clauses Act. It will be found that section 80 of the Lands Clauses Act, after providing for a statutory title by registering a statutory conveyance, proceeds to say that it shall not be necessary for a company to record in the Register of Sasines any conveyance in their favour which should contain a precept of sasine or which might be completed by infeftment; and that the title of the company under such last-mentioned conveyance should be regulated by the ordinary law of Scotland until the conveyance and the sasine thereon should have been recorded in the Register of Sasines, that is should be regulated by the ordinary law of Scotland so long, but so long only, as it remained, so to speak, personal. Hence in the present case, as the conveyance in question, assuming it capable of founding an ordinary title, was one on which *ex hypothesi* infeftment might be taken by recording it according to the law current when it was granted, the title of the Company under it would have been regulated by the ordinary law of Scotland from the date of its execution in 1867, but only till it was registered on 15th May 1868. But thereafter it would have become a statutory title, just as much as if it had been registered within sixty days of its date. On a fair reading of the 80th section, it appears to me that a company to which the Lands Clauses Act applies cannot, at least if it acquires under that Act, obtain either immediately or ultimately anything but a statutory title. I do not think that the full import of this last clause of section 80 has been realised in some of the cases which have already occurred for decision.

I now proceed to consider what is meant by "a good and undoubted right and complete and valid feudal title." As has been said in previous cases, this is an inaccurate use of language. Your Lordships and I approach its explanation from a somewhat different point of view. But though we follow accordingly a different course, I think that we are entirely at one in the result we reach. What the Company obtains is, according to my view, not a feudal title in the ordinary sense of that term but a statutory title, fee-simple in its nature, the feudal tenure being abolished, while the feudal prestations are preserved and protected.

I am aware that the use of the word "feudal" *prima facie* leads to a contrary view, and that some countenance may be found from other passages in the statute for the idea that it still accurately describes the relation created by the statute. But what has most completely satisfied me that the word is misused is that in 1845 the recording of a conveyance could

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not have conferred anything which could have been described as a feudal title, and I do not think that it can receive a different effect after 1858 from that which it must have been intended to receive from 1845 to 1858. The superior's right, then, to the feudal prestations or dues of superiority, though without the superior's remedies, is, as it will be seen, temporarily reserved, but only until they are redeemed or compensated. If we turn to sections 107 to 111 there will, I think, be found a perfectly complete code having this effect. I may avoid explaining at length my view regarding them, if I may be permitted to refer to my opinion in the recent case of *Fraser* v. *Caledonian Railway Company*,[1] to which, on full reconsideration, I adhere, though there may be one or two passages which I should desire to correct. These sections are prefaced by a preamble perfectly general in its terms, viz., "and with respect to any lands" (that is any lands taken by the Company under its special Act and the Lands Clauses Act) "which shall be charged with, *inter alia*, any feu-duty, casualty of superiority, or other annual or recurring payment not hereinbefore provided for" (and I think that it is generally admitted that the prior provisions of the statute for taking lands and interests in lands do not apply to rights of superiority) "be it enacted as follows":—And what is then enacted, stated shortly, is this:—Section 107. The company may enter into possession of subjects taken without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and provided they are not called upon by the party entitled to the charge to redeem it. Section 109. Where part only of the lands charged with any feu-duty, casualty, &c., is taken, the apportionment of the charge, if not agreed upon, is to be settled by the Sheriff, but by agreement of all concerned the whole charge may be left as a burden upon the remaining part of the lands. Section 108. If any difference respecting the consideration to be paid for the discharge of such lands therefrom or from the portion affecting the lands taken occurs, the same is to be determined as in other cases of disputed compensation. Section. 110. Upon payment of the compensation to the party entitled to the charge, he shall execute to the company a discharge thereof, and if he fails the company may proceed "in the manner hereinbefore provided" in the case of the purchase of lands; and Section 111. The remaining lands are declared to remain charged with the whole or the remainder of such charge, as the case may be.

When this fasciculus of clauses or code is considered, it fully, I think, explains what is meant by the inaccurate expression of the 80th section, "a good and undoubted right and complete and valid feudal title." The Company obtains in perpetuity a statutory title, independent of the superior, very much, I imagine, like the fee-simple title in England, after the passing of the Act abolishing feudal tenure there. But the superior is not to be deprived of his beneficial interest in the superiority—he is to recover the dues as and when they fall due or recur, so long as they are not redeemed. But he may at any time require them to be redeemed, and by implication the Company may insist upon redemption. Parties

[1] 1911 S. C. 145.

may by mutual consent allow them to be continued indefinitely, or either may at any time require that compensation be paid or accepted, and then they are to be discharged. In the present case neither party has called for redemption.

There remains to consider section 126, which has caused the Court so much trouble in some previous cases. The first clause of this section has been adequately explained by the late Lord President (Inglis) in the *Elgin* case.[1] The second clause, whatever its meaning and effect, has reference to the case where a portion only of the lands held by the same owner under the same titles has been taken. We are not dealing with such a case, and are therefore not called upon to consider it, or the proviso which follows it. I think, indeed, that it will be unquestionably necessary some day to reconsider the series of prior cases in which its construction was involved, if only to arrive at some consistent interpretation which will harmonise the whole provisions of this part of the Act. But it is enough for the present case that the rights and liabilities of the parties here are not complicated by its embarrassing provisions.

In the present case the Company have not redeemed the feu-duties and casualties of superiority. They have continued paying the trifling feu-duty of 1s. 3d. per annum. On the death of Isaac Scott a so-called casualty of composition, or recurring payment (and the term "recurring payment" (section 107) does not involve the condition that it recurs at stated periods), became due. The feudal relation as matter of tenure had, I think, been broken, but the superior's beneficial rights remained *pro tempore*, as if it continued to subsist. They were acknowledged and satisfied as I think the statute intended. For I do not find, as I think some have, any hostility to the superior in the statutory provisions, but merely a studious desire to deal justly, and neither more nor less than justly, with all established rights and interests in lands, while at the same time providing for simplification of title. It is true that the parties may have been under erroneous impressions as to the effect of the statute and their rights thereunder, and they may have used terms in incidental documents which were not strictly accurate. Their expressions and even their mistakes do not alter the reality of what was done. There was no enforcing or taking of an entry. There was no granting of confirmation. There was nothing done out of the statutory order which required to be set aside or undone. When it became due a composition was paid. At an earlier date it would have been a matter of bargain what the Company should pay, because they were a corporation with perpetual succession. In 1874 this had been fixed at a year's rent or value of the lands, with obligation to repeat every twenty-fifth year. But in the case of a company holding a statutory title with dues of superiority unredeemed, this was to be paid not for an entry, but *as if on* an entry merely. The first payment was made in 1885. The recurring payment is now due, and the former superiors as in right of it demand payment. They carefully abstain from any reference to non-entry or any use of the statutory procedure which comes in lieu of the old declarator

[1] 11 R. 950.

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of non-entry. They confine themselves to the statutory demand to which section 107 of the Lands Clauses Act entitles them, and they are, I think, entitled to succeed. The only suggestion that there is anything wrong with their prior procedure rests on the fact that, in the receipt which they gave in 1885 on the voluntary payment by the Company of an adjusted sum on the occurrence of the casualty, they use the term "due on the entry of the said Company to the said subjects." This was an error in law, no doubt, for the casualty of superiority was due not *on* the entry because there was and could be no entry, but *as on* the entry of the Company. Both parties evidently thought that there had been an implied entry under the 1874 Act. But their mistake in this respect did not affect the title, and, this is the main point, did not affect the fact that the sum paid, receipt of which was acknowledged, was due, and does not I think, affect the fact that another sum is due now. The Company had it in their power to redeem the feudal prestations of feu-duty and casualty at any time from and after 1868; if they have not done so that is their affair, not that of the quondam superior.

Accordingly, while I cannot affirm the Lord Ordinary's interlocutor, I have come to a conclusion which will, I think, have the same practical result.

LORD PRESIDENT.—I agree in the result at which Lord Johnston and Lord Skerrington have arrived, but I prefer the route which has been followed by Lord Skerrington in whose reasoning I entirely concur. Its adoption may no doubt involve a modification of the dicta of certain Judges whose opinions in this department of our law are entitled to the highest respect. But I do not think that our judgment to-day involves the overruling of any prior decision, otherwise of course this case would have gone to a larger tribunal.

Four cases, it appears to me, require careful consideration. (First) the *Magistrates of Elgin* v. *Highland Railway Company*.[1] It related to a strip of land which formed part of an estate. The Company had completed their title under section 80 of the Lands Clauses Act. The superior raised the statutory action under section 4 (4) of the Conveyancing Act, 1874. That action was thrown out, for, as Lord Adam observed, "I never could understand how this action could be maintained unless it could have been predicated of the lands that they were in non-entry, and I could not well understand how that could be, when the statute provides that the titles which have been made up here by the railway company constitute a complete and valid feudal title in the persons of the railway company." In short, it was an action that could only be raised at the instance of one who was entitled to sue a declarator of non-entry against an unentered vassal, and was obviously incompetent. But both Lord Adam and Lord President Inglis expressed the opinion that in a case such as we have before us, clause 107 and following clauses of the Lands Clauses Act would have been applicable. No doubt, in that case, Lord President Inglis said "the relation of superior and

[1] 11 R. 950.

vassal does not subsist between the pursuer and the defender"; but, in an earlier part of his judgment, his Lordship said that the relationship did not subsist "in the ordinary sense of the constitution of a feu under a superior." So interpreted, I agree.

Lord President.

(Second), what has come to be known as the first *Inverness* case.[1] It related to two parcels of ground, the first embraced under one title and the second forming part only of the lands embraced under one title. In both cases the company had completed its title to the land under section 80. The superior again raised the statutory action under section 4 (4) of the Conveyancing Act, 1874, and once more it was held incompetent, for, to use the words of Lord President Inglis, in the case of the *Governors of Heriot's Trust* v. *Drumsheugh Baths Company*,[2] the condition under which the action "can be brought, namely, that the superior would under the former law have been entitled to sue the action of declarator of non-entry, does not exist." But with the opinions of the majority of the Court in the first *Inverness* case,[1] regarding the pecuniary liabilities of the railway company, I entirely agree, for, as Lord Kinnear observed, "the defenders cannot continue to hold the lands without paying or redeeming feu-duties and casualties."

(Third), what has come to be known as the second *Inverness* case,[3] where the company had acquired part of the lands held under one title by the vendor. Once more they completed their title under section 80, and the superior then raised an action to recover compensation for the loss of his feu-duties and casualties. It was held to be a well-founded claim. I cannot very well see how it could have been otherwise, because undoubtedly the railway company had entered upon the lands and possessed them like any ordinary vassal, and were therefore bound by the ordinary obligations of the vassal. And the Court held that the superior's right was not waived by his permission to the railway company to enter into possession of the lands.

(Fourth), the case of *Fraser* v. *Caledonian Railway Company*,[4] where the company entered into the possession of the lands in the year 1846 but completed their title under section 80 in 1875, and, after a lapse of many years, in 1903, the superior made his claim for compensation for the loss of feu-duties and casualties. The only question raised was whether compensation should be estimated as at the date when the title was completed or as at the date when the claim was made. It was immaterial which, for the amount was the same. But holding the opinion I do in this case, I think the compensation ought to have been estimated as at the time when the claim was made.

If I have accurately interpreted the meaning and effect of those four cases, I think it will be plain that they remain untouched by the decision which we pronounce to-day. But I desire, for my part, to make it perfectly clear (First) that when a railway company takes lands which it is authorised by statute to take, it can only make up a statutory title and none other. To me, the phrase used in the Lord Ordinary's opinion

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[1] 20 R. 551. [2] 17 R. 937. [3] 1909 S. C. 943. [4] 1911 S. C. 145.

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that "the conveyance was habile, in point of form, to found the special statutory right and title to the land . . . although it was equally habile as a common law transmission of the feu," is quite meaningless. (Second) that the feudal relation between superior and vassal remains untouched after the railway company's title is complete. But the feudal remedies are gone. (Third) that when the railway company enters into possession of lands which it is authorised by statute to take, it becomes liable for the feu-duties and the casualties unless and until, at the instance either of the railway company or of the superior, the dues of superiority are redeemed.

We shall, therefore, affirm the interlocutor of the Lord Ordinary.

THE COURT adhered.

PETER MACNAUGHTON, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

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Martin's Executrix v. M'Ghee.

MRS MARY SMITH OR MARTIN (James Martin's Executrix), Minuter (Reclaimer).—*Constable, K.C.*—*MacRobert.*

RICHARD M'GHEE AND ANOTHER (General Trustees of the National Sailors' and Firemen's Union of Great Britain and Ireland) AND OTHERS, Defenders (Respondents).—*A. O. M. Mackenzie, K.C.*—*J. B. Young.*

Executor—Title and interest to sue—Process—Sisting new parties—Death of pursuer pendente lite—Right of executor to be sisted—Executor having no interest in the merits—Title and interest of executor to sue merely for expenses.

A member of a trades union brought an action to interdict the union from applying funds contributed by its members to political purposes. The pursuer died before the case was heard in the Procedure Roll. His widow, as his executrix, craved to be sisted in his place as pursuer in order that she might insist in the action for the purpose of recovering as expenses the sums which he had expended in the litigation.

Held (reversing judgment of Lord Cullen) that the executrix was entitled to be sisted, reserving all questions as to her right to insist in the cause.

After hearing the executrix, *held* further that, as she had no interest in the merits, and as there had been no unreasonable conduct on the part of the defenders, she should not be allowed to proceed with the action merely for the purpose of recovering expenses; and action *dismissed.*

1ST DIVISION. Lord Cullen.

ON 29th January 1913 James Martin, a member of the National Sailors' and Firemen's Union of Great Britain and Ireland, brought an action against that union and against its trustees, in which he sought to interdict the defenders from asking for or receiving contributions from its members and applying such contributions for Parliamentary or other political purposes.

On 4th June 1913 the Lord Ordinary closed the record, and appointed the cause to be put to the Procedure Roll. In July 1913, before the case had come up for hearing, the complainer died.

Thereafter Mrs Mary Smith or Martin, the complainer's widow, who had been appointed executrix on his estate, lodged a minute in

which she craved, as such executrix, to be sisted as complainer in place of her husband. Mar. 27, 1914.

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On 29th July 1913 the Lord Ordinary (Cullen) refused a motion to sist in terms of this minute.*

The minuter reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 31st January 1914.

Argued for the reclaimer;—The Lord Ordinary was wrong in

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* "OPINION.—By interlocutor dated 4th June 1913, I closed the record in this action of suspension and interdict and appointed it to be put to the Procedure Roll. In July 1913, while the case remained unheard, the complainer died.

"The nature of the action is such that, admittedly, the complainer's interest to insist in it has not transmitted to anyone representing him. Although this is so, the widow of the complainer, as his executrix-dative, now seeks to be sisted in his room and place. As such executrix she has, admittedly, no interest whatever in the merits of the action. She says, however, that the action was a well-founded one; that the deceased expended money in prosecuting it against the unjustifiable opposition of the respondents; that the amount of his executry estate was thereby diminished; and that she, as as his executrix, is therefore entitled to be sisted as complainer in order that she may prosecute the action on its merits to the end of recovering the expenses so laid out on it by the deceased prior to his death. The respondents oppose the motion.

"No authority of any kind specifically bearing on the point at issue was cited to me, and I have not been able to find any. It is not often that the interest of a litigant dying *pendente lite* will not transmit to someone representing him.

"The general rule is well fixed to the effect that no one has right to be sisted in room of a deceased litigant, or is liable to have the action in question transferred against him if he stands aloof, unless he has the proper interest in the subject-matter of the action. No exception to this rule is, so far as has been shown to me, to be found in the books. The case of a law-agent was referred to, but it is affected by special considerations, and is, moreover, strictly conditioned and limited, so that it does not aid the contention of the executrix in any way.

"Let it be supposed that the action had related solely to a disputed question of right in heritable property. On the death of the complainer, the party with interest entitled to be sisted in his room, and against whom the action might have been transferred had he stood aloof, would have been his heir in heritage. If the heir sisted himself, could the executrix have asked to be also sisted in the matter of expenses? Plainly not. Or, if the heir stood aloof, could the executrix have asked to be sisted in order to prosecute the action on its merits, in which alone the heir was interested? Equally not, I think. And if this view be right I do not see why the claim of the executrix should be regarded differently because there happens to be no heir or anyone else having an interest as representative of the deceased.

"It is obvious that, if the claim of the executrix to be sisted be refused, the action will be left in an unsatisfactory position. Nothing further can be done in it. But while this will be so, it would seem to me still more unsatisfactory to permit the executrix to prosecute, with any possible amount of attendant expense, an action, in the merits of which she has no interest whatever and a decree in which would be purely academic and form no real *res judicata*, merely with a view to a possible motion by her in the end of the day for expenses.

"I am of opinion that the motion by the executrix to have herself sisted as complainer falls to be refused."

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refusing to sist the minuter, even on the assumption that he was correct in his statement that she had no interest in the merits of the action. The representatives of a deceased person had, in all circumstances, the right to insist in an action raised by their predecessor.[1] It did not follow from the fact that special provision was made for taking up the process on the death of the pursuer in an action of ranking and sale[2] that it was incompetent for the representatives of pursuers in other actions to do the same. The representatives of a deceased defender were entitled to have themselves sisted in his place, although the pursuer brought no transference, and did not wish to proceed with the cause.[3] On the same principle the representatives of a deceased pursuer were also entitled to be sisted. Further, the Lord Ordinary was not justified in stating that it was admitted that no interest to insist in the action had transmitted to the executrix. She maintained that she had an interest, if only in respect that the deceased's estate had been diminished by the sums expended by him in connection with the litigation, which he might have recovered from the defenders as expenses, and this, possibly, even in the event of his being unsuccessful on the merits of the action, if the defenders' conduct had been vexatious.[4] The action involved the patrimonial interest of the deceased, as its object was to protect the funds of the society in which he was interested from malversation—had it not involved his patrimonial interest it would not have been competent[5]—and the minuter had therefore an interest in following out the action as representative of his estate.[6] An action might be competently carried on even though, owing to the lapse of time or other circumstances, the decree which it was sought to obtain would be of no practical use to the pursuer.[7]

Argued for the respondents;—The Lord Ordinary had properly refused the application, in respect that the minuter had no interest either in the merits of the action or in the question of expenses. As regarded the merits of the action, she had not been able to qualify any patrimonial interest in the sense required by the decisions which were cited by her counsel. Even the patrimonial interest of her husband, if it existed at all, was either entirely personal or too remote. It must be remembered that even if a question of benefit money had been involved no action for its recovery was competent.[8] Nor had she any interest vested in her in the question of expenses. No award of expenses had as yet been made, and an award of expenses was always a matter which was within the discretion of

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[1] Act 1693, cap. 15; Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 96; Shand's Practice, ii. 537; Mackay's Manual of Practice, 256 *et seq.*; *cf.* Ritchie v. Ritchie, (1874) 1 R. 826.

[2] A. S. 23rd Nov. 1711, sec. 4.

[3] M'Culloch v. Hannay, (1829) 8 S. 122.

[4] Barrie v. Caledonian Railway Co., (1902) 5 F. 30.

[5] Aitken v. Associated Carpenters, &c., (1885) 12 R. 1206; Osborne v. Amalgamated Society of Railway Servants, [1911] 1 Ch. 540.

[6] Counsel also referred to Leigh's Executrix v. Caledonian Railway Co., 1913 S. C. 838, as illustrating the right of an executor to insist in a claim of damages intimated by his author.

[7] Goodall v. Bilsland, 1909 S. C. 1152, at p. 1161; M'Geehan v. Knox, 1913 S. C. 688.

[8] Schloesser on Trades Unions, (2nd ed.) 127.

the Court. The minuter might have an interest in expenses if circumstances were present such as those in which the law-agent of a deceased pursuer might sist himself in order to obtain a decree for expenses in his own name, *e.g.*, if expenses had already been awarded, or if an interlocutor had been pronounced from which such an award would follow as a natural consequence[1]; but no such circumstances were present here.

LORD PRESIDENT.—In this case the Lord Ordinary appears to me to have gone too fast. He has refused a minute of sist by the executrix of the complainer in the action and dismissed the cause. Now the action was one of interdict brought by a member of a trade union in order to have the union of which he was a member prevented from collecting contributions or levies for the purpose of promoting Labour representation in Parliament. The record was closed on 4th June 1913, and the complainer died on the 18th June. His widow was confirmed executrix on 29th July, and thereafter she presented this minute and asked to be sisted as a party to the process.

It seems tolerably plain that she has no interest—and will probably have no interest—in the merits of the case, and on that ground the Lord Ordinary has refused her crave to be sisted as a party in respect, he says, that "the general rule is well fixed to the effect that no one has right to be sisted in room of a deceased litigant, or is liable to have the action in question transferred against him if he stands aloof, unless he has the proper interest in the subject-matter of the action."

Now I am not prepared to subscribe to that rule as thus absolutely stated. There may be cases in which a person who has not "the proper interest" may not be entitled to insist in the action; but on the other hand there may be cases in which he might be entitled to insist. That is a question upon which we should desire to hear further argument. In the meantime, my opinion is that the rule laid down by Mr Mackay in his Manual of Practice, at p. 258, which was referred to in Mr MacRobert's argument, to the effect that "representatives of a pursuer as his heir, executor, or assignee, could always insist in an action raised by his predecessor," is unqualified, and that we cannot deny the right of the widow, as executrix, to be sisted as a party to this case.

On what her fate may be after she becomes a party to the case I forbear to speculate, because, while I propose to your Lordships that we should recall the interlocutor of the Lord Ordinary and sist the minuter in terms of her minute of sist, I further propose that we should accompany that finding with a finding to the effect that she be entitled to be and be heard before us on the question whether or no she is entitled to insist in the action to its conclusion.

LORD JOHNSTON.—I entirely agree; and I do not think it necessary to add anything to what your Lordship has said.

LORD SKERRINGTON.—I agree.

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[1] M'Lean v. Auchinvole, (1824) 3 S. 190; Ammon v. Tod, 1912 S. C. 306.

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THE COURT recalled the Lord Ordinary's interlocutor, sisted the minuter in terms of her minute, reserving all questions as to her right to insist in the cause, and continued the case.

On 18th March 1914 counsel were heard before the First Division (without Lord Mackenzie) on the question of the minuter's right to insist in the action.[1]

At advising on 27th March 1914,—

LORD PRESIDENT.—In this case we some time ago allowed the widow to be sisted as a party to the action in room and place of her husband. We expressly reserved the question of her right to insist in the action. She is the executrix-dative, and we considered that she was entitled, if she chose, to become a party to this action, in order that she might state her case to us and that we might have an opportunity of considering and deciding whether she should be allowed to prosecute the action to its end on the merits, or, if not, whether she should be entitled to recover expenses. We have now heard a full argument upon that question, with the result that I am satisfied that the executrix-dative has no interest whatsoever in the merits of this action, and that a decree on the merits would be of no use or advantage to anybody. It would be idle and futile. But, notwithstanding, we may, if we think that the conduct of the defenders has been unreasonable, undue, or excessive, and has caused unnecessary expense, find the executrix-dative entitled to an award of expenses. But, after considering all that has been said on both sides, I come to the conclusion that no unreasonable conduct can be laid at the door of the defenders.

The original pursuer of the action died in the month of July 1913. Immediately before the date of his death, the record was closed and the case sent to the Procedure Roll by the Lord Ordinary. It stood there unheard at the date of the death. The defenders were willing to leave it alone. They made no move. They asked nothing of the pursuer as executrix of her husband. In my opinion, it ought to have been left alone.

I am very far from saying that there may not be cases in which we should, in our discretion, allow actions to proceed which involve nothing except a question of expenses; but where, in the early stages of a case, a pursuer dies and there is no transmission of the right in respect of which the action is maintained to his representative, as is the case here, then I am very clearly of opinion that we ought not—to use the words of Lord Neaves in the case of *Dobie* v. *M'Farlane*[2]—to allow the representative "to follow out a litigation in which he can obtain no judgment on his proper demand." And, therefore, because a decree on the merits would,

[1] At the hearing the following authorities were referred to in addition to those cited at the former debate:—Stair, IV. xl. 8; Ersk. Inst., IV. i. 69 and 70; C. A. S., 1913, B. i. 1; Morison v. Gowans, (1873) 1 R. 116; Dobie v. M'Farlane, (1856), 18 D. 1043; Ferrier v. Barrowman's Trustees, (1868) 6 S. L. R. 120; Fraser on Husband and Wife, (2nd ed.) vol. ii. 1145-6.

[2] 18 D. 1043.

in my judgment, be futile, and the conduct of the defenders here has not been unreasonable, I am of opinion that this action ought to be dismissed, and that no expenses should be found due to or by either party.

I have to intimate that Lord Johnston concurs in that opinion.

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LORD SKERRINGTON.—I concur with your Lordship.

LORD ORMIDALE was present when the case was advised.

THE COURT dismissed the action, and found no expenses due to or by either party.

GARDINER & MACFIE, S.S.C.—WEIR & MACGREGOR, S.S.C.—Agents.

No. 65.

SIR ALEXANDER M'ROBERT, Pursuer (Appellant).—*Murray, K.C.*—*A. M. Mackay.*

EDWARD A. REID AND ANOTHER, Defenders.

THE DEESIDE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF THE COUNTY OF ABERDEEN, Defenders (Respondents).—*Macmillan, K.C.*—*C. H. Brown.*

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M'Robert v. Reid.

Road—Right of way—Extent of right—Right of frontager on public right of way to traverse part thereof as access to his lands.

The right of the public to use a public right of way is not confined to end-to-end user, but may be exercised over any portion of it.

Held, consequently, that the proprietor of lands abutting on a public right of way was entitled, as a member of the public, to use a portion of the right of way as an access to his lands.

Diss. Lord Johnston, who was of opinion that such a right could only be established as a prædial servitude in favour of the lands in question.

Expenses—Public Authorities Protection Act, 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*)—*County Council sisting themselves as defenders in action of right of way.*

Held that the provisions of section 1 (*b*) of the Public Authorities Protection Act, for the taxation as between agent and client of expenses awarded to a public authority, were not applicable to the case of a District Committee of a County Council, who, in order to vindicate a public right of way, had sisted themselves as defenders to, and had successfully defended, an action of interdict brought against a private individual.

1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

ON 17th June 1911 Sir Alexander M'Robert, proprietor of the lands of Douneside, in the parish of Tarland, Aberdeenshire, brought an action in the Sheriff Court of that county against Edward A. Reid, the proprietor of the adjoining lands of West Town, Ranna, Tarland, and his wife, in which the pursuer craved the Court to interdict the defenders from unlawfully trespassing upon the lands of Douneside.

The pursuer averred (Cond. 3 and 5) that the defender and his family had been in the habit of trespassing over a private road leading to Douneside from the public road to Tarland, and through certain fields upon his lands, when going between the defender's lands of West Town and the village of Tarland or its neighbour-

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hood. The defender admitted that he and his family had been in the habit of passing over the pursuer's lands, but claimed that they had done so by what was a public right of way.

On the defenders' motion, on 26th July 1911, intimation of the dependence of the action was appointed to be made to the Clerk of the Deeside District Committee of the County Council of Aberdeenshire, and on 11th September 1911 the District Committee were, on their own motion, sisted as defenders to the action, in virtue of the powers conferred upon them by the Local Government (Scotland) Act, 1894.* The District Committee lodged defences, and thereafter undertook the defence of the action.

The defenders averred that the route through the pursuer's lands, the use of which was complained of, had for more than forty years been used as part of a public footpath or right of way for persons passing on foot between the village of Tarland and its district and the Cushnie district. It appeared from the defenders' statements, and from a marked copy of the Ordnance Survey plan (No. 19 of process) produced with the defences, that the southern terminus of this alleged right of way was at a point (B) on the public road leading northward from Tarland, whence it passed by a service road through the steading of Douneside (H), and thence, by a footpath through fields on Douneside to the northern boundary of the pursuer's property (M), the total distance traversed on the pursuers' property being about 525 yards (designated on the plan as B, H, M). The footpath then continued across the defenders' property, passing the house of West Town and through arable land, to its northern boundary (this portion being designated as M, G, O), and then continued as a hill track over the Cushnie Hill, eventually debouching, by alternative routes, at two points (T1 and T2) upon a road in the Cushnie Glen, at a distance of over four miles from Tarland.

The pursuer pleaded, *inter alia*;—(1) The defender Edward A. Reid having trespassed on pursuer's lands as condescended on, pursuer is entitled to decree as craved. (2) There being no public right of way over pursuer's lands, pursuer is entitled to decree as craved. (3) The Deeside District Committee of the County Council of the county of Aberdeen having sisted themselves as defenders to the action, and there being no public right of way over pursuer's lands decree of interdict should be pronounced against them.

The defender Reid pleaded;—The footpath in question having been used by the public as a right of way for a period of more than forty years, the defender should be assoilzied.

The defenders the District Committee pleaded;—(1) The said road through the pursuer's lands forming part of a public right of way, the pursuer is not entitled to interdict as craved. (2) The public having for more than the prescriptive period, without challenge or interruption, and as matter of right, passed on foot through the pursuer's lands by the road now disputed, the pursuer is not entitled to prevent the other defender or other members of the public from using the same.

On 27th August 1912 the Sheriff-substitute (Laing), after proof, pronounced an interlocutor in which he found in fact that there existed certain public rights of way from points in the Cushnie Glen (T1, T2) to the village of Tarland which had a common por-

* 57 and 58 Vict. cap. 58, sec. 42.

tion traversing the defender's lands (O, G, M), and the pursuer's lands (M, H, B) by the route complained of. He found in law "that the defenders and all others are entitled to the free use and possession of said public rights of way, and that without any interference or interruption on the part of the pursuer, so far as they pass by the single path M, H, B through his lands: Therefore repels the first, second, and third pleas in law for the pursuer: Sustains the pleas in law for the defenders the Deeside District Committee of the County Council of the County of Aberdeen: Refuses the prayer of the initial writ; finds the defender Reid entitled to expenses up to the date when said other defenders entered appearance, and thereafter finds them entitled to expenses as taxed between agent and client, in accordance with the provisions of the Public Authorities Protection Act, 1893 (56 and 57 Vict. chap. 61), section 1 (6)."

The pursuer appealed, and the case was heard before the First Division (without Lord Mackenzie) on 20th to 23rd and 28th to 30th January and 3rd to 6th February 1914.

Argued for the appellant;—[After an argument to the effect that the defenders had failed, on the evidence and on the law, to establish the existence of a public right of way from Cushnie to Tarland] —*Esto* that the defenders had proved the existence of a public right of way from end to end of the route claimed, this was no answer to the demand for interdict against the defender Reid. That defender's case rested on the proposition, unsound in law, that he, as a member of the public, was entitled to use all or any part of the route, over which the public right had been shown to exist, for any purpose, including that of access to his land which happened to lie upon the route. No doubt he might acquire the right of access to his property by this public path as a prædial servitude, and private occupation of a servitude road and public right of way might co-exist in the same road according to both the law of Scotland [1] and the law of England.[2] But the defender did not set up a case of servitude upon record, nor, in the circumstances of his title, would it be possible for him to do so. As a member of the public he was only entitled to the user which had constituted the right of way, *i.e.*, end-to-end user. The argument by which the defenders sought to support their proposition was founded on the fallacious assumption that a right of way in Scotland had the same legal characteristics as had a highway in the law of England. These two conceptions were fundamentally different, both in origin and in development. The English highway had its origin in the doctrine of dedication [3]; the theory of servitude, or "easement in gross," had been expressly discarded [4]; and in its development from this origin it had acquired

[1] Thomson v. Murdoch, (1862) 24 D. 975, *per* Lord Curriehill, at p. 981, and Lord Deas, at p. 984; Macfie v. Stewart, (1872) 10 Macph. 408; M'Gavin v. M'Intyre & Co., (1874) 1 R. 1016, *per* Lord Neaves, at pp. 1023-4.

[2] Brownlow v. Tomlinson, (1840) 1 M. & G. 484; Duncan v. Louch, (1845) 14 L. J., Q. B. 185; Wells v. London, Tilbury, and Southend Railway Co., (1876) 5 Ch. D. 126.

[3] The Queen v. Petrie, (1855) 4 E. & B. 737; Marshall v. Ulleswater Co., (1871) L. R., 7 Q. B. 166; Glen on Highways, p. 29.

[4] Rangeley v. Midland Railway Co., (1868) L. R., 3 Ch. 306, *per* Cairns, L.J., at p. 310.

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certain legal characteristics which were quite foreign to a right of way in Scotland.[1] A right of way in Scotland was of the nature of a servitude,[2] it was just such a quasi-servitude as an English highway had been declared not to be.[3] Accordingly the English authorities cited for the respondents could be of no assistance in deciding the question which was raised in this case.[4] As was the case with a servitude, no higher right could be enjoyed than that which had been prescribed. The use of the path through the pursuer's land as a road of access to the defender Reid's land would add considerably to the burden which was imposed upon the pursuer by the through route between Tarland and Cushnie. *As to expenses.*—The District Committee were not entitled to the benefit of section 1 (*b*) of the Public Authorities Protection Act, 1893,[5] as the action was not one which had been brought against them, but one which they had ultroneously undertaken to defend.

Argued for the respondents;—[After an argument to the effect that a public right of way from Cushnie to Tarland had been established]—Rights of passage over the lands of others fell under two categories, they might be either rights of servitude or rights of highway. A public right of way was recognised, both according to the law of Scotland and according to that of England, as belonging to the latter category. It was with a highway, as distinguished from a servitude road, that the present case was concerned. Such a highway was open in the fullest sense to all the lieges, and a person claiming to use it, or to sue in respect of it, need qualify no local or patrimonial interest.[6] It was not disputed that, in order to establish a right of way, there must be end-to-end user between two public places for the necessary period, but once this legal requirement had been satisfied, and the character of a highway was established, the whole route became *res publica*, and any member of the public was entitled to use the whole or any part of it as he thought fit, at anyrate for the purpose of passing along it.[7] There was no dis-

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[1] Glen on Highways, (2nd ed.) pp. 29 *et seq.* 85, 183, 415-6; Smith's Leading Cases, II. 160 *et seq.*; Dawes v. Hawkins, (1860) 29 L. J., C. P. 343; *cf.* also Hay v. Earl of Morton, (1861) 24 D. 116, and Sutherland v. Thomson, (1876) 3 R. 845, to the effect that a proprietor has the right to put swing gates on a public right of way, a right which does not exist with regard to a highway.

[2] Stair, II. i. 5; II. vii. 2; Erskine, II. ix. 12; Bell's Prin. secs. 638, 659, and 1010; Portens v. Allan, (1773) M. 14,512; Winans v. Tweedmouth, (1888) 15 R. 540, *per* Lord Adam, at p. 556; M'Gavin v. M'Intyre, (1874) 1 R. 1016; Reilly v. Greenfield Coal and Brick Co., 1909 S. C. 1328, *per* Lord President Dunedin, at p. 1338.

[3] Rangeley v. Midland Railway Co., L. R., 3 Ch. 306, *per* Cairns, L.J., at p. 310.

[4] Mann v. Brodie, (1885) 12 R. (H. L.) 52, *per* Lord Blackburn, at pp. 54, 55.

[5] 56 and 57 Vict. cap. 61, section 1 (*b*).

[6] Stair, II. vii. 10; Erskine, II. ix. 12; Rankine on Landownership, (4th ed.) pp. 325 *et seq.*, esp. at p. 342; Duke of Atholl v. Torrie, (1849) 12 D. 328, *aff.* (1852) 1 Macq. 65; Macfie v. Scottish Rights of Way Society, Limited, (1884) 11 R. 1094; Scottish Rights of Way Society, Limited, v. Macpherson, (1887) 14 R. 875, *aff.* (1888) 15 R. (H. L.) 68.

[7] Galbraith v. Armour, (1845) 4 Bell's App. 374, *per* Lord Campbell, at p. 380, and Lord Brougham, at p. 389; Breadalbane v. M'Gregor,

tinction in this respect between a right of way in Scotland and a highway according to English law; it was only in regard to servitude roads that the distinction existed, and a frontager, in either country, claiming the right to use part of a highway, even though it were for the purpose only of obtaining access to his own lands, was claiming no more than the right he enjoyed in common with every other member of the public.[1] The appellant's argument as to the increase of burden was irrelevant, as it applied only to the use of a servitude road. *As to expenses.*—The Sheriff-substitute had decided rightly in applying section 1 (*b*) of the Public Authorities Protection Act to this case. The defenders had acted in execution of what was a public duty.[2]

At advising on 27th March 1914,—

LORD PRESIDENT.—This is, in some respects, a singular case—in all respects a voluminous one; but, as it was presented to us by counsel at the bar, a case by no means complex. It has received laborious and painstaking consideration from the Sheriff-substitute at Aberdeen, whose views upon the evidence are before us in a note of remarkable ability, displaying an intimate and minute acquaintance with the relevant facts and a grasp of the legal principles applicable worthy of the highest commendation. If criticism were admissible on a judgment at once so careful and exhaustive, I should be disposed to say that the Sheriff-substitute was too methodical and too precise in dividing up the evidence before him, in parcelling out the witnesses and applying their evidence to definite epochs of time. For the case, as it was made before us, is a simple declarator of right of way at the instance of the Deeside District Committee of the County Council of the county of Aberdeen directed against the proprietor of Douneside, in which, had the case been tried by jury, the issue would probably have run something like this: Whether, for upwards of forty years or for a period beyond the memory of man, there existed a right of way for foot-passengers from the point A, on the road leading from Tarland to Aberdeen, to the points T1 and T2, in the Glen of Cushnie, proceeding through the property of Douneside on the line B, H, M and thence northwards, at or near the line defined on the Ordnance Survey plan herewith produced.

That is the issue to which I have applied my mind, and, upon careful consideration of the evidence, my verdict is in favour of the pursuers in

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(1848) 7 Bell's App. 43, *per* Lord Campbell, at p. 60; Waddell v. Earl of Buchan, (1868) 6 Macph. 690, *per* Lord Curriehill, at p. 699; Sutherland v. Thomson, (1876) 3 R. 485, *per* Lord Gifford, at p. 496.

[1] Beveridge v. Ward, (1860) 2 F. & F. 208; Vestry of Bermondsey v. Brown, (1865) L. R., 1 Eq. 204, *per* Romilly, M.R., at p. 215; 2 Smith's L. C. 164; Marshall v. Ulleswater Co., L. R., 7 Q. B. 166, *per* Blackburn, J., at p. 172; Ramuz v. Southend Local Board, (1892) 67 L. T. 169; W. A. Chaplin & Co., Limited v. Westminster Corporation, [1901] 2 Ch. 329, *per* Buckley, J., at p. 334.

[2] Greenwell v. Howell, [1900] 1 Q. B. 535; Aird v. Tarbert School Board, 1907 S. C. 305; Rex v. Norfolk County Council, [1901] 2 K. B. 268; Thornhill v. Weekes, [1913] 1 Ch. 438.

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the issue—the Deeside District Committee. I have reached that conclusion upon an independent examination of the evidence, uninfluenced, I acknowledge, by the fact that the Judge who heard and saw the witnesses, and who in this case had the advantage of viewing the ground, had reached the same result. Because, in questions of right of way, the criticising of the credibility of witnesses and the balancing of their testimony in delicate scales is unusual. Criticism is, in such cases, as a rule, directed not against honesty and candour, but rather against accuracy of memory, accuracy of observation, and opportunity for observance, as tested and tried by well-recognised physical features and undisputed facts.

Now, in the present instance, the Sheriff-substitute has expressed a view favourable to the evidence of those witnesses for the defenders who were examined in Court before him. He believes that they gave their evidence honestly and to the best of their recollection. I loyally accept that testimony in favour of the defenders' witnesses, but I extend it to the pursuer's witnesses as well, as did I think counsel on both sides of the bar. And, accepting the witnesses on both sides as giving honest and reliable evidence according to their lights and opportunities, the testimony in favour of the right of way from Cushnie Glen to Tarland, reaching the latter point through the estates of West Town and Douneside, is, I am constrained to acknowledge, adequate in quantity and convincing in quality. Indeed, when every allowance has been made for lack of memory and when every deduction has been made for natural exaggeration on both sides, there remains a solid body of testimony in favour of the right of way by the routes defined in the Sheriff-substitute's interlocutor which is unequalled in any case with which I am acquainted. [His Lordship reviewed the evidence and proceeded]—

But the existence of the right of way being established, the question still remains—what are the legal consequences in this case? The action is directed at the instance of the proprietor of Douneside against his next-door neighbour, the proprietor of West Town. Its aim and object was to have the latter interdicted from trespassing upon the estate of Douneside, or, in other words, from using the path M, H, B, upon the plan for any purpose whatsoever. For that was the only trespass complained of. The sole ground on which the proprietor of West Town justified his user of the path was not that there was a prædial servitude in favour of West Town as against Douneside in which West Town was the dominant and Douneside the servient tenement, but that the path formed a part of a right of way. In short, he maintained his position not as proprietor of West Town, but as a member of the public. And it seems to have been conceded before the Sheriff-substitute that, if the public footpath across the hill was established, that was equivalent to absolvitor from the conclusions of the action, for, although a plea to relevancy was stated, it was of consent repelled, and counsel on both sides very frankly explained to us that it was not intended to raise this topic but merely to challenge the specification of the averments made by the pursuer in the case. And accordingly it seems very plain that the pursuer would never have embarked upon an inquiry so extensive and so expensive if, in his opinion, the result and effect would be *nil* upon his crave for interdict. In short,

it was taken for granted, apparently, before the Sheriff-substitute, that if a right of public footpath was once established, any member of the public, even although he chanced to be a neighbouring proprietor, could use it to traverse any part of the route as well as to traverse the whole route. And, indeed, that assumption seems to me to be correct in law, and I am not surprised that the Sheriff-substitute was never invited to consider it. When it is realised what the meaning of "public right of way" is according to the law of Scotland, it will at once become plain why the question of its effect in this action was never contested before the Sheriff-substitute; and it is easy to see that the establishment of a public right of way here was not intended to be otherwise than equivalent to decree of absolvitor in the action.

As Erskine (II. ix. 12) says "The right of a public road or King's highway is not properly a servitude, but *publici juris*—common to all the members of the State, whether they are or are not proprietors of any tenement." And as Lord Curriehill observed, in *Waddell* v. *Earl of Buchan*,[1] "A right of highway confers on the public a right to use the surface for the ordinary purposes of locomotion. It is a kind of right that has existed in this country and elsewhere from the infancy of civilisation. Means of travelling from one part of the country to another is absolutely essential to the very existence of society. Unless rights of highway belonged to the public, the power of locomotion would be completely annihilated. In all civilised nations we find such a right belonging to the public. It was known in the Roman law as *res publica*. With us also it is *res publica*, and is vested in the Crown as a branch of the *regalia*, for behoof of the public. The nature of the right is a right to use the surface for the purpose of locomotion by carriage or on foot, but not to exercise any other rights of property." And similarly Lord Gifford, in *Sutherland* v. *Thomson*,[2] says, "No doubt there is a broad and a well-known distinction between a servitude footpath and a public footpath, the use of the one being confined to the residents in or the visitors to a dominant tenement, the use of the other being open to the whole public wherever they reside or wherever they are going."

The result in law then surely is that the whole route becomes *res publica;* and, if so, it seems to me to be a self-contradictory proposition to say that the whole route is *res publica*, but that from the route a large section of the public is always to be excluded, to wit, those who propose to traverse only a portion and not to travel from end to end. There is no authority for it. No text writer can be quoted, no decision can be cited, no dictum can be discovered in favour of so extravagant a proposition as that from a *res publica* a large section of the public may at all times be excluded. If a public right of way be once established, then no proprietor at any part of the route can prevent members of the public from using that part unless they undertake to use the whole route.

No doubt it is essential to the establishment of a public right of way that use from end to end, continuous and uninterrupted, for the prescriptive period, be proved, yet, when the right of way is once established, the

[1] 6 Macph. 690, at p. 699.

[2] 3 R. 485, at p. 496.

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user cannot be confined to travellers from end to end. If otherwise, then the Deeside District Committee of the County Council of the county of Aberdeen would never have been admitted to this process. It is true their admission was contested, but not upon this ground, and, once they were admitted, the pursuer of the action straightway proceeded to amend his pleas; and so also did the defender. And the third plea in law for the pursuer, I observe, is: "That the Deeside District Committee of the county of Aberdeen having sisted themselves as defenders of the action, and there being no public right of way over the pursuer's lands, decree of interdict should be pronounced against them." In other words, the fate of the action against the Deeside District Committee depended, in the view of the pursuer, upon decree in favour of a public right of way being pronounced or not.

I am of opinion, in conformity with the views I have expressed, that the judgment of the learned Sheriff-substitute should substantially be affirmed, that the first, second, and third pleas for the pursuer ought to be repelled, and that the pleas in law for the defenders ought to be sustained. But, with regard to the last finding in the Sheriff-substitute's interlocutor, relating to the application to this process of the Public Authorities Protection Act, 1893, I am very clearly of opinion that the statute on which the Sheriff-substitute founds does not apply to this case, and accordingly that that portion of his interlocutor ought to be recalled.

Lord Johnston.—[In his Lordship's absence his opinion was read by Lord Ormidale]—A question is raised in this case, which I think is new, viz., whether a proprietor, whose property is on the route of a public right of way, from one public place to another, can claim to use a portion of the route, as though it were a prædial servitude attaching to his own property. I state the question thus, because it seems to me that that is the real question, and that it is necessary to distinguish between his claim as proprietor and his claim as member of the public. His claim as proprietor derives no added force from the fact that he may also represent himself as a member of the public. His claim as member of the public stands by itself, and receives no added force from the fact that he is also a proprietor on the route.

I think that it must be inferred from the fact that the original defender has endeavoured to step out of the case and leave his defence to the District Committee, that he has no faith in his position as proprietor on the route. Yet I think that that is the true ground of his claim, and would be successful, for reasons which I shall afterwards state, but for a specialty applying to his particular property as acquired by him. But the case has been presented to us not by the original and true defender, but by the District Committee. Their concern is only with the question of public right of way, and with the defence of the original defender as a member of the public. While I must consider this question first, I must decline to confine my attention to it, for I think that it has been astutely put forward to draw away attention from the true question.

Were the question merely, has a public right of way been established from the Cushnie neighbourhood to Tarland, I should acquiese, though

with some qualification, in your Lordship's opinion that such has been established. [His Lordship reviewed the evidence, and proceeded]—

Now comes the question, can the Reids and their people, having no occasion to use the right of way for its proper purpose of passage from Tarland to Kirkton of Cushnie or *vice versa*, claim to make use of it as a right of way for themselves from West Town into Tarland? I take their claim, first, as based on their right as members of the public. As such they get no assistance from the fact that Mr Reid is proprietor and they occupants of West Town, though this was by no means kept clear in the argument, in which a good deal was done to confuse the issue by standing on two stools at the same time. I am not able to decide this question on the analogy of what I am told is the law of England. I cannot pretend to know that law or its principles. But I understand the law of Scotland to be, that to establish a right of way it must be proved to run from one public place to another, and can only be established by user from one terminus to the other—further, that a public right of way can be lost by disuse. In this latter point I am informed that the law of Scotland differs from the law of England. If so, I think that the difference is essential. But whatever the law of England is, we know, and have to apply, the law of Scotland in this case. Suppose that the right of way, now moribund, to be already dead as a public right of way, there being no question of prædial servitude, from Kirkton of Cushnie as far as the confines of West Town at either N or O, could it be kept alive through its whole length by continued use from the farm of West Town at G on to Tarland? To that question there can, I imagine, be only one answer, and that in the negative. As the evidence of user between Tarland and West Town would be no evidence to establish a public right of way between Tarland and Cushnie, so it would be no evidence of retention of the right of way between Tarland and Cushnie. And as West Town is not a public place it would be no evidence to establish a more limited but public right of way between West Town and Tarland. It follows, I think, as a necessary corollary, that the Reids and their people cannot, as members of the public, claim to have established a public right of way from West Town to Tarland, or a right to use the public right of way between Cushnie and Tarland as an access merely from West Town to Tarland. But it does not follow that the owner of West Town has no right to a way on the line of the assumed public right of way from his farm of West Town to Tarland. It is at this point I think that the case has miscarried. It seemed incomprehensible that a proprietor on the route of a right of way should not have right to use that right of way from his particular property to either end or over any length of it. And it was taken for granted that he had such right. But there was a failure, in my opinion, to discriminate. It was too readily assumed that this emanated from the public right of way, —was a mere consequence of it. If so, and it is part of the public right, any member of the public, who, by tolerance of a proprietor on the route, nay even by trespass, can reach the line of the right of way has the same right, which is alien to the conception of a public right of way in Scotland, as evidenced by what is required to establish one.

This brings me to what I think is the real question in this case, and the

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question which it was raised to determine, viz.:—Whether the proprietor of West Town, not as member of the public, but as proprietor of West Town, has or has not a right of way through Douneside to Tarland for himself and those employed on his farm of West Town. The miscarriage in the case has, I think, arisen from resting on public right, and failing to observe that every public right of way contains *in gremio* of it the possibility of innumerable private or prædial servitudes of way covering sections of its length. If a house is situated on the route, there is no practicable possibility of, and possibly little interest in the other proprietors along the route, preventing its owner making such use of portions of the right of way track as will establish, contemporaneously with the public right of way, a private or servitude right of way over their lands in favour of his intermediate property. It is for this reason, I imagine, that the question we are now considering has never arisen. And I would have no hesitation, in other circumstances, in holding that Mr Reid had acquired a right to use the right of way route from his house to Tarland through the pursuer's lands, not as a member of the public and as by virtue of a public right of way from Cushnie to Tarland, but as the proprietor of West Town, which had, as dominant tenement, acquired, alongside of or *unico contextu* with the public right of way, a servitude right of way over the pursuer's lands as servient.

But there are circumstances which make this case an exception from the rule which would thus generally apply, and which bar Mr Reid from establishing such private right. Prior to 1866-68 the lands of West Town and Douneside were in one hand. There could be no question of servitude in favour of one over the other. In 1866-68 they were for the first time severed, and since that date have been separately occupied. In selling West Town there was no servitude granted in its favour by the former proprietor of both over the lands of Douneside. Nor was there any "way of necessity" through these lands. West Town had its own good and ample access provided by the route G, F, D, and has so still. Moreover, the plan already referred to, on which the sales of the various parcels were made, shows emphatically that there was no intention to give a right of way to the one subject over the other. A servitude right of way involves the conception of a grant. Possession implies the grant, but possession will not establish a right if the circumstances of the severance of the properties, as disclosed from the titles or from their history as otherwise known, show, as they do here, that there was no such grant. Any user, which would in other circumstances amount to possession implying a prior grant, will in that case be referred to tolerance. And here we do not need even to rely upon this general doctrine, for we have ample evidence that the user of the path from the new site of West Town at G through the lands of the pursuer to the public road at Tarland was *de facto* of tolerance. It commenced in relationship among the occupants of the two farms. It continued in the convenience accorded as a matter of good neighbourhood. That it was of tolerance was thereafter recognised. At times leave was asked and leave granted. In these circumstances there is no ground for holding that the property of West Town has acquired any such servitude right of way over Douneside in the route claimed, as in

my opinion must be shown, if the proprietor of West Town is to establish a right to use a road through his neighbour's property of Douneside into the neighbouring village of Tarland. The user has become burdensome, and the tolerance has been withdrawn.

I cannot but feel that, at least from my point of view, there has been a grave miscarriage of process. I feel, in common, I know, with your Lordships, a great disinclination to reflect upon the skill of the parties' advisers, and also upon the conduct of the case by the Sheriff-substitute. The former have, I think, involved their clients in great, but misdirected, expense, and the latter has taken excessive trouble over a question which was not, in my opinion, properly before him, because it was not competently raised as a defence by the only defender called, and because the compearing defenders should not have been permitted to raise it in this process. But I cannot allow such disinclination to affect my judgment, because I cannot do so without adopting and continuing the mistakes which have been made.

1st. As the action came into Court, it was a mere interdict by one proprietor against his neighbour for trespass by the latter upon the former's ground. It raised a question of trespass versus prædial servitude only.

2nd. The defender did not meet the charge of trespass by claiming a prædial servitude, but asserted a public right of way.

3rd. This defence was not, for the reasons I have stated, competent in his mouth to support his user. The alleged public right of way is some four miles long. Defender's and pursuer's lands cover a short bit of it at one end, probably not a third of a mile all told. A proprietor on the route of a public right of way has, I think and have already said, no right to use the route, in his capacity as a member of the public to which it is dedicated, as a private access for his property through his neighbour's ground to a point desired. If he has right so to use it, it can only be as a prædial servitude of his property. He may indeed very easily acquire such servitude right of way in the line of the public right of way. Yet, notwithstanding, the legal complexion of his right is that of a private servitude of way. The present case is an excellent example and test of the reason of the thing. If there is a public right of way through the pursuer's ground, the use of it by the true public of the terminus *a quo* and the terminus *ad quem* is intermittent and comparatively innocuous. But the defender's use of it is continuous and onerous to a degree, and if, owing to special circumstances, he has acquired no private servitude right of way in the line of the public right of way, and yet is to be allowed to use the route of the public right of way for his private purpose of getting from his lands to Tarland, because it is the route of a public right of way, this would be enormously to enhance the burden upon one particular proprietor on the route of the public right of way, not for the benefit of the public, but for the benefit of a neighbouring property. The defender cannot, in my opinion, plead in defence to this action of trespass the public right of way.

4th. But while the record was still open, the defender, having astutely set abroad a cry that a right of way was being endangered, and having

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hoodwinked the Tarland Parish Council by a bogus round-robin from the Cushnie neighbourhood, first the Parish Council and then the District Committee rushed into the breach to pull his chestnut out of the fire for him, without considering two important matters:—(1) Did the question between the pursuer and the defender really raise any question of public right of way in which the public were at all seriously interested; and (2) did the process admit of any question of public right of way being tried? Both these questions should, I think, have been answered in the negative. One of the most astounding things in the case is that their own minutes and correspondence show that, if the original parties, the owners of Douneside and West Town, could have agreed in their private interest, the District Committee would have been satisfied in the public interest, thus recognising how entirely a private matter the whole question was.

5th. From this point there has, I think, been entire miscarriage. Before the record was even closed, the Sheriff, on the motion of the defender, ordered intimation of the dependence of the action to the District Committee. The District Committee, having taken two months to consider, voluntarily appeared by minute and were sisted as defenders to maintain the existence of the public right of way. The pursuer opposed, as I understand, their appearance and the course of procedure to which that appearance led, and was overruled by the Sheriff. But the pursuer did not take any proper plea, nor did he, as he ought to have done, appeal before going to proof. Instead, he allowed himself to be drawn on to join issue with the District Committee. The defender, on the other hand, slipped quietly out of any participation in the defence, though he has obtained no sist as against him of the process, which is directed against him personally and against him only. The case has gone to proof and to judgment, and has occupied many days in the proof, has resulted in a most elaborate note on the evidence by the Sheriff-substitute, and has led to a most inordinately long hearing before this Court. Yet I regret to say that it is my opinion that we ought now to go back to the point where the record was closed, and that all this time and expense have been wasted.

6th. I take the position of the District Committee first. They are sisted as defenders and they lodge a defence which is based entirely upon the assertion of a public right of way. They do appear to have considered what the effect of their appearance was, but at the same time they do not appear to have done so with full appreciation. The interdict was directed solely against the private defender. The fact of the District Committee ranging themselves as defenders alongside of the private defender could only result in an operative decree for or against the private defender. It was not possible that the Sheriff should interdict the District Committee as compearing defenders from trespass. For a District Committee do not themselves use such a road, and are not therefore apposite parties to be called in an interdict. On the one hand their appearance in the action of interdict limits them to protect the principal defender. They make common cause with him. If they can help him to establish a defence competent to him they may effectually support him. But they cannot protect him by establishing a defence which is

not in his mouth to plead. Moreover they can by their appearance in this process get no effective decision of the question in which alone they are *ex hypothesi* interested, viz. :—the question of a public right of way. The alleged route goes through three other proprietors' lands, as well as those of the defender and pursuer. It is quite inconceivable to me that, by intimation of this process of interdict to those three proprietors, any obligation was imposed on them to come in and stand their trial. Had they done so they would merely have emulated the conduct of the District Committee themselves, and have rushed in where they had no call to enter. On the other hand, no decree could be pronounced settling the question of a public right of way at the instance of the District Committee even in a question between them and the pursuer. The Sheriff-substitute has felt the pinch, for while he has found in his fifth finding that a public right of way exists over the whole route alleged, and repels pleas for the pursuer and sustains pleas for the defender, all that he is able to do in the way of decree is to refuse the prayer of the initial writ, which was one craving interdict against the Reids for trespass. He could pronounce no decree declaratory of a public right of way in favour of anybody or against anybody. What the District Committee ought to have done, if they were anxious to vindicate a right of way which they thought was challenged and which they were satisfied was of public value, was to have left the defender Reid to fight his own battle in the interdict process, and only, if and when they were advised it was necessary, to have raised a declarator of public right of way in their own name and interest against the whole proprietors concerned. The almost fantastic procedure which has been followed in this case would thus have been avoided.

7th. I take next the position of the defender. I can quite understand his anxiety to throw his defence over on to the shoulders of the District Committee. He doubtless knew very well that the public right of way was moribund and that it would do him little harm to admit it so far as his own property was concerned, if by doing so he could ride in on the back of the District Committee and avoid the question of a private servitude right of way. For doubtless he had not much faith in his claim to such. And I am not surprised; for his title when examined entirely negatives the suggestion.

I conclude, therefore, that the only judgment we ought to pronounce is one recalling the Sheriff-substitute's interlocutors—finding that there are no *termini habiles* in the record under which we can competently determine the question of public right of way as between the pursuer and the compearing defenders, the District Committee; refusing to entertain their pleas; finding that the defenders the Reids are not *in titulo* to plead a public right of way as defence to the action; and as they have stated no other plea, granting interdict against them as craved.

LORD SKERRINGTON.—In this action for trespass the Sheriff-substitute, after a lengthy and elaborate inquiry into the facts, issued a very able and careful judgment by which he refused the application for interdict, and in substance declared that there had been constituted by prescriptive

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user a public right of way for foot-passengers leading in a north-easterly direction from the village of Tarland, through the estate of Douneside (formerly called Burnside) now belonging to the pursuer, then through the adjoining estate of West Town of Ranna now belonging to the original defender Mr Reid, and then by two routes across a hilly moorland to two points situated on what he held to be a public road in the Glen of Cushnie. The alleged right of way, so far as passing over the pursuer's property, is 525 yards in length; in Mr Reid's property it is 1085 yards in length; but the total distance from Tarland to Cushnie Glen is more than four miles.

In the course of the debate doubts occurred to me whether this action as laid was a competent process in which to decide any such question; but on further consideration I am satisfied that these doubts were unfounded. It seems strange, in the first place, that a public right of way should be declared to exist, not only over the estates of the pursuer and of the defender Mr Reid, but also over two estates whose owners were not called as defenders and whom the judgment in this litigation will not bind. It must, however, be kept in view that, according to our forms of process, a person who is cited as a defender cannot be forced to appear so as to make the judgment conclusive and binding upon him. Accordingly, even if the two landowners to whom I have referred had been cited as defenders in the present action, or preferably in an action of declarator at the instance of the compearing defenders the Deeside District Committee, they could not have been compelled to lodge defences, and a decree in absence against them would not have constituted *res judicata*. Some such consideration probably led to the decision in the case of *Craufurd* v. *Menzies*,[1] where the Court without stating any reason repelled as "untenable" the objection that all parties interested in the right of way had not been called. This decision has ruled the subsequent practice. The next difficulty was created by the form of the initial writ, which did not ask for a declarator negativing any public right of way over the pursuer's property, but simply asked for interdict against trespass by Mr and Mrs Reid. It appears, however, from the third and fifth articles of the condescendence that the action was brought for the express purpose of negativing a claim on the part of Mr Reid to the effect that he was entitled to use as an access to his property of West Town from the village of Tarland a public right of way with which he alleged that the pursuer's property of Douneside was burdened. In his defences Mr Reid repeated this contention, and maintained that he was entitled to use as an access to his property from the village of Tarland a road or footpath on the estate of Douneside, which he alleged to have been used by the public from time immemorial as part of a public right of way which led from Tarland northwards through the lands of Douneside and West Town, and through two other estates until it reached points situated on public roads in the parish of Cushnie. No objection was stated in the Sheriff Court to the relevancy of this defence.

It was, however, argued to us by the pursuer's counsel that the owner of

[1] (1849) 11 D. 1127.

a property traversed by a public right of way which passes over the lands of several proprietors between its public termini is not entitled to use the right of way as an access from either terminus to his own estate; but that, in common with all other members of the public, he may use it only for the purpose of end-to-end traffic between the two termini. In accordance with this view of the law the pursuer's counsel maintained that, even if the Sheriff was right in finding that the alleged public right of way had been established, his client was entitled to interdict Mr Reid from using the track as an access to his property from the village of Tarland, or for any purpose except through traffic between Tarland and Cushnie Glen. On the other hand, the pursuer's counsel stated that if the Sheriff's judgment as to the right of way should be recalled he claimed right to an interdict against Mr Reid entering upon the estate of Douneside for any purpose whatsoever. It will be seen, therefore, that the existence of the alleged public right of way was a matter upon which the Sheriff was entitled and bound to adjudicate as between the pursuer and Mr Reid in order to enable him to decide whether the pursuer was entitled to an interdict against Mr Reid, and, if so, in what terms. Prior to the Sheriff Courts Act of 1907 a Sheriff had no jurisdiction to give anything but a possessory judgment on such a question—*Thomson* v. *Murdoch*.[1] By that statute he was given jurdisdiction in all actions of declarator, with certain specified exceptions which do not include declarators affirming or negativing a public right of way. It follows that, if a question as to the existence of a public right of way is raised in defence, the Sheriff is bound to decide it upon its merits, just as he was under the old law held to be not entitled to confine himself to a merely possessory judgment in a case where the existence of a servitude was in dispute—*Gow's Trustees* v. *Mealls*.[2] If I am right in thinking that the existence or non-existence of the alleged public right of way was competently in issue as between the pursuer and Mr Reid, it follows that the Deeside District Committee were entitled, in terms of section 42 of the Local Government (Scotland) Act, 1894, to be sisted as defenders, and were properly so sisted in order to enable them to vindicate the alleged right of way. The pursuer did not appeal against the interlocutor sisting the District Committee as defenders. On the contrary, he consented to his plea to the relevancy being repelled, and joined issue with them and went to proof as to the existence of the alleged public right of way. In intervening in this litigation there is no reason to suppose that the District Committee acted otherwise than from a sense of public duty, and this Court is not concerned with any question except as regards the competency of their intervention. From the date when they were sisted as defenders Mr Reid ceased to take an active part in the litigation, and he was not represented in this Court. He left his defence, as he was entitled to leave it, to the District Committee.

In the view which I have stated as to the relevancy of Mr Reid's defence, it is not necessary, though it may be convenient, to express an opinion as to whether a member of the public may lawfully use a public right of way as an access to his own premises or for any purpose except

[1] 24 D. 975, *per* Lord Deas, p. 982. [2] (1875) 2 R. 729.

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passing from the one public terminus to the other. In order to establish the existence of a public right of way it must be proved that the public have for the prescriptive period traversed the way from end to end. It does not, however, follow that, after a public right of way has come into existence by prescriptive user, the public are limited in all time to the kind of user by which alone their right was constituted. It is true that there are similarities between a public right of way and a private servitude both in the manner in which they may be acquired and also in regard to the right of the owner of the *solum* to use his ground for any purpose not inconsistent with the right of passage. But it would not be safe to argue from these similarities that the maxim *tantum præscriptum quantum possessum* applies to a public right of way with the same strictness as to a servitude. Indications to the contrary are to be found in the authorities—*Mackenzie* v. *Bankes*.[1] On the other hand, it would be equally unsafe to argue that a public right of way is a highway, and then to assume that in Scotland there is no difference between one class of highway and another. Rights of way undoubtedly stand in a class by themselves—*per* Lord President Dunedin in *Reilly* v. *Greenfield Coal and Brick Company, Limited*.[2] In particular, the public must take them as they find them and not alter their character—*per* Lord President Inglis in *Mackenzie*.[1] So, too, I should expect to find some legal differences between (1) a highway included in the list made up under section 41 of the Roads and Bridges (Scotland) Act, 1878; and (2) a highway, once a turnpike or statute-labour road, but no longer maintained at the public expense; and (3) what Lord Dunedin, in the case of *Reilly*,[2] described as "one of those still older roads in Scotland for which there is no actual *nomen juris*, and which, though neither statute-labour roads nor turnpike roads, have still been public roads from time immemorial." In the south of Scotland stretches of the great Roman road and of other artificial roads of venerable but unknown origin are still used by the public even for cart traffic, though their surface has become entirely overgrown. There is not much authority in Scotland as to the extent and limits of the right enjoyed by the public in the different classes of highways, but, in my view, there is one quality which is essential and which must be common to all of them, viz., that the surface of a highway and every square inch of it belongs to the public, not, of course, in property, but in order that it may be used for certain purposes. Hence there is no room for any question as to public termini, because at every step one passes from one public place to another. The primary right of the public in a highway is that of passage, but if this point be kept in view, one may say, as Lord Curriehill did in *Waddell* v. *Buchan*,[3] that "the nature of the right is a right to use the surface for the purposes of locomotion." In short, a member of the public has a *jus spatiandi* within the limits of a highway which he may exercise as he thinks fit, provided the eccentricity of his course does not disturb the public traffic or the public peace. Lord Curriehill's definition is not inconsistent with the

[1] (1868) 6 Macph. 936. [2] 1909 S. C. 1338.
[3] 6 Macph. 690, at p. 699.

views expressed by Lord Dunedin in *M'Ara* v. *Magistrates of Edinburgh*[1] and with certain English cases, where a member of the public was held to be a trespasser because he had done something which exceeded the ordinary and reasonable user of a highway—*Harrison* v. *Rutland*,[2] *Hickman* v. *Maisey*.[3] So far I have been speaking of an ordinary member of the public, but, if he happens to be also the owner of land fronting or abutting on a highway, he has superadded to his public right a right which is peculiar to himself and which is attached to and enhances the value of his estate, viz., the right to step from the highway on to his private property and *vice versa*. This is familiar law in the case of ordinary public roads and streets, and was implied in the decision in *Walker's Trustees* v. *Caledonian Railway Company*.[4] The same principle should equally hold good in the case of a public right of way, provided the circumstances admit of its application. It applies to the right of a riparian owner to use a navigable river, as was illustrated in the case of *Lyon* v. *Fishmongers Company*,[5] cited by Lord Blackburn in his opinion in *Walker's Trustees*.[4] In the case of *Colquhoun's Trustees* v. *Orr Ewing & Company*,[6] the reversal did not throw any doubt upon the soundness of the view taken in this Court, to the effect that the public had acquired by prescription a right of navigation similar to a right of way over a non-tidal part of the River Leven. Both the Lord President (p. 350) and Lord Shand (p. 359) referred to the fact that the river had a public terminus at each end, viz., Loch Lomond and the sea. It cannot seriously be suggested that this public right (after it had come into existence) might be lawfully exercised only by navigating from the loch to the sea or *vice versa*, or that the riparian owners on the river did not enjoy a valuable private right of access for the purpose of using the navigable river. For these reasons I do not think that there is any substance in the argument addressed to us by the pursuer's counsel on this point.

There are many differences between the law of England and that of Scotland in regard to highways, but it is at least relevant to point out that a very serious restriction on the rights of the public which, according to this argument, affects public rights of way in Scotland as distinguished from other highways is not sanctioned by the law of England or, so far as appears, by that of any other country. In the case of *Marshall* v. *Ullswater Company*,[7] Blackburn, J., said, "It is well-established law, that where there is a public highway, the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land. They cannot, of course, pass over the soil of others without leave; and he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another." In Scotland the origin of a public right of highway is attributed not to dedication by the landowner, but to possession by the public; but this difference in theory does not involve any such

[1] 1913 S. C., at p. 1073.
[2] [1893] 1 Q. B. 142.
[3] [1900] 1 Q. B. 752.
[4] (1881) 8 R. 405, *affd.* 9 R. (H. L.) 19.
[5] (1876) 1 App. Cas. 662.
[6] (1877) 4 R. 344, *revd.* 4 R. (H. L.) 116.
[7] L. R., 7 Q. B. 166, at p. 172.

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practical difference as would follow if the argument of the pursuer's counsel were to be sustained.

I shall now consider whether the Sheriff reached a sound conclusion on the evidence when he held that the compearing defenders, the Deeside District Committee, had discharged the burden of proof which they had undertaken and had succeeded in proving prescriptive possession on the part of the public of the right of way in question. [His Lordship reviewed the evidence and stated his reasons for holding that a public right of way had been established.]

I accordingly advise your Lordships to recall the interlocutor appealed against, and to pronounce a finding in fact of the kind which a jury would have made if the case had been tried upon an issue in the usual form, viz., that for forty years and upwards prior to 1911 there have existed public footpaths or rights of way for foot-passengers in or near the directions of the red lines marked . . . all leading from the village of Tarland to T1 and T2, being points on the public road in the Glen of Cushnie. As the result of some such finding, we should sustain the plea in law for Mr Reid in his defences and the pleas in law for the compearing defenders in their revised defences, and refuse the prayer of the initial writ.

As regards expenses, we were told that the Sheriff-substitute was mistaken in supposing that the pursuer conceded the right of the compearing defenders to expenses as taxed between agent and client. I can find no warrant for any such finding in the language used by the Public Authorities Protection Act, 1893. These defenders will therefore be allowed their expenses in the Sheriff Court and in this Court on the ordinary scale. The Sheriff-substitute's award of expenses to Mr Reid and his findings as to the special debate fee and the skilled witnesses will be repeated.

THE COURT recalled the interlocutor of the Sheriff-substitute, dated 27th August 1912, and found in fact "that for forty years and upwards prior to 1911 there have existed public footpaths or rights of way for foot-passengers in or near the direction of" certain lines marked upon No. 19 of process, all of which included the portion B, H, M, G, O, "all leading from the village of Tarland to T1 and T2, being points on the public road in the Glen of Cushnie, all as shown on the plan No. 19 of process; therefore sustain the plea in law for Mr Reid in his defences and the pleas in law for the compearing defenders in their revised defences; refuse the prayer of the initial writ, and decern. . . ."

R. C. GRAY, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

PARISH COUNCIL OF THE PARISH OF GLASGOW, Appellants.—*Murray K.C.—Forbes.*
ASSESSOR FOR GLASGOW, Respondent.—*Wilson, K.C.—Russell.*

No. 66.

Dec. 5, 1913.

Glasgow Parish Council v. Assessor for Glasgow.

Valuation Acts—Value—Method of valuation—Comparison of rentals—Contractor's principle—Offices in city owned and occupied by statutory body.

Held that the proper method of valuing a large building centrally situated in Glasgow, the property of the Parish Council of Glasgow and occupied by them as their offices, was by a comparison with the rentals of premises of a similar character in the neighbourhood; and that the mere fact that the owners and occupiers were a statutory body, in whose place it might not be possible to find a similar tenant, was not a reason for adopting the "contractor's principle" of valuation.

Observed that the "contractor's principle" could only be legitimately adopted if the method of comparison were wholly inapplicable, or for the purpose of checking a valuation otherwise arrived at.

Lands Valuation Appeal Court. Ld. Johnston. Lord Salvesen. Lord Cullen.

Case 320.

AT a meeting of the Valuation Committee for Glasgow, held on 30th September 1913, the Parish Council of the Parish of Glasgow appealed against the valuation of their offices situated at 266 George Street, Glasgow, for the year from Whitsunday 1913 to Whitsunday 1914. In the Valuation-roll the Parish Council were entered as proprietors and occupiers, and the yearly rent or value as £3300, and they craved that the yearly rent or value should be reduced to £1950, the figure at which it had formerly stood.

The Committee, after hearing evidence, fixed the value at £2600.

The Parish Council obtained a case for appeal.

From the stated case it appeared that the subjects in question, which belong to and are occupied by the appellants, are situated east of George Square on the north side of George Street, and that the ground occupied by the buildings extends to 1875 square yards. The subjects have a frontage to George Street of 82 feet. They are bounded on the west (*a*) by the Inland Revenue Offices, which are situated at the corner of George Street and North Frederick Street on the north-east corner of George Square, and (*b*) by the premises occupied by Messrs Hodge & Company, which front North Frederick Street. They are bounded on the east by buildings fronting North John Street. Immediately opposite the Parish Council Offices is the northern side of the Glasgow Municipal Buildings, which form a block of buildings bounded on the north by George Street, on the west by George Square, on the south by Cochrane Street, and on the east by John Street. The Parish Council Offices consist of a front building of stone facing George Street, a back building of brick behind the front building, a one-storey roof-lit office between the front and back buildings, and a detached building behind the back building which is used as a stable, a coach-house, and a garage for ambulances. The front block is well constructed with an elevation in ornamental stone and granite. The main entrance is in George Street, but there is an entrance on the east side from North John Street. There is internal communication between the front and the back buildings. The interior of the front building is handsomely and substantially, but not extravagantly, finished for a public building. The whole is well adapted

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for use as the public administrative office of a parish council, having a council chamber capable of accommodating a council consisting of thirty-one members, a suite of committee and other rooms, and being situated on a main thoroughfare with tramway lines and in a central position as regards the administrative area. It is situated close to the official centre of Glasgow, being immediately opposite the Glasgow Municipal Buildings, it adjoins the Inland Revenue Offices, it is within a few steps of the General Post Office, and the Sanitary Chambers (the administrative offices of public health), and within easy distance of the Sheriff Court. The site of the Parish Council Offices cost £21,898, and the buildings thereon, including cost of excavation and preparation of site, £38,757, or, in round figures, £60,000.

The case was heard on 5th December 1913.

The question mainly argued at the debate was whether the Assessor had been right in taking as the chief criterion for valuation the "contractor's principle," *i.e.*, valuation according to a percentage of the cost of construction. The appellants argued that he ought to have proceeded by the ordinary method of comparing the rentals of similar premises in the neighbourhood similarly situated, of which they maintained there was a sufficiency of examples, and further, that there was no difficulty in figuring hypothetical tenants, other than the Parish Council, who might lease the premises now occupied by the Council if these premises became vacant. The Assessor, on the other hand, argued that the contractor's principle was the only one which could appropriately be employed where property was owned and occupied by a statutory body who (as he contended was the case here) were the only possible hypothetical tenants for such a building as this.[1]

Lord Johnston.—We are of opinion that this case should be dismissed for this year. It can of course be brought up again, if desired, on some future occasion.

I fully recognise that some subjects are of so unique a character that they can only be dealt with by taking the person or body of persons for whom they have been originally constructed and treating that person or body of persons as a potential tenant, and thereafter estimating the rental by taking a percentage of the original cost of construction. But this is a method to which we ought only to have resort when every other method fails. It is a method which, it is true, has sometimes been employed in the past, and it may well have to be employed again. It would be appropriate for instance if it were proposed to erect, for the first time in

[1] *The following authorities were referred to during the debate.*—Annandale & Son, (1867) 11 Macph. 977; Sheriff v. Assessor for Argyll, (1885) 12 R. 919; Kinross and Milnathort Gas-Light Co., Limited, v. Assessor of Kinross-shire, (1890) 17 R. 850; Jenner & Co. and North British and Mercantile Insurance Co. v. Assessor for Edinburgh, 1908 S. C. 601; North British and Mercantile Insurance Co. v. Assessor for Edinburgh, 1910 S. C. 814; Barony Parochial Board v. Assessor for Dumbartonshire, (1882) 10 R. 39; St Cuthbert's Co-operative Association v. Assessor for Edinburgh, (1896) 23 R. 681; North British Railway Co. v. Assessor for Edinburgh, (1905) 7 F. 435; Assessor for Aberdeen v. Magistrates of Aberdeen, 1913 S. C. 712.

Scotland, a large combination lunatic asylum. It was, if I recollect rightly, used in the Leith School Board case and in the case of a large Board school on the south side of Edinburgh. In the great majority of cases, however, there are some means available of fixing the annual value by comparison with the rentals of other subjects, and that method of arriving at a valuation must always be adopted in the first instance. I do not say that there are not cases in which one may properly check the results obtained by this method of comparison by the results obtained by taking a percentage of the cost of construction, but the former is the method to which resort must first be had.

Now I think that the mistake on the part of the Assessor here—and to a certain extent of the appellants also—was in thinking that it was necessary to find an occupant of precisely the same character as the present occupants, or of a character so similar as to be practically the same. I do not think that that is at all necessary. If the district where the subjects are situated had been an isolated one where no business premises were in demand, then, of course, the difficulty would have been greater, might even have been insuperable, and it might have been necessary to have recourse to a percentage of the cost of construction. But the subjects here are situated in the centre of Glasgow, and it is accordingly impossible to say that there is not a great demand for business premises, and that there are not other comparable premises which, although not occupied for the same purposes, or even for the purposes of a statutory body, are yet occupied for business purposes and situated in similar surroundings. Although the appellants' subjects are very centrally situated, the situation is in no respect unique. It is a good and suitable situation, but it is not in one of the most prominent streets in that centre, nor is there any special obligation upon the Parish Council of Glasgow to settle there rather than half a mile away. I accordingly think that this case can be, and should have been, dealt with on the footing primarily of a comparison of rentals. Now unfortunately, although the print in the case is a large one, the data for instituting a comparison of rentals are most insufficient, and, such as they are, misleading and confused,—no proper distinction, to mention one point, being drawn between the front areas and the back areas of the different buildings attempted to be compared. Accordingly, if we were to proceed with this case, I am satisfied that our decision would be very much a matter of guess work. What, therefore, we propose to do is to recall the valuation made for this year, restore the former valuation, and leave it to the parties, if they so desire, to bring the matter before us again next year on a case which is better prepared. I venture further to suggest that parties, in preparing their case, should take their counsel along with them. I may say that what the Court most desire in a case of this nature is a well-prepared tabulated statement which can be readily followed with the help of a map and of any necessary explanations from counsel.

Lord Salvesen.—I think the only matter which we can finally decide in this appeal is that the mere fact that a building, such as the one in question, is occupied by a statutory body is not *per se* a sufficient ground

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for applying the contractor's principle, and that even where subjects are owned and occupied by statutory bodies the proper method to adopt, at any rate in the first instance, is the ordinary method of comparison. It may, of course, be possible for the Assessor here to show that the building is of so peculiar a construction that the only hypothetical tenant is the existing occupier and owner. In that event we might be driven to apply the contractor's principle: but, so far as the evidence goes at present, I should draw the opposite conclusion, viz., that there is nothing unique about this building, that there would be no difficulty in finding other tenants for it, and that, accordingly, the contractor's principle should not be applied to this any more than to a hundred other cases in which the building is one erected by a person for his own accommodation and with special regard to his own requirements. The mere fact that it may not be easy to get a tenant to take the present occupiers' place is not a sufficient reason for having recourse to a principle which is only legitimate where a comparison with neighbouring premises is impossible.

While, therefore, I think we can without difficulty decide the principle and method of valuation, I do not consider that we have adequate materials before us for fixing the amount. The Assessor's contention is that the figure which appears in the Roll at present is too low. That may be so, and he may be able at some future time to demonstrate this by the method of comparison adopted in other cases, of which the following are merely examples:—*North British and Mercantile Insurance Company* v. *Assessor for Edinburgh*,[1] and *North British Railway Company* v. *Assessor for Edinburgh*[2] where the subject in question was the Station Hotel. We have, however, no sufficient materials for affirming his contention in the case as presented, and the old valuation must accordingly stand for the present year.

LORD CULLEN.—I concur.

THE COURT were of opinion that the case did not present facts sufficient for the determination of the appeal, and therefore directed the existing valuation of £1950 to be restored.

MACKENZIE, INNES & LOGAN, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

[1] 1908 S. C. 601, 1910 S. C. 814.

[2] 1911 S. C. 939.

MISS ANNA KATHARINE SCOTT, Appellant.—*W. T. Watson.*
ASSESSOR FOR KINCARDINESHIRE, Respondent.—*A. R. Brown.*

No. 67.

Dec. 20, 1913.

Scott v. Assessor for Kincardineshire.

Valuation Acts—Value—Unlet country mansion-house—Country mansion-house with shootings attached.

A large mansion-house, with expensive gardens and policies attached, was situated on an estate which was small in comparison with the size of the house and on which the shootings were not of much value. The house was occupied by the proprietor, and had never been let. It had cost £17,000 to build, and was valued by the Valuation Committee at a yearly rent or value of £190. The proprietor sought to have this valuation reduced to £115, and led evidence to show that, owing to the expense of upkeep and the unattractiveness of the shootings, the house, if lettable at all, could not be let at such a rent as would give a net return of anything approaching £190.

The Court *sustained* the valuation of the Committee.

Observations on the methods of arriving at the valuation of mansion-houses which are unlet; and on the regard to be had to enhanced rents obtainable for country houses which have valuable shootings attached.

Opinion (*per* Lord Johnston) that, as one of the factors in valuing a mansion-house which has not been let, an Assessor is entitled to take the proprietor as a potential tenant, and to consider what rent he would have to pay for a residence appropriate to the size and rental of his estate.

Lands Valuation Appeal Court. Ld. Johnston. Lord Salvesen. Lord Cullen.

Case 322.

AT a meeting of the Valuation Committee for the county of Kincardine Miss Anna Katharine Scott, owner of the estate and mansion-house of Brotherton, appealed against an entry in the county Valuation-roll for the year 1913-1914 by which the "estate of Brotherton, mansion-house, garden, and offices," in the appellant's occupation, was entered at the yearly rent or value of £252; and she craved that this figure should be reduced to £137.

The figure of £252 was made up of £230 for the mansion-house and £22 for the garden and offices. There was no dispute as to the valuation of the garden and offices, so that in effect the appellant's contention was that the valuation of £230 for the mansion-house should be reduced to £115.

The Committee, after hearing evidence, expressed their opinion that the rent at which the mansion-house, garden, and offices might be reasonably expected to let from year to year was £212, and fixed the valuation accordingly. This was in effect a valuation of the mansion-house at £190.

Miss Scott obtained a case on appeal which set forth that the following facts were admitted, or were held by the Committee to be proved:—"(1) The mansion-house of Brotherton has a total floorage space of from 2500 to 2600 square yards, and consists of 8 public rooms, 12 bedrooms, 4 dressing-rooms, 7 servants' bedrooms, domestic offices, 15-stalled stable, 2 loose-boxes. The mansion-house is situated within policies which include a garden of 3 acres, with conservatory, vinery, and storehouse. The cost of upkeep of the policies and gardens is large. The said mansion-house is situated on the Montrose and Bervie line, 9 miles from Montrose, on the East Coast route to London, and is also situated 9 miles from Dubton Junction on the West Coast route; (2) the policies extend

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to 87 acres; (3) the shooting on the estate of Brotherton extends to 4000 acres. The average bag for a period of fourteen years has been 175 brace of partridges and 150 brace of pheasants. There is no grouse moor, and there are few rabbits on the property; (4) the mansion-house of Brotherton, exclusive of the gardens, was entered in the Valuation-roll at £200 from 1871 to 1893. On a re-valuation that figure was increased to £230,* at which it has remained ever since; (5) since its erection in 1866, at a cost of from £17,000 to £18,000, the said mansion-house has never been let, and no attempt has been made to let it."

The following grounds of appeal were submitted by the appellant:—"(1) The occupation of the mansion-house requires the maintenance of a very large and expensive establishment; and this, together with the cost of the upkeep of the garden and policies, makes the mansion-house of Brotherton unlettable as a separate subject. (2) The said mansion-house could only be let furnished along with the sporting rights of the estate, and accordingly the valuation of the said mansion-house in accordance with the Valuation Acts must be determined by the rent obtainable from the said mansion-house let furnished along with the sporting rights, under deduction of (*a*) the usual sporting expenses; (*b*) the costs of upkeep; and (*c*) an annual allowance for the furniture. (3) That all the other mansion-houses in Kincardineshire which are entered in the Valuation-roll at a higher figure than £200 have a grouse moor attached to them, and the rent or assessed value of mansion-houses where there is a grouse moor to be let or occupied therewith forms no proper basis of comparison for fixing the value of Brotherton mansion-house. . . . (5) That (*a*) cost of construction and (*b*) variations of floor spaces in houses of a similar class have no real bearing on the question of valuation; and (6) That after making the necessary deductions from the rental which might be obtained from house and shootings there remains the sum of £175 for the mansion-house as furnished; that the said sum is an ample valuation therefor; and that the sum of £60 is a reasonable estimate of the rental for the furniture, and falls to be deducted from the sum of £175 in order to ascertain the correct valuation of the house unfurnished."

The Assessor made the following replies:—"(1) That the valuation of this mansion-house having stood at £230 for twenty consecutive years since 1893-94 the valuation should continue at that figure, unless some strong reasons were advanced to show cause for a decreased letting value—*Livingston* v. *Assessor for Paisley*, (1909) 46 S. L. R. 433. (2) That there had been no change of circumstances during the period from 1893-94 until now, except only that a better letting value for this mansion-house had been created through the introduction of electric lighting and the supply of accommodation for motor cars, thus maintaining and improving the up-to-dateness of this mansion-house as at 1893-94. . . . (4) That so far as material had been obtained by the parties as regards other mansions in the county, there was no evidence to show that £230 was an over-valuation, for even admitting some advantages to the latter as compared with Brotherton, they suffered from disadvantage, such as

* A statement in an appendix to the case showed that in addition there was a sum of £22 for garden and offices.

being lit by oil lamps, or by gas, or by petrol gas wholly or partially throughout the mansion-house, lack of motor car accommodation and inconvenience of situation for travelling by the north and south going express trains. (5) That a mansion-house and a grouse moor must be entered in the Valuation-roll each separately and at its respective rent or yearly value; that the present appeal had reference to the value of a mansion-house, and that so long as the mansion-house was in the neighbourhood of grouse moors, viz., in the county of Kincardine, the fact of the moors being five, ten, twenty, or even thirty miles away, instead of around the house, did not nowadays, with the use of motor cars, detract anything, or if at all very little, from the letting value of a mansion-house *qua* mansion-house. (6) That as this mansion-house was a modern one the price paid might to a minor extent be reasonably taken into consideration in fixing the value, and 1½ per cent on the cost of erection in 1866, apart from the value of the site, and the cost of alterations and additions since, would give a valuation of £270. (7) That again the servants' accommodation at this mansion-house was exceptionally large (the family rooms were also very large), and any person who was in a position to keep up a large servants' accommodation as here, could afford to pay, and would pay, a greater rent than the man who with the same number of family rooms of smaller size, and with a lesser retinue of servants required a lesser accommodation for his servants. (8) That in comparison with other mansion-houses, so far as that had been available, and in the area concerned, and taking into account situation, sea coast residence, convenience for express trains, and up-to-dateness in every way, the valuation of £230 continued from prior years was a fair valuation. This was further proved by comparison of floorage space and annual values of other mansions in the county. . . ."

The case was heard on 2nd and 3rd December 1913. The arguments[1] submitted to the Court appear sufficiently from the statement of the grounds of appeal and from the opinions of their Lordships.

At advising on 20th December 1913,—

LORD JOHNSTON.—When he came to make up his Roll for 1913 the Assessor for Kincardineshire thought fit to make some alteration in the valuation of Brotherton House, its gardens, policies, and offices. The alteration was chiefly confined to the policies. The standing valuation having been interfered with, Miss Scott of Brotherton, the proprietrix, has taken the opportunity of opening up the whole question of the valuation of the subjects, and has demanded a very substantial reduction. The truth is that Brotherton House, with its gardens and grounds, the present

[1] Reference was made to Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), secs. 1, 42; Sporting Lands Rating (Scotland) Act, 1886 (49 and 50 Vict. cap. 15), secs. 3, 7; and to the following cases, viz.:—Maxwell Scott v. Assessor for Roxburghshire, (1890) 17 R. 833, Lord Trayner, at p. 834; Forbes Irvine v. Assessor for Aberdeenshire, (1893) 20 R. 626; Colville's Trustees v. Assessor for Fife, (1894) 21 R. 799; Livingston v. Assessor for Paisley, (1909) 46 S. L. R. 433; Lord Middleton v. Ross-shire Assessor, (1882) 10 R. 28; North of Scotland Electric Light and Power Co., Limited, v. Assessor for Brechin, 1909 S. C. 655; Fortescue v. Assessor for Kincardineshire, (1894) 31 S. L. R. 474.

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buildings dating from 1866 and having originally cost £16,000 or £17,000, is too large for the estate under present agricultural circumstances, even though the estate is one of 4000 acres. Miss Scott's contention is that the house is not a lettable subject at all, or at any rate not lettable at anything like the value put upon it by the Assessor, and subsequently by the Valuation Committee. I should say that the Valuation Committee carefully considered the case and have reduced the Assessor's valuation from £252 placed on the mansion-house, gardens, and offices, to £212, the latter sum being made up of £190 for the house and £22 for the gardens and for four cottages which are so related to the house as to be of the nature of offices. The figure upon which Miss Scott stands is £137, made up of £115 for the mansion-house and £22 for the gardens and the same set of cottages.

In the argument before us the whole question of the valuation of large mansion-houses has been raised, and admittedly the question is a difficult one. Viewed from the general point of view it may fairly be said that many country mansion-houses in Scotland, if displenished, would not bring a tenant who would pay any substantial rent at all, for it is the basis of valuation that the subject is to be taken as unfurnished and to be let either on lease or from year to year. But the question is complicated by the accessories of the mansion, such as gardens and policies, and by the cost of maintaining them. In the case of Brotherton the house cannot be regarded as separate from the gardens and policies and the four cottages, to which I have referred, which are necessary for the domestic establishment of the house. Now, the gardens and policies are costly to keep up, and from the point of view of letting value, while they are or may be an attraction to the lessee, they are and must be a drag upon the rent, for no one would take a mansion-house on the footing of keeping up gardens and grounds without taking that expense into consideration, and the result, I think we may fairly accept, would be to reduce the rental value to an almost illusory figure. On the other hand, if the owner lets the subjects on condition of maintaining the grounds and policies, she must calculate upon a very large rental if the net rental is to be anything substantial. There is also the further consideration that rarely, if ever, is such a house let unfurnished even for a period of years, and if the owner is to let it furnished, she must calculate upon a return for, and depreciation on, the value of the furniture as a further deduction from the gross rental.

Mr Christie, witness for the appellant Miss Scott, has given as a problematical rent £700 for the season from July to November. While I think that this is quite an ample sum, if not more than ample, I do not think that we are entitled to view the situation from the standpoint of a summer's let only. We have under the Act to determine the value for the year, but I think that, whether we take the subjects as let for four months or as let for twelve, the sum of £700 is the maximum that the place would fetch even with the shootings thrown in, and that the rent, even if it be taken as obtained for four months only, must be debited with the maintenance of the subjects for the whole twelve.

The question is, however, complicated by the necessity of separately

valuing the shootings, which must at the same time, as a practical proposition, be let along with the house. Now the shootings are already entered in the Roll at something like £65. I cannot conceive of anyone giving that rent for the shootings of Brotherton, looking to the average bag, if he had to keep two keepers, which are necessary to make the shootings available. I think, therefore, that the house rental must be debited with the shootings rental as a first deduction. I think that £700 a year is the very utmost that the house, gardens, and policies would bring if let with the shootings, such as they are, on the estate. Suppose, then, that the subjects brought even £700 for the mansion-house, gardens, and policies, with the shootings thrown in, the deductions necessary to arrive at the net rental of the house, garden, &c., would then be:—Shooting rental, £65; gardeners, £200; garden supplies, say, £100; foresters on the policies, say, £50; making a total deduction of £415, which might reasonably be further increased by various expenses of upkeep on which it is impossible to put a figure, and by landlord's taxes. Taking the deductions at say £450, this leaves a sum of £250. But that is not the net sum, because that is all that is left to remunerate the owner for the use of the house and its furniture. Now, it has been long recognised as a very reasonable mode of dealing with such cases that one-half of the free rental is assumed to be attributable to the building and one-half to the furniture. That, then, would leave a net return to the owner for the house alone of £125 a year. I do not pretend that this is an accurate figure. I think it is a maximum figure. If we are to take the valuation as one to be arrived at on such a basis, I am perfectly satisfied that, were Miss Scott to attempt to let her place, she would have great difficulty in securing any such return, and would, moreover, have to lay her account with having it on her hands very frequently unlet.

But the question is made no less difficult of determination by the Assessor's reference to a number of places which have fine houses, but at the same time are endowed with grouse moors and shootings of a valuable nature, and by the appellant's answer that these give no comparison with Brotherton House, because in these cases the shootings help to let the house—in fact are such an inducement as to bring tenants, who otherwise would not dream of taking the house by itself; whereas in the case of Brotherton the shootings are of such little value that, although being in existence they must be let along with the house, they form no inducement to a sporting tenant to take the place.

This matter of shootings was considered in the case of *Lord Middleton*,[1] when he let the house and forest of Applecross. There the mansion-house and the deer forest were treated as one subject, and they undoubtedly were only lettable as one subject. From the gross rental for the season, which was recognised as the only return which they properly could bring, the deductions for foresters' and gardeners' wages and the upkeep of gardens, &c., were all slumped, with the result that a £2000 rental was reduced on the evidence to £450, although the net rental was taken by agreement as £600. But shortly after this decision an Act was passed in

[1] 10 R. 28.

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1886, termed the Sporting Lands Rating Act, 1886, which provided two changes in the law of valuation. First, shootings and deer forests were to be valued for the future, whether they were actually let or not. And second, the yearly values of shootings and deer forests were to be entered separately for each parish. Hence, since 1886, following the rule of this statute, shootings and deer forests have been entered as separate subjects, notwithstanding that (as in all the cases referred to by the Assessor and by the appellant), when let, the shootings are let along with the house. When, then, one speaks of shootings enhancing the lettable value of a house, I think that that is somewhat fallacious. The accompanying possession of good shootings may render a house more easily let, and the existence of a good house in proximity to good shootings may make the shootings more easily let. But it is difficult to see how it can fairly be said that the influence of valuable and attractive shootings on the combined rental can be held as adding to the valuation of the house when regarded from the point of view of the Valuation Acts as a separate heritable subject. Their value ought to be exhausted in the valuation of the shootings themselves. If they are to be regarded as separate subjects, the value of each of them in the market must be separately ascertained. Where they are let in combination, and either on lease or from year to year, the Assessor must, no doubt, apportion the rent between house and shootings on the best view he can take of their respective intrinsic values. I think, however, that a season's let, which is the usual way in which such subjects are dealt with, affords a more or less fair criterion of the value of the shootings, but a most fallacious one of the value of the house. In any view I think it not justifiable in the case of a house which is unlet to say that the estate is possessed of valuable shootings, and that, if they were let along with the house, a very much enhanced rent would be got for the house.

On the whole matter I conclude that the question of the valuation of unlet, and practically unlettable, houses is one of the most difficult questions which Assessors have to deal with, and that on the whole they deal very fairly with it. For their guidance I think I may say that there is another factor which enters into this peculiar class of valuations. The proper mode of valuing by comparison with other similar houses is difficult to apply, when few, and possibly none of them, are let, or at any rate let from year to year. It may, I think, be supplemented by the consideration that the owner is himself or herself a potential tenant. For the enjoyment of such an estate as this the owner must have a residence. Having regard to the rental of the estate and the present position of agriculture, it could not be suggested that Miss Scott, unless she had a fortune independent of the estate, would build a house such as that to which she has succeeded, but one more proportional to the present position of the estate. Regarded from this point of view, I do not think it can be said that the valuation of £190 put upon Brotherton by the Valuation Committee, who probably gave some weight to the consideration which I am now advancing, but with more experience, is more than would represent a dwelling-house reasonably adapted to the owner's enjoyment of this estate, and I therefore think that this valuation should be sustained.

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In order, however, that I may not be misunderstood, before leaving the case I must refer to the case of *Forbes Irvine*[1] and the other Aberdeenshire cases decided along with it. In these cases it was attempted by the Assessor to lay upon the various houses higher values than those for which they would let in the market, on the view that the owner would give more for his house than anyone else. But, as I understand the argument, this contention was based on the idea of the owner being willing to pay a *pretium affectionis*. What I have said in the immediately preceding passage has no reference to the increased value to a proprietor of his own house, arising from his attachment to the place and the property. I am regarding the question simply and solely from the point of view of the owner requiring to house himself reasonably, in accordance with the free rental of the estate which belongs to him. Taking the case from that point of view, I am satisfied that £190 a year is a fair valuation for this house, and one which will admit of the owner bearing her fair share of the general taxation, which is the ultimate object of the Valuation Acts.

Lord Salvesen.—The salient facts in this case are (1) that Brotherton House has, since it was built in 1866, always been in the possession of the successive owners; and (2) that for twenty years it has been entered without objection as of the annual value of £230. It is not alleged that there has been any recent change of circumstances which would affect its lettable value. On the contrary it has been made more convenient as a place of residence through the introduction of electric lighting and the general use of motor cars, for the accommodation of which provision has been made in the offices, thereby minimising the inconvenience of its being situated nine miles from a principal station. The appellant is, however, quite entitled to have the assessable rental revised if she can show good grounds for that being done; but the onus is upon her, and none the less that she successfully resisted before the Valuation Committee a proposed increase which must now be assumed to have been unwarranted.

The case which she makes is substantially as follows: Brotherton House is a large and beautiful country residence with policies extending to 87 acres. The shootings over the estate are entirely low ground shootings, and therefore not such as to attract the wealthy class of summer tenants. The expense of upkeep of the garden and grounds is very large; and any rent that could be expected in the open market would be more or less swallowed up by the expenses of upkeep. According to one of her witnesses, Mr Speedy, the house is really unlettable even along with the shootings; or at most would bring in a rent which would leave the owner out of pocket after paying the wages of gardeners, foresters, and keepers. The logical result would seem to be that this mansion-house, which cost some £17,000 or £18,000 to build, ought to be entered as a subject of no assessable value.

If we were to accept this view it would be capable of very wide application; for there are many subjects in Scotland where the expense of upkeep actually incurred by the proprietor is in excess of the rent that

[1] 20 R. 626.

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any prospective tenant would be likely to pay. The more magnificent the building is, the more forcibly can this reasoning be applied. Where there has been an actual let the Court will no doubt be forced to take the rent stated in the lease as being the value of the subjects let; and if the tenant has stipulated for the services of gardeners, keepers, &c., as part of the consideration for the rent, their wages must of course be deducted. If in such a case the owner has let the subjects for no more than will pay the wages of the servants whom he contracts with his tenant to keep upon the property, perhaps the assessable value will be nil. It does not, however, follow that the Court will proceed upon a hypothetical rent where the owner does not choose to let his property but prefers to keep it himself. Presumably he does so because he desires to have the enjoyment of it rather than to receive a rent which would only enable him to pay his servants. Where a place is unlettable because it is out of proportion to the requirements of ordinary shooting tenants it may be that the only hypothetical tenant must be taken to be the owner, and that the value for assessment purposes ought to be the rent which an owner who required to live upon his property might reasonably be expected to pay. If one takes such an extreme example as a ducal palace it may be assumed that such a subject would be extremely difficult to let because of the very small number of persons who are willing to pay an adequate rent for such a residence. In the case figured one would need to find some other method of assessment than that of the rent obtainable in the open market, unless one were to reach the conclusion that such subjects, because of their very magnificence, ought not to bear any portion of the rates. No doubt Brotherton House is not quite in the same position, because the estate as a whole would readily enough find a purchaser; and such a purchaser would scarcely expect to have the mansion-house thrown in for nothing along with the other lands because of the expense of maintaining its policies in a suitable style. In the present instance the Valuation Committee has entered the annual value of the mansion-house at a figure which represents only a little over one per cent on the cost of its erection; and I cannot hold that this apparently moderate valuation, which is less than has been accepted for twenty years, has been displaced by the appellant's evidence. In my opinion, therefore, we should dismiss the appeal.

Lord Cullen.—The subject of the present appeal is the mansion-house of Brotherton, near Johnshaven, Kincardineshire. It was built in 1866 at a cost of about £18,000. It has never been let, nor has there been any attempt to let it. Between 1871 and 1893 it was entered in the Roll at the annual value of £200. Between 1893 and 1912 inclusive it was entered at £230. In the present year the Assessor entered the mansion-house, garden, and offices at £252. Against this valuation the appellant maintained that the valuation should be reduced to £137, representing a reduction of the valuation of the mansion-house from £230 to £115, the balance of £22 being admitted to be a fair valuation of the garden and offices included in the entry. The Valuation Committee have fixed the valuation of the house, garden, and offices at £212. Deducting the

£22, the valuation of the house has thus been fixed at £190 as against the figure of £115 maintained by the appellant.

The appellant admits that there has been no material change of circumstances favouring a reduction of the valuation. She therefore has to maintain that the mansion-house valuation, so far as exceeding £115, has all along been too high. As the mansion-house has always been in the proprietor's occupation, without having been offered in the market for letting, and as it has since its erection been entered in the Roll at the figures above mentioned, the appellant has to undertake a heavy onus in her present appeal.

While the appellant is willing that the mansion-house should be entered at £115, the evidence which she has presented is to the effect that the house (with its gardens and offices) has no letting value at all. This is the opinion stated by both of the witnesses, Mr Christie and Mr Speedy. The subjects are admitted to form a very fine residence. The reason given for their having no letting value is the burden of upkeep. The house is a fairly large one, built on an expensive scale, and the gardens, &c., are also laid out on an expensive scale. And so it is said that no tenant could be found who would be willing to undertake the annual upkeep of the subjects on the scale on which they are kept up at present and also to pay any rent over and above to the owner. In addition it is said that, as the shootings on the estate do not embrace a grouse moor, and are, for low ground shootings, of an indifferent quality, they do not form an attraction which would aid in obtaining a let of the present subjects. Mr Christie makes a calculation on an assumed rent of £700 for house, &c., and shootings during the shooting season, under which he brings out a net rent of £87 for the house, &c. But this is a mere *pro forma* calculation. His evidence is to the effect that the subjects could not be let at all.

This result—that the subjects are unlettable—is rested solely on the opinion of Mr Christie and Mr Speedy. The test of the market has never been resorted to. And the proprietor's sense of annual lettable value is reflected in the long continued valuations acquiesced in as above mentioned.

The comparative method by adducing rents of other mansion-houses in different localities in the county has been resorted to on both sides. The method is a legitimate one. It is not an easy one to apply on paper in cases like the present. Each country mansion-house has to depend for letting purposes on its locality and amenity and its own peculiar attractions, internal and out of doors. And places which do not appeal to all persons appeal to some. It may be that Brotherton, as an expensive place, would not be easily let. The same thing happens with many other country houses which, from one cause or another, are difficult to let, but which in the end find a tenant who likes the particular place he takes, and is able and willing to pay for it. I have given my best consideration to the evidence adduced by way of comparison between Brotherton House and other places (about which the information given is only partial), and I do not feel able to conclude from it that Brotherton House is not lettable at the figure of £190 placed on it by the Valuation Committee.

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The onus, in view of the valuation history of the subjects and the absence of any change of circumstances, is on the appellant, and is a heavy one. I am of opinion that she has not discharged it, and that the appeal should be refused.

THE COURT were of opinion that the determination of the Valuation Committee was right.

W. & J. COOK, W.S.—WILLIAM B. RAINNIE, S.S.C.—Agents.

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WATER OF LEITH PURIFICATION AND SEWERAGE COMMISSIONERS (Appellants).—*Horne, K.C.*—*Ingram.*
ASSESSOR FOR MIDLOTHIAN (Respondent).—*Constable, K.C.*—*Duffes.*

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WATER OF LEITH PURIFICATION AND SEWERAGE COMMISSIONERS (Appellants).—*Horne, K.C.*—*Ingram.*
ASSESSOR FOR LEITH (Respondent).—*Lippe.*

Valuation Acts—Value—Public Sewers—Method of Valuation.

Held that sewers, owned and occupied by a statutory body of Commissioners, fell to be entered in the Valuation-roll at the yearly rent which a hypothetical statutory tenant would give for the sewers; and that that rent was represented by a sum made up by taking 3¼ per cent on their total capital cost, and adding thereto, in addition to landlord's rates and the average annual charge which would fall on a landlord for maintenance, such a percentage on the cost of the sewers (as distinct from land and wayleaves) as, paid annually into a sinking fund, would provide for their complete renewal in 100 years.

Held further (1) that, in calculating the capital cost of sewers constructed by the Commissioners under their statutory powers, lands purchased by the Commissioners were to be taken at the full prices paid, and that there also fell to be included (*diss.* Lord Salvesen) the legal and engineering expenses incurred in acquiring the lands, but not the Parliamentary expenses of obtaining the Act, nor (*diss.* Lord Cullen) sums paid as compensation for disturbance: (2) that the capital cost of existing sewers acquired and utilised by the Commissioners was to be taken as the additional sum which would have had to be expended on new sewers by the Commissioners had the existing sewers not been available.

Question, per Lord Johnston, whether a hypothetical sinking fund is an item which ought to enter into the valuation of subjects of such a permanent nature as public sewers.

I.—Water of Leith Purification and Sewerage Commissioners v. *Assessor for Midlothian.*

Lands Valuation Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

Cases 323 and 324.

AT a meeting of the Valuation Committee for the county of Midlothian, held on 10th September 1913, the Water of Leith Purification and Sewerage Commissioners appealed against certain entries in the county Valuation-roll for the year ending Whitsunday 1914, by which certain sewers situated in the county, and owned and occupied by the appellants, were entered in the Roll at the aggregate yearly rent or value of £2640. They craved the Committee to reduce the valuation to £1755, 10s., and, the Committee having refused to comply with their demand, they asked for and obtained a stated case on appeal.

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The facts set forth in the case were to the following effect:—

The Commissioners were incorporated by the Water of Leith Purification and Sewerage Act, 1889, for the purpose of securing, and thereafter maintaining, the purity and flow of the Water of Leith, and with this object they were charged with the duty of maintaining an existing sewer constructed about 1864 and transferred to them by the Act of 1889, and also with the duty of constructing and maintaining additional sewers and works. The Act of 1889 conferred on the Commissioners the usual powers for the compulsory acquisition of lands, easements, servitudes, and privileges.

The sewers situated in Midlothian, the subject of this appeal, were sewers constructed by the Commissioners at a total capital cost of £57,371, a sum which included cost of construction, payments for land and wayleaves, sums paid to tenants of heritable subjects as compensation for disturbance, and the legal and engineering expenses incurred in connection with the acquisition of the land.

The method adopted by the Assessor in valuing the sewers was the following:—He fixed the yearly rent or value of the sewers to be a sum made up by adding together the following sums:—(1) A sum obtained by taking 3¼ per cent on the total capital cost; (2) a sum obtained by taking a percentage on the total capital cost which, paid into a sinking fund annually for seventy-five years, would at the end of that period have reproduced the capital sum; (3) a sum for annual maintenance as distinguished from renewals; (4) a sum representing the rates which would fall on the owners annually.*

The Committee, after hearing evidence, were of opinion that the Assessor's method was right, and they in substance affirmed his valuation, but reduced the actual figure to £2574, their view being that, on the question of maintenance and sundry other minor matters, his figures were too high.

II.—Water of Leith Purification and Sewerage Commissioners v. *Assessor for Leith.*

At a meeting of the Valuation Committee for the burgh of Leith, held on 11th September 1913, the Water of Leith Purification and Sewerage Commissioners appealed against entries in the burgh Valuation-roll by which certain sewers, situated in the burgh and owned and occupied by the appellants, were entered in the burgh Roll at the yearly rent or value of £3205. They craved the Committee to reduce the figure to £1150, and, the Committee having refused to comply with their demand, they asked for and obtained a stated case on appeal.

The facts in this case were analogous to those in the appeal

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* The following statement made by the Assessor is taken from the Appendix to the case:—

"(1) Cost of Sewers: £57,823 at 3¼ per cent . .	£1879	4	11
(2) Sinking Fund (75 years): £57,823 × ·00324702 .	187	15	0
(3) Add Maintenance, say	350	0	0
(4) Add Owners' rates: average 1s. 10·79d. per £ on £2416, 19s. 11d.	229	10	3
say £2640	£2646	10	2"

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against the Assessor for Midlothian, the sewers in question forming a part of the Water of Leith Purification system, the only point of difference between the cases being the fact that, included among the sewers which appeared in the burgh Roll, was a sewer constructed in 1864 which had been transferred to the Commissioners by the Act of 1889.

The method of valuation adopted by the Assessor was similar to that adopted by the Midlothian Assessor, his calculations being based upon the total capital cost of construction, and this method he applied not only to the sewers constructed by the Commissioners after 1889, but also to the sewer constructed in 1864.

The Committee, after hearing evidence, were of opinion that the method of valuation adopted by the Assessor was correct, and they substantially affirmed his decision, but reduced the actual figure to £3192.

The two cases were heard on 4th December 1913, the arguments in the Midlothian case being adopted in the Leith case with regard to sewers constructed by the Commissioners under the Act of 1889.*

Argued for the appellants in the Midlothian case;—The Assessor had erred in his method of applying the principle of valuation sketched by Lord Salvesen in *Assessor for Aberdeen* v. *Magistrates of Aberdeen*.[1] The first item in his calculation was clearly wrong. He had taken 3¼ per cent on the total capital cost of the sewers, including (1) legal and engineering expenses incurred in the acquisition of the lands, (2) sums paid by way of compensation for disturbance. Neither of these items should have been included, as they did not form part of the capital value of the sewers. The legal and engineering expenses added nothing to the value of the lands, and would not be considered as an element of value by a purchaser; and the same consideration applied with even greater force to sums paid by way of compensation for disturbance. If the proposed items were included, it followed logically that the Parliamentary expenses of getting the Act should also have been added, which was absurd and had not been suggested. Further the capital value of the lands and wayleaves should only have been taken at two-thirds of the sum at which they were bought, as the original prices paid represented a fictitious, and not the true, market value. The Assessor had also erred with regard to the second item, viz., the sinking fund. In the first place, he should have taken a period of one hundred years instead of seventy-five years, as the life of sewers was of almost indefinite duration; in the second place, he should not have included the price of land and wayleaves or the expenses in his calculation, as these were not subjects which required any renewal. As to the third item, viz., maintenance, he had also gone wrong. Maintenance obviously was something distinct from renewal (which was covered by the sinking fund), and meant the ordinary expenditure necessary every year to keep the sewers

* In both cases the appellants had argued before the Valuation Committees that sewers were not assessable subjects, and that accordingly the sewers in question should not have been entered in the Roll; but this argument was not maintained on appeal, in view of the decisions in *Magistrates of Dundee* v. *Assessor for Forfarshire*, 1912 S. C. 848, and *Assessor for Aberdeen* v. *Magistrates of Aberdeen*, 1913 S. C. 712.

[1] 1913 S. C. 712, at p. 716.

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working. That was an expense which fell upon the tenant and not upon the landlord,[1] and there should accordingly have been no charge under this head. In any event it was excessive, and it included items which were obviously indefensible, *e.g.*, outlays incurred by the Commissioners in performance of certain statutory duties such as watching the water.[2]

Argued for the respondent the Assessor for Midlothian;—The Valuation Committee had rightly approved of the Assessor's method of valuation. The first item in his valuation was clearly correct. The problem was to find what sum a hypothetical statutory body would be willing to pay annually by way of rent,[3] rather than have themselves to acquire the land and construct the sewers; and it was obvious that in considering this problem they would have to base their calculations on the footing that the land could not be acquired without their making payment of those incidental expenses to which the appellants had taken objection.[4] The Parliamentary expenses were distinguishable because, at the stage when the rent was supposed to be under consideration, the hypothetical tenants were already in being. The appellants' contention that the capital value of the land should have been taken at only two-thirds of the price paid was, for the same reason, untenable, as the hypothetical tenants would themselves have had to pay inflated prices (assuming the prices in question to be so) if they had been purchasers. As a matter of fact, however, the sums in question were fixed by arbitration. As regarded the sinking fund seventy-five years was a more favourable figure than had been taken in previous cases; and as regarded maintenance the sum fixed by the Assessor fairly represented the charges which would fall upon a landlord.[5]

Argued for the appellants in the Leith case;—These appellants adopted the argument for the appellants in the Midlothian case. Further, when the appellants in 1889 acquired the sewer constructed in 1864 the expenditure disbursed on its construction had been written off, and the sewer stood at nothing in the capital account of their predecessors. Admittedly, however, it must be held to have some capital value still, but that value should not be taken at more than the value of the construction work which the old sewer saved the Commissioners.

Argued for the Assessor;—The 1864 sewer was still an efficient sewer and fell to be entered in the Roll on the principle and at the figure adopted by the Assessor.

At advising on 20th December 1913,—

County of Midlothian.

LORD SALVESEN.—In the case of the *Assessor for Aberdeen*,[6] we were

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[1] Oakbank Oil Co., Limited, v. Assessor for Midlothian, (1902) 4 F. 520.

[2] Reference was also made to Liverpool Corporation v. Llanfyllin Assessment Committee, [1899] 2 Q. B. 14.

[3] Magistrates of Dundee v. Assessor for Forfarshire, 1912 S. C. 848, at p. 852.

[4] Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co., (1887) 14 R. (H. L.) 33.

[5] Reference was also made to Edinburgh and Leith Gas Commissioners v. Assessor of Edinburgh, 1909 S. C. 664.

[6] 1913 S. C. 712.

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constrained to hold, following a decision of the House of Lords, that sewers and purification works in a burgh were lands and heritages within the meaning of the Lands Valuation (Scotland) Act, 1854, and as such fell to be entered in the Valuation-roll at their true and not at a merely nominal value. We did not, however, except in the most general way, determine the principles upon which such yearly value should be fixed, and it is obvious that the application of the principles must vary with the facts in each particular case. In the *Aberdeen* case[1] the parties relieved us from adjusting the figures, while in the present case the whole controversy is as to the amount of the valuation.

The present appellants are a statutory body who obtained from Parliament compulsory powers for the construction of a large sewer which was to receive and carry into the sea the sewage and other polluting matter formerly discharged into the Water of Leith. The object of the promoters was to restore the Water of Leith more or less to its natural state and so to improve the amenity of the district through which it flows. The duty which they undertook was a public duty, and the expense of discharging it was defrayed out of public money. In order to obtain the necessary powers application had, of course, to be made to Parliament, and large expense was incurred in obtaining the Act. Following upon this the appellants had to acquire lands and wayleaves either by agreement or, failing agreement, by arbitration under the Lands Clauses Act, and thereafter in the land so acquired to construct their works and lay their sewers. As usually happens in such cases a large number of claims by landowners fell to be settled by arbitration, and legal expenses amounting to several thousands of pounds were incurred. In addition, the appellants were found liable to pay considerable sums by way of compensation for disturbance to the tenants or occupiers of the lands which they required for the purposes of their undertaking.

The first question in the case is whether the legal expenses incurred in acquiring land are to be treated as part of the value of the heritage, in other words, are to be added to the price of the land in order to fix the sum upon which interest falls to be calculated in accordance with the principles laid down in the *Aberdeen* case[1]? This certainly would not be so in the case of an ordinary private proprietor. No doubt a proprietor who had acquired his land only as the result of a litigation, or who had incurred large conveyancing fees in connection with the disposition to him of the lands he held, would be unwilling to sell at any price which would not recoup him both for the actual price and for the expense which he had incurred incidental to the purchase. But such expenditure in the ordinary case adds nothing to the value of the land itself, and would not be considered as an element of value by a purchaser. Such a purchaser would look only to the return which he could derive from the land, and would base his estimate of its value on such return, assuming there was in addition no potential future value. It was contended, however, that, as the only possible tenant for such a system as the appellants administer would be a body having the like statutory duty to purify the

[1] 1913 S. C. 712.

Water of Leith, the rent which this hypothetical tenant would have to pay to the existing owner must be of such amount as to recoup the owner for all the expenditure which he had incurred. On this principle the Parliamentary expenses of obtaining the Act would also have to be taken into account. Yet it is not contended here that these expenses have in any way added to the value of the heritage, and the Assessor for Midlothian in his evidence does not maintain that they should be so added. Such expenses were incurred in constituting the Commissioners as a statutory authority, and in obtaining the necessary powers for putting their scheme into operation. If their duties and powers were to be transferred to another statutory body shortly after the passing of the Act, it would be obviously unfair that they should not be relieved of these statutory expenses. Equally the expense of putting their compulsory powers into force is a good charge upon their funds however derived, and would fall to be provided for, not by the individual Commissioners, but by whatever authority took over their duties. I cannot see, however, that in this matter of valuation these expenses, whether incurred in connection with the grant of compulsory powers or in the acquisition of land by virtue of them, can be taken into account, and they were not even put forward in the *Dundee*[1] and *Aberdeen* cases.[2] What we have to value is the heritable subject so far as existing in the county of Midlothian, and the value of that cannot depend to any extent on the legal expenses that were incurred in acquiring the heritage. The hypothetical statutory tenant is one who is contemplated as being in existence, and is desirous only of leasing the heritable subjects so far as they belong to the appellants. The latter are contemplated as remaining the owners with their statutory powers unimpaired, but as finding it more convenient to carry out their duties in part through the intervention of a tenant. No doubt the whole conception is entirely artificial and cannot be conceived as being given effect to in practice but, such as it is, it is dominated by the cardinal consideration that it is the annual value of the heritage which has on some principle to be ascertained. On this broad general ground I think it is impossible to say that the expenses of arbitrations incidental to the purchase of the land in question form part of the heritage.

The same considerations appear to me to apply to the amounts paid by way of compensation for disturbance. No doubt these sums were incurred to obtain immediate possession of the land which could not otherwise have been got; but, now that the lands have been acquired and the sewers constructed, they do not enter into the value of the heritage. Had the appellants delayed the construction of their works until the expiry of the leases which gave rise to the claims for compensation such sums would conceivably never have been exigible. No doubt the statutory duty which they undertook required that the works should be proceeded with at once; but the only permanent value which remains is the land itself and the works which are constructed in and upon it. This appears to me to be the only heritage whose annual value we have to ascertain.

The second point raised by the appellants was with regard to the price

[1] 1912 S. C. 848. [2] 1913 S. C. 712.

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actually paid to the landowners. They say, and with much force, that that price does not represent the true value of the land acquired. They point to the fact that in the price fixed by agreement or arbitration a sum varying from 10 to 50 per cent is conventionally added as *solatium* for the exercise of the compulsory powers; and they accordingly claim a deduction of one-third from the price. If it were possible to value such subjects by reference to the general market I should be disposed to give effect to this claim; but I do not see how this can be done. No other body than the appellants themselves can be conceived as desiring wayleaves for the construction of sewers or land for purification works. As a matter of convenience, therefore, I am prepared to hold that the price actually paid by the appellants must be taken to represent the value of the land and wayleaves which they own. I am accordingly for disallowing this deduction.

The next question relates to the items of annual expenditure which would have to be taken into account in fixing the rent payable by a hypothetical tenant. The amount, as I pointed out in the *Aberdeen* case,[1] must include, in the first place, interest on the capital expended on the construction of efficient sewers. Parties are agreed that in this case the appropriate rate of interest is 3½ per cent, being the rate at which the appellants have been able to borrow money. The owner must likewise be recouped for the charges of maintenance which fall to be defrayed by him and not by the tenant; the rates leviable on him as owner; and in addition such amount by way of sinking fund as, when accumulated with compound interest, would enable him to reconstruct the sewers when they came to be completely worn out. It is perhaps somewhat difficult to separate owner's maintenance from renewals; but I am satisfied that there must be a considerable sum which requires to be expended on maintenance annually which is not of the nature of renewals and will not diminish the expenditure necessary when the sewers require to be reconstructed. Thus if a drain bursts the owner must repair it; and it does not by any means follow that such repair will prolong the existence of even the part repaired as compared with other portions of the sewer which needed no repair. On the other hand, it is necessary to see that no part of the expense of proper renewals is charged against the owner, who *ex hypothesi* must provide a sinking fund for complete renewal when the system as a whole becomes worn out or obsolete. On the basis of actual figures the appellants have worked out the sum of £73 as representing the average cost of maintenance of their heritable subjects so far as situated in the county of Midlothian, and I think this sum is sufficient. As regards the sinking fund I am of opinion that, looking to the very permanent nature of the works constructed, this ought to be spread over a period of 100 years and not 75 years as the Assessor suggests; and it may be noticed in passing that the Assessor for Edinburgh has consented to its being thus dealt with so far as his district is concerned. A large part of the expense of maintenance incurred by the appellants is not directly connected with the sewers, but is incurred in watching the Water of Leith in fulfilment of their other statutory duties, and it is mainly in respect of this that parties have differed.

[1] 1913 S. C. 712.

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The only additional question raised in this case is as to the capital value of the sewer which existed within the burgh some twenty-five years before the creation of the appellants as a statutory authority. Their case is that, if this sewer had not existed at the time, they would have been able at an increased cost of £15,000, half of which only would have been expended in Leith, to have provided a new sewer which would do the combined work of the old and the new sewer which they actually made: in other words, that the value to them of the existing sewer was only the amount of construction work which it saved them. I am of opinion that the appellants are right in their contention. Expenditure which has not been wholly beneficial must be estimated only at its beneficial value. Instead therefore of the sum of £25,000, which enters the Assessor's statement in respect of this old sewer, the sum of £7500 should now enter it.

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Lord Cullen.—I concur in the conclusions arrived at by Lord Salvesen except as regards the questions involved in the Midlothian appeal relating to (1) legal and engineering expenses which were incurred in the acquisition of the lands in which the sewer is constructed, and (2) sums paid by way of compensation for disturbance in said process of acquisition.

A statutory undertaking like the present, which cannot be let, may nevertheless be conceived, under the decisions, as the subject of a lease to its owners, as the only hypothetical tenants. The sewer works are to be figured as already established, and the statutory body as considering whether they will rent them or proceed to establish similar works for themselves. And, as actual bargain is out of the question, the hypothetical rent, on the adoption of the former alternative, is to be taken as one which will correspond (on an approximate calculation) with the pecuniary results to the hypothetical statutory tenants of adopting the second alternative, and neither higher nor lower.

If this be so, it seems to me that, in considering the hypothetical rent, the statutory body and only hypothetical tenants must be conceived as taking account of all expenditure which they would have to incur if they constructed for themselves. The Parliamentary expenses of the constituting Act do not come in, because, at the stage when the rent is supposed to be under consideration, the hypothetical tenants are in being. What they have to take account of is the expense which would be necessarily incident to operating their statute in order to provide themselves with a sewer similar to that which they are conceived as having the opportunity of renting.

Now, it is not alleged that any of the expenditure in question, by way of legal and engineering costs incident to the acquisition of the lands, was made unnecessarily. It is assumed to be expenditure properly and necessarily made in acquiring the land rights necessary for the establishment of the existing and hypothetically rented sewer. And, as I follow the decisions, the hypothetical rent is to be conceived as a sum corresponding to the cost which would be incurred by the hypothetical statutory tenants, if they took the course of procuring for themselves a similar sewer instead of renting the existing one. To take that course they would have

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to incur expenditure of a similar kind. I am therefore of opinion that these legal and engineering expenses are rightly included in the capital cost of the undertaking on which interest is calculated.

I may add one other observation on this head. Interest is being taken at 3½ per cent. This rate would not be appropriate to the case of any private individual who established works and leased them. It is taken because the owners here are a statutory body, and because lenders have the security afforded by the statute. And, in viewing the same statutory body as a hypothetical tenant, it seems to me that there ought to be a corresponding recognition of the fact that, if that body had to establish another and similar sewer, as an alternative to renting, hypothetically, the existing one, their process of establishing such other sewer would be attended with all the expense normally incident to the acquisition of land by such a statutory body through the operation of their statute.

As regards the sums paid to tenants for disturbance, these appear to me to have been, directly, part of the cost of the acquisition of the lands by the undertakers. To acquire the lands, including right to immediate possession, it was necessary to buy out both landlord and tenant. It may be true that the sums paid for both purposes do not correspond with the present market value of the lands so acquired. This, indeed, is alleged, although not proved, by the appellants. Properly speaking, the calculation in such a case as this should proceed on the basis of what would be the present cost to the hypothetical tenants of establishing a similar sewer. But the evidence does not direct itself to such present cost. The calculation goes on the original cost. And there is, in my opinion, no doubt that the sums paid to tenants for disturbance were part of the original cost of acquiring the lands required and used for the establishment of the sewer.

I am therefore of opinion that these sums, as well as the legal and engineering expenses above dealt with, should, in the artificial calculation under our consideration, be included in the original capital cost on which the interest of 3½ per cent is calculated.

Lord Johnston.—I do not propose to go over the grounds which your Lordships have both fully dealt with; but, as there are one or two incidental points of difference of opinion between your Lordships, it is necessary that I should give my view on those particular points.

The problem which we have to solve is to fix an artificial rent for these sewers, and the problem can only be solved by proceeding upon the supposition that there is a hypothetical tenant requiring sewers to effect the particular purpose effected by these sewers. The rent to be paid by such tenant must be based upon a fair return, not only on the capital sunk in the undertaking, but also upon the expenses incurred by the owner, if the owner is to recover in his rent a sum sufficient to recoup himself.

It is common ground between the parties that the Parliamentary and other expenses of obtaining the statutory powers are not to be taken into consideration. On the other hand, when we come to fix the capital upon which interest is to be calculated as the first factor in the rent, we are met by the consideration that the capital has been expended on land and on works. Now in executing the works there are incidental expenses, such

as those for engineering and superintendence, which undoubtedly form a fair item in calculating the cost of the works. In the same way in obtaining the land there are other incidental expenses, such as the expenses of arbitrations and other legal expenses in connection with obtaining a title to the land. These also I regard as legitimate items, and I shall shortly say that on that point I agree with Lord Cullen, and for the reasons stated by him. I think that special consideration should be given to the fact to which he drew attention, namely, that the calculation is based upon such a low rate of interest as 3¼ per cent; and I think if that low rate of interest is to be taken, it should be calculated upon the full costs of the Commissioners in acquiring the land.

Upon the second point, namely, whether an allowance should be made in respect of compensation for disturbance I agree with Lord Salvesen. I think that consideration is not like the consideration of the expenses of title and of arbitrations; it is ephemeral and must be held to have exhausted itself; and for that reason I agree with Lord Salvesen. Accordingly, the judgment of the Court on this matter will be that the land must be taken at its cost, plus the amount disbursed in legal expenses in the course of obtaining it, but not the sums paid for immediate possession, or, in other words, in respect of disturbance.

I think we are all agreed that the price paid must be taken without the deduction of one-third claimed by the Commissioners.

There remains the question of the expenses of maintenance. Here I confess that, if I had been giving judgment by myself, I should have taken rather a different view from that taken by both your Lordships. I do not accept by any means readily the idea of a sinking fund. I think the proper course would have been to take as the figure to be allowed for in the rent the cost of maintenance as it would fall upon the landlord. In the nature of things this sewer has a long lease of life—beyond most subjects—and I do not think this fictitious idea of a sinking fund, built up for the purpose of renewing the sewer at the end of a hundred years, is at all apposite to the actual situation. I think it would have been better to have taken the average annual cost of repairs and maintenance (including partial renewal if that were necessary) which would, in the case of landlord and tenant, have fallen upon the landlord. But as your Lordships are of a different opinion I do not seek to do more than indicate that, if I had been deciding the case alone, I should have taken a different view.

There is one other item; it must be understood that the Commissioners' outlays incurred in performance of certain statutory duties, such as watching the water, have nothing to do with the question before us.

Counsel for the Commissioners having asked the Court whether the sinking fund was to apply both to the land and to the works,—

Lord Salvesen.—I had overlooked that question. We are all of opinion that the sinking fund does not apply to the land, but only to the works.

Lord Cullen.—I proceeded upon that footing. With regard to Lord Johnston's remarks upon the subject of the sinking fund, I should, perhaps, add that I have not considered the question to which his Lordship's

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remarks are directed, and I reserve my opinion on it. The case, as presented, assumes the propriety of providing a sinking fund; and the provision of a sinking fund is, I think, in accordance with the practice which has hitherto prevailed. The case, moreover, does not contain materials for ascertainment of the average cost, year by year, of such partial renewals by the owners as might be said to give the sewer works a life of indefinite duration.

THEIR LORDSHIPS in each case pronounced an interlocutor in which they stated that they were of opinion that the determination of the Valuation Committee was wrong, and fixed the annual values of the sewers at figures arrived at by calculations based upon the principles explained in the opinions, thereby making considerable reductions on the amounts at which the Committee had valued the subjects in question.

H. INGLIS LINDSAY, W.S.—A. G. G. ASHER, W.S.—R. H. MILLER, S.S.C.—Agents.

No. 69.

May 13, 1914.

MRS FLORENCE NOON OR M'GOVERN, Pursuer.—*Ingram.*
THE WEST CALDER CO-OPERATIVE SOCIETY, LIMITED, Defenders.—*MacRobert.*

M'Govern v. West Calder Co-operative Society, Limited.

Expenses—Taxation—Jury trial—Motion for a rule—Fees to opposing counsel.

A motion for a rule having been refused with expenses, the Court *allowed* a fee of two guineas to the opposing party's junior counsel for attending that motion, but *disallowed* a fee to his senior counsel for that attendance; and also *disallowed* a fee to his junior counsel for attending when the motion was sent to the Summar Roll.

2D DIVISION. Ld. Anderson and a Jury.

IN an action of damages for personal injury at the instance of Mrs Florence Noon or M'Govern against the West Calder Co-operative Society, Limited, a jury trial was allowed, and resulted in a verdict for the pursuer. The defenders thereafter moved for a rule upon the pursuer to show cause why a new trial should not be granted. The motion for a rule was refused with expenses to the pursuer.

At the taxation of the pursuer's account the Auditor allowed, *inter alia*, the following fees to the pursuer's counsel: for attending in the Single Bills, when the defenders' motion for a rule was sent to the Summar Roll, one guinea to junior counsel; for attendance when the rule was moved for in the Summar Roll, eight guineas to senior counsel and six guineas to junior counsel.

The defenders presented a note of objections to the Auditor's report, objecting, *inter alia*, to these fees.

After hearing counsel in the Single Bills on 13th May 1914, the Second Division, without delivering opinions, disallowed the three fees objected to, but allowed a fee of two guineas to junior counsel for attending the motion for a rule, Lord Salvesen observing, "I think parties should understand that we are deciding this as a matter of principle, in order to settle the practice as to allowing fees to the opposing counsel for attending when a rule is moved for."

J. FERGUSON REEKIE, S.S.C.—BONAR, HUNTER, & JOHNSTONE, W.S.—Agents.

ANDREW WHYTE AND OTHERS, Appellants.—*Johnston, K.C.*—*Aitchison.*
DAVID STEWART, Respondent.—*Sol.-Gen. Morison*—*D. Jamieson.*

No. 70.
May 20, 1914.

Whyte v. Stewart.

Lease—Small Holdings—Resumption of holding by landlord—Statutory small tenant—Duty of Land Court in applications for resumption of holding—Assessment of tenant's claim to compensation—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49), *sec.* 32 (15).

Sec. 32 of the Small Landholders (Scotland) Act, 1911 (which regulates the rights of statutory small tenants), enacts, subsection (15): "Without prejudice to any agreement between the parties, the Land Court may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for building, planting, feuing, or some other reasonable purpose having relation to the good of the holding or the estate (including any purpose specified in sec. 19 of this Act), authorise the resumption thereof by the landlord, subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land resumed, to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act, 1908, on the determination of his tenancy. . . ."

Held (1) that, where the Land Court is satisfied that the resumption of a holding is desired for a purpose specified in secs. 19 or 32 (15) of the Act, it is the imperative duty of that Court, under the latter section, to authorise resumption at the earliest date reasonably possible, and it is not within the power of the Court to postpone resumption beyond that date; (2) that under sec. 32 (15) the Land Court is not entitled to make actual payment of compensation to the tenant a condition precedent to resumption of the holding; and (3) that, as compensation falls to be assessed by arbitration and not by the Land Court, an order pronounced by the Court requiring the tenant to lodge a statement of his claim for compensation was incompetent.

Lease—Small Holdings—Resumption of holding by landlord—Appeal—Death of landlord—Right of his representatives to insist in appeal—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49).

The landlord of a small holding, who had obtained from the Land Court an interlocutor authorising him to resume the holding for the purpose of residing there, but only under certain conditions, died after initiating an appeal against the terms of that interlocutor.

Held that his children, to whom he had bequeathed the holding, were entitled to insist in the appeal.

Lease—Small Holdings—Statutory small tenant—Equitable rent—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49), *sec.* 32.

Observed (*per* Lord Salvesen) that, in fixing an equitable rent, the Land Court is not entitled to reduce the rent below what would otherwise be an equitable rent, for the purpose of recouping the tenant for loss incurred in working the holding or for the over-renting of the holding during the previous period of his tenancy.

2D DIVISION. Land Court.

THIS was a special case stated by the Scottish Land Court at the request of the deceased Andrew Whyte, Miss Margaret J. Whyte, his daughter, and Andrew Whyte, his son, the proprietors of the farm and lands of Lawyett, in the matter of conjoined applications

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at the instance of the deceased Andrew Whyte and David Stewart, under the Small Landholders (Scotland) Act, 1911.*

The facts stated in the case are narrated in the following passage from the opinion of Lord Dundas:—"By lease, dated 6th April 1906, Andrew Whyte (now deceased) let the farm of Lawyett, extending to 27 acres, to David Stewart (whom I shall call the respondent), for seven years from Whitsunday 1906, at a yearly rent of £45. Stewart occupied the farm as resident cultivating tenant during these seven years, and is still in possession. The Small Landholders (Scotland) Act, 1911, received the Royal assent on 16th December 1911, and came into operation on 1st April 1912. On 21st August 1912, Stewart lodged an application with the Land Court for an order determining whether he was a landholder or a statutory small tenant in the farm, and for an order fixing a first fair rent, or alternatively a first equitable rent therefor, and the period of renewal of his tenancy. Answers were lodged by Whyte, in which he expressed his desire to resume possession of the farm, and on 6th May 1913 he presented a separate application to the Land Court—apparently as a matter of precaution, having regard to No. 70 of the Land Court's rules—for an order authorising him to resume possession at Whitsunday 1913, or at such other date as the Land Court might determine. The prayers of both applications are printed in the Special Case, and seem to be framed in accordance with the forms scheduled to the rules issued by the Land Court in virtue of section 3 (12) of the Act of 1911. The applications were conjoined; evidence was led before the Land Court on 24th May 1913; they inspected the ground about a week later; and an interlocutor in the conjoined applications was issued on 8th November 1913. The Land Court found that Stewart was a statutory small tenant, fixed the period of renewal of his tenancy as at and from Whitsunday 1913 to Whitsunday 1915, and his equitable rent at £25 per annum during that period; and further, in respect that it was proved to the satisfaction of the Court that Whyte desired to resume possession of the farm for the reasonable

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* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), as altered by the Small Landholders (Scotland) Act, 1911, enacts:—Sec. 2. ". . . The [Land Court] may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof, for some reasonable purpose having relation to the good of the holding or of the estate, . . . authorise the resumption thereof by the landlord upon such terms and conditions as the [Land Court] shall think fit. . . ."

The Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49), enacts:—

Sec. 19. "Without prejudice to the generality of the power to authorise resumption by the landlord for some reasonable purpose having relation to the good of the holding or of the estate, conferred by sec. 2 of the Act of 1886, the feuing of land, or the occupation by a landlord for the purpose of personally residing thereon of a holding, being his only landed estate, or the protection of an ancient monument or other object of historical or archæological interest from destruction or injury, shall respectively be deemed a reasonable purpose as aforesaid."

Sec. 32 (2). "Except so far as expressly applied by this Act, the Landholders Acts shall not apply to statutory small tenants."

Sec. 32 (15) is quoted in the rubric.

purpose of personally residing thereon, it being his only landed estate, authorised him to resume possession at Whitsunday 1915, subject to certain provisions as to compensation, which I shall afterwards refer to more particularly.* Whyte craved a Special Case, in terms of section 25 (2) of the Act. He died on 25th January 1914, before the case had been finally adjusted; and by interlocutor of the Land Court, dated 7th February 1914, his son and daughter, who (under his settlement) are his heirs in the farm, and whom I shall call the appellants, were sisted as parties, in his room, to the conjoined applications, requisition for a Special Case, and the Special Case itself."

The case also set forth (Art. 8):—"It was proved that the said tenant, David Stewart, had at his entry got this farm in poor condition and without sufficient buildings for proper working, that he had erected and altered buildings at his own cost for its proper working, and had incurred considerable expenditure in bringing the farm into good condition, that the farm was in good condition and well worked at the date of the application and of the inspection, that the said buildings had been erected by the tenant without objection by the landlord, but without the landlord's written consent, and that the farm had only begun to yield an adequate return for his expenditure in bringing it into condition during the last two years or thereby of the said lease, that a further period was reasonably necessary to enable him to recoup himself for the inadequate return obtained during the earlier years of said lease."

The contentions of the parties were stated in the case as follows:—"It is maintained for" Miss Margaret J. Whyte and Andrew Whyte "that the Scottish Land Court have misinterpreted the statute and that the foregoing decision is erroneous in law in respect

* The portion of the interlocutor of the Land Court dealing with Andrew Whyte's application was as follows:—"Find with regard to the application by the landlord, Andrew Whyte, for resumption of the holding that it has been proved to the satisfaction of the Court that the applicant desires to resume the holding for the reasonable purpose of personally residing thereon, the said holding being his only landed estate: Therefore authorise and empower the said Andrew Whyte to resume the said holding at the term of Whitsunday 1915 on compensation for resumption being paid to the tenant, the said David Stewart, as provided by section 32 (15) of the Act of 1911, and on such compensation being paid require the said David Stewart to surrender his said holding at said term to the landlord; and failing parties coming to an agreement as to the amount of compensation payable, appoint the tenant, the said David Stewart, to lodge by or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed, and continue the case for further procedure." The Land Court issued the following note to the interlocutor:—"*Note.*—With regard to resumption, the fifteenth subsection of section 32 of the Act of 1911 determines the compensation payable to a statutory small tenant for resumption when resumption is authorised. But the leading section which introduced resumption—section 2 of the Crofters Holdings Act of 1886—taken along with the explanatory nineteenth section of the Small Landholders Act, 1911, regulates other terms and conditions which may be imposed. Resumption of an entire holding at a short date has never been authorised. In the whole circumstances of the present case we think it would not be equitable to authorise resumption earlier than Whitsunday 1915. As regards the landlord there is no urgency for resumption."

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that (1) it did not authorise the said Andrew Whyte to resume possession till the term of Whitsunday 1915, notwithstanding that the Land Court held it proved that he had satisfied them that he desired to resume possession for a reasonable purpose in terms of the statute, and that he should have been allowed to resume possession from Whitsunday 1914 at latest; (2) the said decision authorises resumption only on and after payment of 'compensation for resumption,' and failing the parties coming to an agreement as to the amount of compensation payable, appoints the said David Stewart to lodge with the Scottish Land Court by, or before, 1st April 1915, a statement setting forth in detail the subjects for which compensation is claimed, and continues the case for further procedure. It is maintained for the said parties that the Land Court in granting authority to resume were not entitled to do more than attach the condition, in terms of the statute, that it should be subject to the payment of the like compensation by the landlord to the tenant in respect of improvements which a tenant would be entitled to under the Agricultural Holdings (Scotland) Act, 1908, on the determination of his tenancy. It is further maintained that the Scottish Land Court had no power to deal with, or fix the amount of, compensation payable by the landlord to the tenant, that compensation falling to be determined by arbitration in accordance with the provisions of the Agricultural Holdings (Scotland) Act, 1908, as varied by section 32 of the Small Landholders (Scotland) Act, 1911.

"It is maintained by the tenant, David Stewart, that (1) the order by the Land Court was competent, (2) that, if any change in the period for which renewal was granted, and to the expiry of which resumption was postponed, were now to be made, the period should have been longer than the two years allowed by the Land Court."

The case further set forth:—"The Land Court desire to bring under the notice of the Supreme Court that, by the death of the said Andrew Whyte, the whole purpose of his application for resumption in order personally to reside thereon has failed, and that the more convenient course would have been for his representatives to apply to the Land Court for a re-hearing, if resumption for the purpose of personal residence of both or either of them was desired."

The questions of law were as follows:—"(1) Whether it was competent for the Land Court to pronounce in the said application for resumption an order postponing resumption until the term of Whitsunday 1915? (2) Whether it was competent for the Land Court in the said application to make resumption conditional on payment of compensation being made by the landlord prior to the tenant's surrender of possession? (3) Whether it was competent under the said application for the Land Court to appoint the tenant respondent in said application, to lodge a statement detailing the subjects for which he claimed compensation?"

The case was heard before the Second Division on 12th and 13th May 1914. At the hearing objection was taken to the competency of the appeal seeing that Andrew Whyte was dead, and counsel were heard both on this point and on the questions of law in the case.

Argued for the appellants;—(1) The death of Whyte did not make the appeal incompetent. The Land Court ought, as the

appellants contended, to have authorised resumption at Whitsunday 1913, which was the ish of the respondent's lease; and in that case the subsequent death of Whyte could not have revived the tenancy, for an order of resumption, once it was pronounced, could not be affected by any subsequent event or actings of the parties. If, therefore, the appellants were right on the merits, it followed that the appeal was competent. (2) The Land Court had no power to postpone the resumption of the lands. Section 32 of the Act of 1911 formed a complete code, and the other sections of the Act did not apply to statutory small tenants unless they were incorporated in section 32.[1] Section 2 of the 1886 Act was not incorporated, and therefore did not apply. The power of the Land Court in regard to resumption was to be found in section 32 (15) read along with section 19 of the Act of 1911. In section 32 (15) "may" was to be construed as "must."[2] In sections 22 and 32 (7), and in section 6 of the Act of 1886 "may" was employed to denote an imperative duty laid on the Court; and the same construction applied to section 32 (15). The Land Court had power in their discretion to determine whether the purpose alleged for the resumption was the real motive or not; but if the real purpose was one which the statute declared was reasonable then the Land Court was bound to authorise the resumption. Even assuming that the Court had a discretion in authorising or refusing resumption, it was bound to exercise that discretion reasonably,[3] and the Land Court had not acted reasonably. (3) Although the resumption was "subject to the payment" of compensation, it was not implied that payment of compensation was to be a condition precedent to resumption. If it were, the date of resumption might be postponed for a protracted period owing to delay in fixing the amount of compensation. (4) The third question should be answered in the negative. The order of the Court in question was preliminary to the fixing of compensation; but the compensation fell to be fixed by arbitration, as under the Agricultural Holdings (Scotland) Act, 1908,[4] and not by the Land Court.

Argued for the respondent;—(1) The appeal was incompetent. The Land Court authorised resumption on grounds personal to Whyte; and on his death, when these grounds ceased to exist, his representatives were not entitled to enforce the order for resumption at Whitsunday 1915. As the order for resumption would not be available to Whyte's representatives, they could not insist in the appeal.[5] (2) The Land Court had under section 32 of the Act of 1911 a discretionary power in the matter of the resumption of holdings. The rule of construction laid down in *Julius* v. *Lord Bishop of Oxford*[6] did not apply to that subsection. The subsection referred

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[1] Small Landholders (Scotland) Act, 1911, sec. 32 (2).

[2] Julius v. Lord Bishop of Oxford, (1880) 5 App. Cas. 214, at pp. 222, 231, 235; Nichols v. Baker, (1890) 44 Ch. D. 262; *In re* Eyre and Corporation of Leicester, [1892] 1 Q. B. 136; Macdougall v. Paterson, (1851) 11 C. B. 755; Rex v. Mitchell, [1913] 1 K. B. 561; Walkinshaw v. Orr, (1860) 22 D. 627; Gray v. St Andrews and Cupar District Committees of Fife County Council, 1911 S. C. 266.

[3] Gardner v. Jay, (1885) 29 Ch. D. 50, *per* Bowen, L.J., at p. 58.

[4] 8 Edw. VII. cap. 64.

[5] Martin v. M'Ghee, *supra*, p. 628.

[6] 5 App. Cas. 214.

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to section 19, which again referred to section 2 of the Crofters Act, and both these sections must be held as incorporated in the subsection. If this were so, then power to annex conditions to the resumption of a holding was expressly given to the Land Court; but even if this were not so, the interlocutor was within the discretionary power which the Land Court possessed. The Land Court had not annexed conditions as to the resumption, but had merely fixed the date at which it was to take place. Immediate resumption of a holding would in almost every case be impossible, and would certainly be inequitable; accordingly of necessity the Land Court must have the power to postpone the resumption for some period, and it must be within its discretion to determine what the duration of that period was to be. The appellants could not, therefore, challenge the findings of the Land Court as being *ultra vires;* and the present appeal was really an attempt to control the discretionary power vested in that Court. In the circumstances of the case the Land Court's order must be regarded as a refusal of Whyte's application for the resumption of the holding; and it could not be contended that it was beyond the power of the Land Court to refuse such an application. (3) The second question should be answered in the affirmative. The expression in section 32 (15) of the 1911 Act was "subject to the payment of" compensation, and not "subject to the right to compensation." (4) The order of the Land Court challenged was an order on the respondent, and the appellants had no interest to object to it. The Land Court had certain duties of valuation to perform for the purpose of ascertaining the compensation due to the tenant[1]; and in any case it was competent and convenient that the tenant's claim should be lodged with the Land Court even if the compensation fell to be assessed by an arbiter.

At advising on 20th May 1914,—

Lord Dundas.—The material facts in this case may be quite briefly summarised. [Here followed the passage printed on pp. 676-7 *supra.*] The Special Case was presented to this Court on 19th February 1914. With the decisions of the Land Court upon matters of fact, or of administrative policy within their statutory powers, we have no concern; our jurisdiction is limited to answering the questions of law which are put to us, or which legitimately arise out of the statement of facts submitted in the Special Case.

Objections were stated *in limine* to the competency of the Case. In the body of it the Land Court bring under our notice their view that, by the death of Andrew Whyte, the whole purpose of his application for resumption in order personally to reside on the farm has failed, and that the more convenient course would have been for his representatives to apply to the Land Court for a rehearing, if resumption for the purpose of personal residence by both or either of them was desired. This view was developed in a vigorous argument by the learned Solicitor-General and his junior, who contended that, Andrew Whyte having died before the interlocutor of 8th November 1913 came into operation, his application, based on his personal claim to resume possession and reside, fell abso-

[1] The Crofters Holdings (Scotland) Act, 1886, sec. 31, was referred to.

lutely; that the questions put to this Court were thus rendered entirely futile; that we have no right or power to interfere with the findings pronounced by the Land Court in Stewart's application; that the appellants have no title to raise any of the questions submitted; and that, if they desire to resume possession of the farm, they must present a fresh application to the Land Court in terms of the statute. In my opinion, the objections to competency are ill-founded. The two applications to the Land Court were conjoined; the interlocutor pronounced on 8th November 1913 in the conjoined processes had, in my judgment, the effect of establishing and stereotyping, as matters of fact determining the status of parties, the termination of Stewart's tenancy and Whyte's right to resume possession. Whyte lived for some months after the date of the interlocutor, and I do not see that his subsequent death affected in any way the cardinal results established by it. I do not think there is any occasion or room for the appellants to apply to the Land Court for a rehearing, or to lodge a fresh application. They are, in my opinion, entitled, as Whyte would have been if he were alive, to raise before us questions as to the competency in law of the Land Court's decision, and to maintain that the landlord's resumption ought to have been authorised as at a date earlier than 1915 and unclogged by any condition precedent as to payment of compensation.

The case being therefore, in my judgment, competently before us, I shall deal *seriatim* with the questions of law submitted. The first of these is whether it was competent for the Land Court to pronounce an order postponing resumption till Whitsunday 1915. My opinion is in the negative. It appears from a note added by the Land Court to their interlocutor of 8th November 1913 that they considered such postponement to be in their power as falling within the "terms and conditions" which section 2 of the Crofters Act of 1886 authorises to be imposed in applications by a landlord for resumption of a holding. It seems to me that that section cannot here be prayed in aid by the Land Court, because it does not form part of the code of provisions contained in the Act of 1911 in regard to statutory small tenants. That code is to be found in section 32 of the statute. The respondent, however, maintained that, apart altogether from the Act of 1886, the Land Court had power under the section just referred to, and particularly (15) thereof, to authorise resumption as at a future and deferred date. I do not agree with this contention. Subsection (15) provides that "the Land Court may, on the application of the landlord, and upon being satisfied that he desires to resume the holding or part thereof for building, planting, feuing, or some other reasonable purpose having relation to the good of the holding or the estate (including any purpose specified in section 19 of this Act), authorise the resumption thereof by the landlord . . ." Section 19, thus referred to, provides that "without prejudice to the generality of the power to authorise resumption by the landlord for some reasonable purpose having relation to the good of the holding or of the estate, conferred by section 2 of the Act of 1886, the feuing of land, or the occupation by a landlord, for the purpose of personally residing thereon, of a holding, being his only landed estate, or the protection of an ancient

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monument or other object of historical or archæological interest from destruction or injury, shall respectively be deemed a reasonable purpose as aforesaid." I think these two sections, fairly read together, may be taken as expressing (if one applies their language to the particular case in hand) that the Land Court may, on the application of the landlord, authorise resumption of the holding upon being satisfied (as they were here) that he desires to resume for the reasonable purpose of residing thereon, it being his only landed estate. Now, if that be, as I think it is, a fair gloss upon the words of the statute, it infers, in my judgment, a duty on the part of the Land Court, in the circumstances here present, to authorise resumption at the earliest date reasonably possible, and excludes any discretionary power on their part to refuse or postpone the right to resume. There is abundance of authority, Scots and English, to the effect that language which appears in terms to be a mere permission or discretionary power may amount to a peremptory duty when delegated by statute to a public authority appointed to exercise a public duty. It was therefore, in my opinion, incompetent for the Land Court to fix the date of resumption and surrender as late as Whitsunday 1915. The appellants' counsel stated, and one can appreciate his reasons for doing so, that he would be content if the date were altered to Whitsunday 1914. It is therefore unnecessary to consider whether or not he could have successfully maintained an argument in support of any earlier date. I conclude that we ought to answer the first question in the negative, and that the Land Court should, in accordance with their rule 108, amend their interlocutor of 8th November 1913 so as to give effect to the view indicated. Before leaving this point it may be right to add that, holding (as I do) that the Land Court had no discretionary power in this matter, I refrain from expressing an opinion as to the legal competency (or the reverse) of the reason which, as I gather from the concluding portion of article 8 of the case, led them to defer the date of resumption to Whitsunday 1915.

The second question is whether it was competent for the Land Court to make resumption conditional upon payment of compensation being made by the landlord prior to the tenant's surrender of possession. By the interlocutor of 8th November 1913 the Land Court authorised and empowered Andrew Whyte to resume the holding at Whitsunday 1915, "on compensation for resumption being paid to the tenant, the said David Stewart, as provided by section 32 (15) of the Act of 1911, and on such compensation being paid, require the said David Stewart to surrender his said holding at said term to the landlord." The latter part of the sentence quoted makes it a condition precedent of resumption that the assessed amount of compensation should be actually paid; and the appellants argue that the imposition of this condition precedent was *ultra vires* of the Land Court. I think their contention is well founded. Section 32 (15) of the statute, as I read it, *directs* the Land Court, in the circumstances of this case, to authorise resumption "subject to the payment of the like compensation to the tenant in respect of improvements on or in connection with the land resumed to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act, 1908, on the determination of his

tenancy." The words "subject to the payment of" are, no doubt, open to construction; but, upon the whole, I think they only import a right to the tenant to receive compensation upon the footing and in the mode prescribed by the Act of 1908; and afford no warrant for making actual payment of the assessed amount a condition precedent to the tenant's surrender of the holding. This construction seems to me to be in accordance with the natural and ordinary meaning of the words used; and I think that, if the contrary meaning had been intended, Parliament could very easily (and presumably would) have made that clear. The contrary view might involve great hardship to the landlord; there would be no security that, in spite of his endeavour, the amount of the compensation could even be ascertained at the appointed date of resumption; and the tenant might contrive to sit on in possession for a long time after it, if the arbitration proceedings were unduly protracted, and if litigation perhaps ensued, in one form or another, before the amount of compensation was finally determined and could be paid. In my judgment the Land Court's order upon this matter was not warranted by the statute, and was *ultra vires* and illegal.

The interlocutor of 8th November 1913 proceeded further to "appoint the tenant, the said David Stewart, to lodge by or before 1st April 1915 a statement setting forth in detail the subjects for which compensation is claimed." We are asked by the 3rd question to decide whether this part of the order was competent. It is not quite clear, as the question is stated, whether the Land Court ordered the claim to be lodged on the footing of, and preparatory to, themselves assessing the compensation, or merely as an administrative step of procedure which they conceived might tend to expedite procedure before an arbiter. But I think, from what appears in the printed case, and from the way in which the arguments were presented to us, that we must treat the question as proceeding upon the former of the two hypotheses, and answer it accordingly. On that assumption our answer ought, in my opinion, to be in the negative. Section 32 of the statute seems to me to give the statutory small tenant, upon the landlord's resumption of the holding, a right to receive compensation ascertained by arbitration as prescribed by the Act of 1908, and to afford no warrant for its assessment by the Land Court. In my judgment, therefore, we ought to answer the second and third questions in the negative; and I apprehend that the Land Court should, in order to bring their interlocutor of 8th November 1913 into conformity with our opinion, delete that part of it which begins with the words "on compensation for resumption" and ends with the words "compensation is claimed"; and substitute for the deleted matter, following the language of section 32 (15), "subject to the payment of the like compensation to the tenant, the said David Stewart, in respect of improvements on or in connection with the land resumed to which a tenant would be entitled under the Agricultural Holdings (Scotland) Act, 1908, on the determination of his tenancy."

Lord Salvesen.—This case brings into relief the somewhat drastic changes that have been effected by the Small Landholders (Scotland) Act, 1911, in the law relating to the private ownership of land. [His Lord-

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ship narrated the facts of the case, and continued]—The first question in the case is—Whether it was competent for the Land Court, in the circumstances, to postpone resumption by the owner until the term of Whitsunday 1915.

The provisions of the Small Landholders (Scotland) Act, 1911, are chiefly concerned with small landholders, but section 32 contains a code of provisions applicable to statutory small tenants. Subsection 15 contains the provisions with regard to the resumption of the holding, or part thereof, by the landlord, and it is on the terms of this subsection that the chief controversy has turned.—[His Lordship quoted the subsection.] In the note which the Scottish Land Court appended to their interlocutor of 8th November they say: "The leading section which introduced resumption—section 2 of the Crofters Holdings Act, 1886,—taken along with the explanatory 19th section of the Small Landholders Act, 1911, regulates other terms and conditions which may be imposed. Resumption of an entire holding, at a short date, has never been authorised. In the whole circumstances of the present case, we think it would not be equitable to authorise resumption earlier than Whitsunday 1915." It is plain from this passage that the Court were of opinion that the provisions of section 2 of the 1886 Act had been imported into the code contained in the 1911 Act relating to statutory small tenants. In my opinion this is not so. All the purposes in respect of which the Court may authorise a landlord to resume are set forth in the subsection above quoted, and it is only necessary to refer to section 19 in order to find what purposes, other than those already expressed, are specified in that section. Section 19 itself is not incorporated, and, even if it were, it is difficult to see how it could be held to incorporate the provisions of section 2 of the Crofters Act. The solution of the controversy must, therefore, depend on the language of subsection 15—taken along with the addition, which is imported by the clause in brackets, from the 19th section—that occupation by the landlord for the purpose of personally residing thereon of a holding, being his only landed estate, is a reasonable purpose in respect of which the Court may authorise the resumption by the landlord of the holding. It was strenuously urged by the respondent that the language was permissive, and that it is in the discretion of the Land Court, although satisfied that the landlord desires to resume his holding for one of the purposes specified, to grant or refuse his application. I cannot think that that is in accordance with the sound construction of this statute. It is, no doubt, for the Land Court to find the facts; but, as soon as they are satisfied on the facts that the landlord desires to resume the holding for a reasonable purpose, it is their duty to give effect to the intention of the Legislature and to grant an order authorising the landlord to resume. In the case in question what he had to satisfy them of was his present desire and intention to resume and cultivate. It is that intention which is to be given effect to. If the Land Court has power to postpone the resumption for a period of two years, equally must they have power to postpone it for any longer period, or to refuse it altogether. To give an applicant, who desires to resume at Whitsunday 1913, the right to resume two years later, when the whole circumstances may have changed and he may be

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unable to enter upon personal occupation of the holding, is to stultify the whole proceedings. I hold that subsection 15 imposes a duty upon the Land Court of authorising resumption in favour of the landlord as soon as reasonably practicable, after they are satisfied of the facts which the landlord must establish as a condition precedent to his application being granted. To hold otherwise would be to make the Land Court absolute masters of the situation, and enable them to give effect, or not, to the plain intendment of the statute as they thought fit. There are many decisions to the effect that language which is in form permissive must nevertheless in certain cases be construed as imperative in effect. I refer especially to *Macdougall*,[1] *Eyre*,[2] and *King*[3]; all of which are cases in which the dicta in the well-known case of *Julius* v. *The Bishop of Oxford*[4] received practical application. Some of them had special reference to the powers of Courts of law.

Even if I had been of a different opinion I should still have held, on the facts stated by the Court below, that the discretion which they have exercised is vitiated by the grounds upon which they exercised it. I gather from statement 8 that they postponed the period of the landlord's resumption for two years in order to enable the tenant to recoup himself for the inadequate return he obtained during the earlier years of his lease. Apparently it was upon the same footing, although this is not expressly said, that they reduced the rent of £45, on which the parties had agreed, to £25. In my opinion such a consideration could not legally enter into the question either of fixing an equitable rent or of postponing the term of resumption by the landlord. Subsection 8 of section 32 lays down the considerations upon which the equitable rent is to be fixed. These do not include compensation in respect of the holding having been over-rented during the term of the tenancy, or in respect of loss which the tenant had made while working the holding. If such matters were to be considered the rent might have been fixed at nothing, and would not thus be the rent of the subjects at all. The rent at which the holding has been let is, no doubt, an element which the Court are entitled to consider in fixing an equitable rent, and one which ought to have very great weight; but it appears to me to be monstrous to say that the new rent is to be fixed at a low figure, that is, at less than what would otherwise be an equitable rent, in order to make up to the tenant for loss which he has previously sustained. Presumably, on the same reasoning, if the Land Court had doubled the period of the new tenancy, they would have fixed the rent at a higher figure; and, if they had only continued the tenancy for a single year, would have reduced the rent to an illusory sum. What they have to fix is the equitable rent, not the rent which will enable the tenant to recoup himself for losses which he has sustained during his prior tenancy, any more than they would be entitled to double the equitable rent because the landlord was able to show that during the previous tenancy the tenant had made a large profit by the working of the holding. We are, however, relieved from any difficulties which might otherwise

[1] 11 C. B. 755.
[2] [1892] 1 Q. B. 136.
[3] [1913] 1 K. B. 561.
[4] 5 App. Cas. 214.

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Land Court pronounced their interlocutor, in the conjoined applications, finding that he fulfilled the two statutory requisites, namely, *bona fide* intention to reside personally on the holding and that the holding was his only property. Andrew Whyte's death did not occur till 25th January 1914. Assuming 8th November 1913 to be the proper date for the determination of the question, Andrew Whyte, in my opinion, became then entitled to immediate resumption of the holding of Lawyett, and David Stewart's rights in the holding came to an end, subject to such compensation as the statute gave him, and it may be to such period as might be reasonable for enabling him without unnecessary hardship to remove. I therefore answer the first question in the negative, and, doing so, necessarily hold that the deceased's son and daughter, as his heirs in the farm, are entitled to insist that Stewart's tenancy was absolutely determined, and not merely, as the Land Court have found, to apply for a rehearing if resumption for the purposes of both or either of them is desired. The latter is not the question which they desire to raise, and it is a question which does not seem to me to arise. I agree with the views expressed by your Lordships on the non-application to the case of section 2 of the 1886 Act as to terms and conditions.

On the second question I agree that the view taken by the Land Court is not one to be presumed; that it would lead in many circumstances to practical injustice; and that it is not warranted by the words of the code applicable to statutory small tenants contained in section 32 of the 1911 Act, taken along with the provision of the Act of 1908.

As to question 3 I am not prepared to answer it in the negative, if the question be taken by itself; but if it is read along with the contentions as stated in the case, which are clearly meant to raise the wider question of the Land Court's right to deal with the amount of compensation payable by the landlord to the tenant, I agree in the course proposed by your Lordships, and, looking to the ulterior object thereby disclosed, I answer the question in the negative.

Lord Justice-Clerk.—I concur with Lord Dundas. I have had an opportunity of perusing his opinion, prepared after consultation, and it so entirely expresses my opinion that I find it unnecessary to add anything. I will only say that I desire to confine my opinion to the matters dealt with in that opinion, and beyond that I do not wish to go.

The Court answered the three questions of law in the negative, and remitted the process in the application to the clerk to the Scottish Land Court.

R. D. Ker & Ker, W.S.—Dove, Lockhart, & Smart, S.S.C.—Agents.

THOMAS YOOL, Appellant.—*Wilson, K.C.—D. M. Wilson.* No. 71.
WILLIAM SHEPHERD, Respondent.—*Anderson, K.C.—R. C. Henderson.* May 21, 1914.

Lease—Small Holdings—"Holding"—Subjects consisting of weaving mill and croft—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49), *sec.* 26 (3) (*f*)—*Agricultural Holdings (Scotland) Act*, 1908 (8 *Edw. VII. cap.* 64), *sec.* 35 (1). Yool v. Shepherd.

Held that subjects consisting of a carding, spinning, and weaving mill, and a house and steading with 9 acres of agricultural land and 3 roods of pasture, let to one tenant at a *cumulo* rent of £19, 5s., (of which £10, 5s. effeired to the mill and £9 to the rest of the subjects) did not constitute a holding as defined in the Agricultural Holdings (Scotland) Act, 1908, and therefore were not a holding within the meaning of the Small Landholders (Scotland) Act, 1911.

IN an application to the Land Court, under the Small Landholders (Scotland) Act, 1911, by William Shepherd for an order fixing an equitable rent for subjects of which he was the tenant and Thomas Yool was the proprietor, the Land Court granted the application, and, at the request of the proprietor, stated a case for appeal. 1ST DIVISION. Land Court.

The only evidence produced before the Land Court was a joint minute of admissions and two leases of the subjects in question, one dated in 1871, the other, being the lease under which the respondent held the subjects, dated in May 1892. The subjects were described in the earlier of these leases, granted by the predecessor of the appellant in favour of the then tenant, as "All and Whole the carding mill of Miltonduff and land and others attached, forming the mill croft, in the parish of Elgin and county of Moray," and in the current lease as "All and Whole the buildings (with water wheel, shaft and spur wheel) of the carding mill at Miltonduff, as presently occupied by Alexander Macdonald, with the croft of land and houses attached thereto, extending to nine acres and nine poles or thereby of arable land, and three roods and fourteen poles or thereby of pasture." The rent of the whole subjects was stated in both leases at £19, 5s., no separation being made, in either case, of the proportions effeiring to the mill and to the rest of the subjects respectively.

The result of an inspection of the subjects by the Land Court was stated in the case as follows:—"(13) This holding extends to nearly 10 acres, of which about 9 acres are arable land and 3 roods are pasture. The buildings comprise a dwelling-house, steading, and the mill. The said mill consists of a single building, containing one large room and a small store on ground floor and a loft above. It is worked by the tenant and his family. The looms and working plant substantially consist of one power loom, one hand loom, and a set of two carding machines in the large room on the ground floor, and one spinning jenny in the loft. The water power is used for driving these machines, except the hand loom. The industry carried on is mainly the weaving of blankets, but tweeds are also manufactured. It is similar in character to the home industries, such as weaving and spinning, which are commonly carried on by the smaller landholders in many parts of Scotland."

The case further set forth:—"(6) It was admitted by joint minute of admissions that the mill presently existing on the land in question was originally a carding mill, spinning mill, weaving

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mill, and waulkmill, and that no part of it was then used as a dwelling-house; that these buildings are now solely used as a carding mill, spinning mill, and woollen mill; that the said mill was built or restored and adapted for the above purposes by William Skene, who was tenant of the land at the time, and who had various similar mills in different parts of the country." In article 7 it was narrated that, notwithstanding the operations of Mr William Skene referred to in article 6, the whole buildings upon the subjects were purchased by, and included in the conveyance of the subjects to, the appellant, and that, when the respondent and another who was originally associated with him in the lease became the tenants thereof, they paid nothing for the buildings, either to the proprietor or to the outgoing tenant, and that the latter made no claim in respect of them. "(8) It was further admitted by the said joint minute that during the whole period of the existence of the applicant's lease the looms and working plant, other than the water wheel and shafting which belonged to the landlord, have been provided by the tenant. (9) It was further admitted by the said joint minute that on one or two occasions the tenant of the subjects had sublet the mill separate from the croft, and on these occasions the subtenant has lived in part of the mill, but the croft and mill have never been let as separate subjects by the landlord. (10) It was further admitted by the said minute that the proportion of the *cumulo* rent paid by the applicant for the subjects might fairly be held to have been £10, 5s. for the mill, and £9 for the land and dwelling-house. . . ." (13) . . . Without some auxiliary or subsidiary occupation a holding of this size would not yield a livelihood to the tenant and his family. The carrying on of this industry does not interfere with the proper cultivation and management by the tenant and his family of this holding, which is well farmed and stocked. The mill occupies a very small area of the holding. If the mill and holding were separated, the mill would lose most in letting value. The holding is situated in a district entirely rural, occupied by farms and small holdings. The Court was satisfied that this industry is an auxiliary or subsidiary occupation of the tenant, and that, taken as a whole, the subjects are principally agricultural in character. (14) The said Thomas Yool maintains that the said order of 5th April is erroneous in point of law, in respect that the holding, being, on the facts stated, neither wholly agricultural nor wholly pastoral, nor partly agricultural and, as to the residue, pastoral, is excluded from the provisions of the Small Landholders (Scotland) Act, 1911, by section 32 (5) of the said Act, taken along with the definition of a 'holding' in section 35 of the Agricultural Holdings (Scotland) Act, 1908,* and therefore that the said application was incompetent. (15) The respondent, the said William Shepherd, maintains that the said order of the Land Court was sound in law. He contends that the Land Court was entitled to hold that the subjects formed a holding within the provisions of the Small Landholders Acts, and that the existence of the mill as a pertinent of the subjects and its use in connection therewith did not render the application to the Land Court incompetent."

* The provisions of these sections are quoted by Lord Mackenzie in his opinion, *infra*.

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On 5th April 1913 the Land Court pronounced the following order:—"Repel the objections taken for the respondent to the competency of the application: Find that the applicant is a statutory small tenant in and of the holding described in the application, and that no reasonable ground of objection to the applicant as tenant has been stated: Therefore find that he is entitled, in virtue of the 32nd section of the Act of 1911, to a renewal of his tenancy, and to have an equitable rent fixed . . ."*

The question of law for the determination of the Court was:—"Whether, on the facts stated, the Land Court was entitled to hold that the subjects in question were not excluded from the provisions of the Small Landholders (Scotland) Act, 1911, by reason of the existence and use of the said mill which forms part of the said subjects?"

The case was heard before the First Division (without Lord Johnston) on 21st May 1914.[1]

LORD PRESIDENT.—It is quite certain that the Land Court is final upon all questions of fact, and that our functions are confined exclusively to reviewing its orders upon questions of law. But, accepting the facts as found in the stated case before us, I have no hesitation in coming to the conclusion that it is impossible to hold that the subjects to which this application relates fall within the provisions of the Small Landholders Act of 1911. The question whether they do so or not depends entirely upon the answer to this further question, Do they constitute a holding in the sense of the Agricultural Holdings Act of 1908?—because it is certain that these subjects are excluded from the statute of 1911 if they do not constitute a holding within the meaning of the statute of 1908.

Now, by the statute of 1908, a holding in the sense of that Act means any piece of land which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, and it appears to me to be out of the question to say that the subjects to which the application here relates are either wholly agricultural or wholly pastoral or partly the one and partly the other. From the lease, which is before us, it appears that they are described as: "All and whole the buildings (with

* "NOTE.—Both parties agreed that the whole subjects, including the building used as a carding, spinning, and woollen mill, should be held and dealt with as one subject. The applicant contended that the use by him of this building did not take the holding out of the Act. The respondent contended that it did, as, in his view, the croft and dwelling-house and steading were merely pertinents or accessories of this mill. In the circumstances, particularly in view of the facts that this mill was originally built, or restored and adapted for the above purposes, not by the landlord, but by a former tenant, in order to carry on a home industry, and that it has been for many years, and was at the date when the Act of 1911 came into operation, so used and carried on by the present applicant, and that the whole looms and working plant, other than the water-wheel and shafting, have been provided by the applicant, we are of opinion that it is a pertinent of the holding. . . ."

[1] *The following authorities were referred to at the hearing*:—Mackintosh v. Lord Lovat, (1886) 14 R. 282; Taylor v. Earl of Moray, (1892) 19 R. 399; Gilmour v. Peterson, (1901) 3 F. 569; Marquis of Breadalbane v. Orr, (1896) 4 S. L. T. 75.

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water wheel, shaft and spur wheel) of the Carding Mill at Miltonduff, as presently occupied by" a certain person, "with the croft of land and houses attached thereto." It further appears that they have been treated as a *unum quid* by the successive tenants who have occupied them. It further appears that the rent, being £19, 5s. in the old lease, may be fairly apportioned thus—£9 to the agricultural part of the subjects and £10, 5s. to the mill. And it is nothing to the purpose to say that, because the mill was originally constructed by a tenant of the subjects and not by the landlord, and because the machinery which is at present in the mill, including the looms, was provided by the existing tenant, therefore the mill must be regarded as entirely subsidiary, and the holding ought to be regarded as purely agricultural, or partly agricultural and partly pastoral.

The Land Court seem to have thought that they had decided this question when they came to the conclusion, upon the facts stated, that the mill was a pertinent of the subjects. But that does not lead to the conclusion that the subjects fall within the statute of 1911. What meaning can be attached to the expression "pertinent" I do not know; but, using the expression in its ordinary sense, I should be very far from holding that a portion of the subjects, to which the greater part of the rent effeirs and which is obviously the more valuable part of the subjects, could be called a pertinent of the other portion. Whether that be so or not, however, it is not decisive of the question before us. That question, I repeat, must be decided entirely upon a consideration of the question whether the definition of the statute of 1908 applies to the subjects in question. I am of opinion that it does not, and, therefore, that we ought to answer the question put to us in the negative.

Lord Mackenzie.—I am of the same opinion. The Land Court has held that the subjects in question were not excluded from the provisions of the Small Landholders (Scotland) Act of 1911. In my opinion they were.

The material statutory provisions in connection with this question are the Small Landholders Act of 1911, section 26, which provides that "a person shall not be held to be an existing yearly tenant or a qualified leaseholder under this Act" in respect of, (3) (*f*) "any land that is not a holding within the meaning of the Agricultural Holdings (Scotland) Act, 1908." Turning to the Agricultural Holdings (Scotland) Act, 1908, the real question in this case turns upon section 35, which provides that "holding means any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office or employment held under the landlord."

I do not find in the print before us that the Land Court applied their minds to this section upon which the whole question turns. It is not mentioned in the notes which have been printed. If they had applied their minds to that question I am quite unable to see how they could have arrived at the conclusion that the subjects here in question were either wholly agricultural or wholly pastoral, or in part agricultural and

as to the residue pastoral, when they were dealing with a lease which let "All and whole the buildings (with water wheel, shaft and spur wheel) of the Carding Mill at Miltonduff, as presently occupied by Alexander Macdonald, with the croft of land and houses attached thereto," and when it appears that the buildings are used as a carding mill, spinning mill, and woollen mill, and when the apportionment of the rent between the mill and the land and dwelling-house is £10, 5s. for the mill and £9 for the land and dwelling-house. And, accordingly, in my opinion, there are no facts in the present case which would entitle the Land Court to take the view they did, and hold that these subjects fell under the provisions of the Small Landholders (Scotland) Act of 1911.

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LORD SKERRINGTON.—I agree.

THE COURT answered the question of law in the negative.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—JAMES SCOTT, S.S.C.—Agents.

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ROBERT DIGBY WATSON AND OTHERS (John Bannatyne's Trustees), First Parties.—*Bartholomew.*
ROBERT DIGBY WATSON AND ANOTHER (James Watson's Trustees), Second Parties.—*A. O. M. Mackenzie, K.C.—J. Smith Clark.*
FRANCIS MARTIN AND ANOTHER (Eliza Martin Cogan's Trustees), Third Parties.—*Blackburn, K.C.—A. R. Brown.*
JOHN CHRISTIAN LIVINGSTON (Robert John Bartholomew's Trustee), Fourth Party.—*Hamilton.*

Succession—Vesting subject to defeasance—Gift on several contingencies.

Testamentary trustees were directed to hold a legacy in trust for H. in liferent, and for her children or their issue in fee. Failing issue of the liferentrix the fee was destined to her brother R., whom failing to his issue, whom all failing to three members of the family of C. *nominatim* and the survivors and survivor of them, the issue of predeceasers being entitled to the share which their parent would have taken on survivance. A residuary clause in the testator's settlement was declared to include any legacy that lapsed. All the legatees named to whom the fee was destined survived the testator, but all predeceased the liferentrix without issue. On the death of the liferentrix without issue, the legacy was claimed by the representatives of R. as having vested in him *a morte testatoris* subject to defeasance on contingencies which had not occurred; and it was also claimed by the representatives of the last survivor of the family of C. as having vested in that party on the predecease of R. and the other two members of that family.

Held that the legacy had lapsed and had fallen into residue.

Observations (*per* the Lord President) on the doctrine of vesting subject to defeasance.

Opinion (*per* Lord Mackenzie) that "there is no reason in principle why a fee should not vest subject to divestiture upon one or more than one contingency."

1ST DIVISION.

ON 6th February 1913 a special case was presented to the Court for the determination of questions arising upon the construction of the trust-disposition and settlement, dated 28th August 1874, and codicil, dated 10th August 1877, of John Bannatyne, merchant in

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Glasgow. The questions related to a legacy of £2500 in favour of Susan Matilda Cunningham Graham Bartholomew.

By his settlement the truster bequeathed various legacies, and directed his trustees, *inter alia*, as follows:—"Thirdly, I direct my trustees to make payment to each of Susan Matilda Cunningham Graham Bartholomew and Robert John Bartholomew, both children of the deceased Robert Bartholomew, merchant in Glasgow, of the sum of Two thousand five hundred pounds and that on their respectively attaining the age of twenty-one: Declaring that in the event of either of them predeceasing the said period of payment, leaving issue, such issue shall be entitled to the legacy which their parent would have taken on survivance: And farther, that in the event of either of them predeceasing the said period without leaving issue, then the legacy which would have been taken by such predeceaser on survivance shall fall and accresce to the survivor of the said two legatees, whom failing, to his or her issue, whom all failing, then the said two legacies shall fall into and form part of the residue of my estate. . . . And lastly, and with regard to the residue of my estate (including therein such of the foregoing legacies as may have lapsed, and also the fee of any sum that may be set apart for securing the said annuities or any of them, but subject to the said annuities as long as the same subsist), I direct my trustees as at my death to pay and convey the same absolutely to and in favour of the said James Watson, whom failing by his predeceasing me, then to and among his children."

By a second codicil, dated 10th August 1877, the truster provided as follows:—"With reference to the legacy of £2500 provided by the third purpose of my said trust-disposition and settlement in favour of Susan Matilda Cunningham Graham Bartholomew now Henn, I hereby direct my trustees instead of paying the same as therein directed, to hold and apply, pay and convey the same for behoof of the said Mrs Susan Matilda Cunningham Graham Bartholomew or Henn, in liferent for her liferent use only, and to and among her children in fee, and that in such shares and proportions, and subject to such terms, conditions, and restrictions, and otherwise, as she may appoint by any writing under her hand, and failing such writing, then to and among such children equally, and that on their respectively attaining the age of twenty-one, and on the death of their said mother: Declaring that in the event of any of the said children dying, without having attained the said term of payment and conveyance, leaving issue, such issue shall be entitled to the share which their parent would have taken on survivance: And further, that in the event of any of the said children dying without leaving issue, then the share which such predeceaser would have taken on survivance shall fall and accresce to his or her surviving brothers and sisters, along with the issue of any brother or sister who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance: And further, declaring that in the event of the death of the said Mrs Susan Matilda Cunningham Graham Bartholomew or Henn without leaving issue, or of her leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, then the said legacy shall fall and accresce to her brother, Robert John Bartholomew, named and designed in my said trust-disposition and settlement, whom failing, to his issue, whom all

failing, to Robert Orr Cogan, Eliza Cogan, and Mary Susan Cogan, children of the late Robert Cogan, merchant in Glasgow, and the survivors and survivor of them, the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance: And with this addition to my said trust-disposition and settlement I ratify the same."

The trustees acting under these writings were the *first parties* to this case; the testamentary trustees of James Watson, the residuary legatee, were the *second parties;* the testamentary trustees of Eliza Cogan were the *third parties;* and the testamentary trustee of Robert John Bartholomew was the *fourth party.*

The case set forth, *inter alia*:—

"(6) The said Mrs Henn, the liferentrix of the said legacy of £2500, Robert John Bartholomew, and the said children of the late Robert Cogan, all survived the said John Bannatyne. Robert John Bartholomew predeceased the liferentrix, having died on 20th July 1884, aged thirty, and never having had issue. The said Mary Susan Cogan died unmarried on 1st April 1885. The said Robert Orr Cogan died on 25th January 1886, never having had issue. The said Eliza Martin Cogan [referred to in said trust-disposition and settlement of the said John Bannatyne as Eliza Cogan] died unmarried on 13th June 1910. The said Eliza Martin Cogan left a trust-disposition and settlement, the surviving trustees nominated under which are the third parties to this case. Mrs Henn, the liferentrix, died on 16th October 1911, leaving no issue.

"(7) In these circumstances a question has arisen as to who is entitled to the said legacy of £2500 and the income therefrom since 16th October 1911. . . .

"(8) The second parties maintain that on a sound construction of the said trust-disposition and settlement and codicils the said legacy of £2500 lapsed on the death of the said Mrs Henn and fell into and now forms part of the residue of the trust-estate of the said John Bannatyne which vested in the said deceased James Watson, and that the same, with all accrued income, falls to be paid to them as trustees and executors of the residuary legatee.

"(9) The third parties maintain that from and after 25th January 1886 the said legacy of £2500 vested in the said Eliza Martin Cogan, but subject to defeasance in the event of (1) the said Mrs Henn leaving issue who should survive and take in terms of the destination in their favour, or (2) the said Eliza Martin Cogan predeceasing Mrs Henn survived by issue; that on the death of the said Eliza Martin Cogan the said legacy became a vested right in her estate subject to defeasance only in the event of Mrs Henn leaving issue who should survive and take; and that on the death of Mrs Henn without issue the said legacy became payable to the persons in right of the estate of the said Eliza Martin Cogan.

"(10) The party of the fourth part maintains that the said legacy vested *a morte testatoris* in the said Robert John Bartholomew, subject to defeasance in the event (1) of the liferentrix leaving issue who should survive and take in terms of the destination in their favour; (2) of him the said Robert John Bartholomew predeceasing the liferentrix and leaving issue who should survive and take; or (3) of him the said Robert John Bartholomew predeceasing the liferentrix not leaving issue who should take, and the said Robert Orr Cogan, Eliza Martin Cogan, or Mary Susan Cogan, or

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any of them surviving the liferentrix or predeceasing the liferentrix leaving issue who should survive and take; and that none of the said events having occurred, the said legacy remained vested in him and in his estate, and was transmitted by his trust-disposition and settlement to this party."

The questions of law were:—"(1) In the circumstances above set forth, did the legacy of £2500 which was liferented by Mrs Henn become on the death of Miss Eliza Martin Cogan a vested right in the latter's estate, subject to defeasance in the event of Mrs Henn leaving issue who should survive and take, and is it now payable to the third parties? or (2) Did the said legacy vest in the said Robert John Bartholomew so as to be transmitted by his trust-disposition and settlement to the party of the fourth part? or (3) Has the said legacy lapsed and fallen into residue, and does the amount thereof with the accumulations of income thereon since Mrs Henn's death fall to be paid to the second parties?"

The case was heard before the First Division (without Lord Johnston) on 12th, 13th, and 14th May 1914.

Argued for the second parties;—The survivorship clauses in the destination of the legacy here in question, and the destinations-over, excluded vesting *a morte testatoris*.[1] Even the gift to children of the liferentrix, if she had any, was subject to two conditions, viz., attainment of majority and survivance of their mother; and the destination-over to Robert John Bartholomew and his issue, with the further destinations-over, made it impossible that the person or persons called to the succession should be known—they might not even be in existence—at the death of the truster, or at any time prior to the death of the liferentrix. At that date alone it became possible to ascertain the party or parties entitled to take.[2] Until that date, accordingly, vesting was postponed, and the principle of vesting subject to defeasance was inapplicable.[3] That doctrine should be confined within the narrow limits in which it had received effect, and its application should not be extended to the case of a destination depending upon more than one contingency. In the events which had happened this legacy had lapsed, and the truster's direction that the residuary clause of his settlement should carry any legacies that lapsed was equivalent to a destination-over to the residuary legatee. This disclosure of the testator's intention was sufficient in itself to exclude vesting subject to defeasance, which had never been held to take place except when the testator's intention was found to require it.[4] In

[1] Young v. Robertson, (1862) 4 Macq. 314; Bryson's Trustees v. Clark, (1880) 8 R. 142.

[2] Steel's Trustees v. Steel, (1888) 16 R. 204, Lord President Inglis, at p. 208.

[3] Johnston's Trustees v. Dewar, 1911 S. C. 722, Lord Kinnear, at p. 729; Coulson's Trustees v. Coulson's Trustees, 1911 S. C. 881, Lord Dundas, at pp. 885-6; Young v. Gordon, 1909 2 S. L. T. 321; Forrest's Trustees v. Mitchell's Trustees, (1904) 6 F. 616; Earl of Dalhousie's Trustees v. Young, (1889) 16 R. 681, Lord President Inglis, at p. 685; Thompson's Trustees v. Jamieson, (1900) 2 F. 470; Nolan v. Hartley's Trustees, (1866) 5 Macph. 153. Lord Skerrington referred to the case of Wylie v. Wylie's Trustees, (1902) 8 F. 617.

[4] Parlane's Trustees v. Parlane, (1902) 4 F. 805; Bowman v. Bowman, (1899) 1 F. (H. L.) 69; Snell's Trustees v. Morrison, &c., (1875) 4 R. 709.

the destination to the children of Mrs Henn the word "survivors" clearly referred to the death of the liferentrix, and it was necessary to read that word in the same sense in the destination to survivors throughout the truster's codicil, whereby he did not revoke his settlement, but merely varied his directions as to payment of the legacy referred to in the third purpose thereof, so as to exclude any beneficiary who did not survive the liferentrix.[1] It had to be borne in mind that his writings were of date anterior to the decisions in which the doctrine of vesting subject to defeasance had been considered. The decision in the case of *M'Lay* v. *Borland*,[2] in which the Court was considering a heritable destination, did not affect any question as to the construction of testamentary writings.[3]

Argued for the third parties;—The words "survivors and survivor" clearly referred to survivance *inter se*, and accordingly at 25th January 1886, when Eliza Cogan became the last survivor of the parties to whom the fee was destined, she took a vested right therein, subject to defeasance in events which had not happened, and on her death that right formed part of her testamentary estate.[4] It was immaterial that that vesting was subject to more than one contingency, viz., that of the legatee predeceasing the liferentrix and leaving issue, or of issue being born to the liferentrix, for both of these contingencies were resolutive, not suspensive.[5] The only suspensive contingency, viz., that of survivorship, was removed whenever Eliza Cogan became the only survivor.[6] In the events which had happened it was necessary to read the truster's will as though she were the only beneficiary named. Her issue under such a destination would have taken a vested interest even though they did not survive the liferentrix. As she left no issue the fund in question was conveyed by her settlement to the third parties. There was no destination-over in favour of the residuary legatee with regard to this legacy, for the whole of the third purpose of the truster's settlement, including the provision as to residue, was superseded and revoked by the codicil of 10th August 1877.

Argued for the fourth party;—Vesting took place in Robert John Bartholomew at the death of the testator, subject to defeasance on the occurrence of certain events which had not happened. There was no reason why vesting should not take place subject to

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[1] Boyle v. Earl of Glasgow's Trustees, (1858) 20 D. 925.

[2] (1876) 3 R. 1124.

[3] Turner v. Gaw, (1894) 21 R. 563, Lord M'Laren, at p. 567.

[4] Wylie v. Wylie's Trustees, 8 F. 617; Cairns' Trustees v. Cairns, 1907 S. C. 117, Lord Kyllachy, at p. 122, Lord Low, at p. 124; Penny's Trustees v. Adam, 1908 S. C. 662.

[5] Coulson's Trustees v. Coulson's Trustees, 1911 S. C. 881; M'Lay v. Borland, 3 R. 1124, Lord President Inglis, at p. 1128; Taylor v. Gilbert's Trustees, (1878) 5 R. (H. L.) 217, (1877) 5 R 49, Lord Justice-Clerk Moncreiff, at pp. 56-7.

[6] M'Laren, Wills and Succession, i. 648, sec. 1174; Maitland's Trustees v. M'Dermaid, (1861) 23 D. 732, Lord Justice-Clerk Inglis, at p. 737; Begg's Trustees v. Reid, (1899) 1 F. 498, Lord Moncreiff, at p. 501; Newton v. Thomson, (1849) 11 D. 452, Lord Fullerton, at p. 456; Gardner v. Hamblin, (1900) 2 F. 679, Lord M'Laren, at p. 685; Ferguson's Trustees v. Readman's Executors, (1903) 10 S. L. T. 697; Lindsay's Trustees, (1885) 12 R. 964; Lawrie's Trustees v. Lawrie, (1905) 7 F. 910.

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defeasance on the occurrence of more than one contingency.[1] If, then, such vesting had taken place here, that vesting was in Robert John Bartholomew. He was the person first called to the fee failing issue of Mrs Henn, and presumably, therefore, the testator intended to favour him rather than the Cogan family. In *Gregory's Trustees* v. *Alison*[2] vesting was held to have taken place subject to defeasance in the son, not in his character as next of kin of his father, but in the character in which he was first called, viz., as the child of the marriage, *i.e.*, as representing the first branch of a series of devolutions. In the cases of *Penny*,[3] *Cairns*,[4] and *Wylie*,[5] which had been regarded as instances of vesting subject to defeasance, vesting had taken place in the children as the parties first called, not in their issue. Vesting then having taken place in Robert John Bartholomew at the testator's death, and not having been defeated by the occurrence of any of the resolutive contingencies, that vesting became absolute in the fourth party as his testamentary trustee on the death of the liferentrix.

At advising on 23rd May 1914,—

LORD PRESIDENT.—It is common ground that none of the numerous cases cited to us in the course of the debate will rule this case. If, therefore, we are free to approach the consideration of the questions submitted to us wholly unencumbered by prior authority, I do not think they are attended with any difficulty. For the testator has expressed his intentions in language singularly clear and unequivocal.

By his settlement he, *inter alia*, entrusted £2500 to his trustees. From the date of his death they became the fiduciary fiars of that sum of money; and, by his second codicil, he directed them how to apply it. He told them to pay the income, but the income only, to a Mrs Henn during her lifetime. At her death, but not until her death, they were to pay the capital to her children. If there were none, they were to pay it to her brother. If he was dead, they were to pay it to his children. If he left no children, they were to pay it to three persons—a brother and two sisters of the name of Cogan. If one of the three was dead they were to pay it to the remaining two. If two were dead they were to pay it to the third. And, if all were dead, they were to pay it to the issue, the children of the Cogan family, each family taking the share which their parent would have taken had he or she survived. Now, at the death of the liferentrix (she died childless on the 16th October 1911), Robert, her brother, and the three Cogans had all died childless. In other words, the legacy lapsed. But the trustees were not without guidance in that event, for they were told that, if the legacy did lapse, they were then to pay the money to the testator's nephew, James Watson, as his residuary legatee.

That, it appears to me, is the plain meaning of the second codicil, read, as I think it ought to be read, in relation to the third purpose and

[1] M'Lay v. Borland, 3 R. 1124; Gardner v. Hamblin, 2 F. 679; Taylor v. Gilbert's Trustees, 5 R. (H. L.) 217.

[2] (1889) 16 R. (H. L.) 10.

[3] Penny's Trustees v. Adam, 1908 S. C. 662.

[4] Cairns' Trustees v. Cairns, 1907 S. C. 117.

[5] Wylie v. Wylie's Trustees, 8 F. 617.

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the last purpose of the settlement. In my recital of the terms of the bequest I have not used the exact language of the testator. I have employed less conventional, but, I hope, not less precise phraseology. In the second codicil there is to be found one clause, and one only, which, it is said, is open to two interpretations. It is the clause of bequest to the Cogans, which is thus phrased:—"To Robert Orr Cogan, Eliza Cogan, and Mary Susan Cogan, children of the late Robert Cogan, merchant in Glasgow, and the survivors and survivor of them, the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance." Does that clause of survivorship apply to the date of payment and distribution, or does it not? I think it does. I do not think the language is open to two interpretations. To an unsophisticated mind—I mean a mind unsophisticated by the study of vesting cases—a clause of survivorship indicates that the survivor must be looked for at the supreme moment when something is to be done for the survivor, namely, to pay him money; and if he is not alive at that date his prior existence is wholly disregarded by any unsophisticated person. Now, it appears to me that the language of the testator here plainly indicates that the survivor is to be looked for at the date of distribution. In other words, the rule of *Young* v. *Robertson*[1] is to be applied, and that for the very clear and cogent reasons given by the noble Lords who decided that case. In every other part of the second codicil in which we find the words "survivance" and "surviving," that is the sense in which they are used; and I cannot think it would result in anything but confusion if we were to interpret these words of bequest to the Cogans in any different sense. If that is the true interpretation of this codicil, then the answer to the questions put to us is easy.

But we were urged by counsel for the third parties to reject the plain and obvious meaning of the testator's words and to apply to this case the doctrine of vesting subject to defeasance. I decline; and, if I am asked for reasons, I give them in the words that Lord M'Laren used in the case of *Turner* v. *Gaw*,[2] where he said: "It is not a case for the application of the doctrine, because the necessary condition of vesting subject to defeasance is that, if the original institution, say of issue, were absent or supposed to be absent from the deed, the persons next in order would take a vested interest *a morte testatoris*; and that, as explained by the late Lord President in the passage read,"—a passage from *Steel's Trustees*[3]—"can only be where they are a class of persons definitely ascertained. If they are a class of persons not ascertained, and the period of distribution is postponed, then it is evident that even if there were no original destination to issue, that class could not take a vested interest at death, because the presumption always is that the words of survivorship or conditional institution are referred to the period when the trust expires." Now, it may be said that that is too limited and narrow a statement of the doctrine. I cannot think that, at this time of day and having in view subsequent decisions, any wider statement would be correct. Thus

[1] 4 Macq. 314. [2] 21 R. 563. [3] 16 R. 204.

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stated, it does not appear to me to be inconsistent with the judgment of the House of Lords in *Taylor* v. *Gilbert's Trustees*,[1] because the keynote of that judgment will, I think, be found in the penultimate paragraph of Lord Gordon's opinion, concurred in by the Lord Chancellor and Lord Hatherley, where he points out that, by a clause in the settlement which had been entirely overlooked in the Court of Session, the testator expressed a clear intention that vesting should take place prior to the date of distribution. And, as I read the judgment, it would have affirmed, and not reversed, the judgment of the Court of Session had that clause been absent. And it was exclusively upon the construction of that overlooked clause—which their Lordships regarded as decisive of the case—that a judgment was pronounced vesting the bequest before the date of distribution.

But much has happened since the date of *Taylor* v. *Gilbert's Trustees*,[1] and probably the full effect of the judgment of the House of Lords in the case of *Bowman*[2] has not yet been clearly realised, for the destruction of the canon of interpretation laid down in *Hay's Trustees*,[3] which we find in the judgments of Lord Watson and Lord Davey in *Bowman's* case,[2] appears to me to leave very little of the doctrine of vesting subject to defeasance. If, as Lord Watson says, a gift-over in favour of the heirs of an instituted child is to have exactly the same effect, and to receive the very same interpretation, as a gift-over in favour of any other relative or a stranger *nominatim*, then apparently the doctrine of vesting subject to defeasance must have very nearly reached the vanishing point.

To my mind the most significant exposition of the doctrine which we now have is in the latest case, and comes from the lips of a Judge whose eminence in this domain of law no one will question—Lord Kinnear—who said, in *Johnston's Trustees* v. *Dewar*,[4] "I cannot say for myself that, in the cases where it has been held that interests have vested subject to defeasance, I can find any principle of law which is capable of being drawn out to a logical conclusion, unless it be the principle that you are to construe a will so as to give effect to the presumed intention of the testator when there is nothing in the will which will tend to rebut that presumption. The only doctrine, so far as I understand it, that has received effect in a description of vesting subject to defeasance is this, that when a gift is made in such terms that it would take effect absolutely at the death of the testator but for the single contingency of the possible birth of issue to a particular person, that is a possibility which interferes so little for practical purposes with the primary legatee treating the legacy as his own, subject to his being divested by the single event, that it must be presumed that the testator intended that he should so treat it. In the leading case it is pointed out that it is for the benefit of the object of the testator's bounty that he should be able to deal with his expectant interests as if they were vested in him subject to being divested upon the happening of the subsequent event, rather than that he should be prevented from dealing with them at all on the ground that they are kept in

[1] 5 R. (H. L.) 217. [2] 1 F. (H. L.) 69. [3] 17 R. 961.
[4] 1911 S. C. 722, at p. 729.

suspense. It must be presumed that the testator intended to give that benefit in a case in which the contingency which should exclude the primary legatee is so simple as that of the birth of children to one particular person. Accordingly, it has been held that where a fund is given in liferent to a daughter or a granddaughter, and to her issue if any, and, failing this issue, to a person or a class of persons at the testator's death, without any further destination which could possibly exclude such a legatee, the legacy is vested in him subject to defeasance, rather than that his interest is held in suspense until the death of the liferentrix, whether she has issue or not. The condition upon which that doctrine has always been applied is that there is no other contingency but that very simple one, and that it is the possibility of issue without any further destination on their failure that raises the presumption."

I cannot think the true basis of this artificial canon of construction is to be found in a presumed desire on the part of a testator that a legatee should have ample and immediate opportunity of borrowing on the security of his expectancy, and to the eye of a trained lawyer, who keeps in mind that there is now no distinction between a gift-over in favour of the heirs or issue of an instituted child and a gift-over in favour of a stranger *nominatim*, a doctrine poised on so narrow a ledge as this holds out very little prospect of longevity.

But, whatever view may be taken of the doctrine of vesting subject to defeasance, I desire to decide this case—and I understand both your Lordships desire so to decide—on the simple ground that the doctrine is wholly inapplicable here, because the testator has plainly expressed his intention that vesting should be suspended until the date of distribution, and that nobody should take any part of this capital sum of £2500 unless and until they survived the period of payment.

Holding these views, I think we ought to answer the first and second questions in the negative, and the third question in the affirmative.

Lord Mackenzie.—It was maintained by two of the parties to this case, (1) Robert John Bartholomew's trustee and (2) Eliza Cogan's trustees, that the fee of the legacy of £2500 bequeathed by the second codicil had vested subject to defeasance. I am of opinion that the contention of neither party is well founded, and that the legacy of £2500 lapsed, and falls into residue in terms of the settlement. I do not reach this conclusion by reading into the second codicil the provisions of the third clause of the settlement. The codicil is in substitution for that clause, and supersedes it. The effect of the codicil must be ascertained from its own terms.

As regards Robert John Bartholomew's trustee, who maintains that there was vesting *a morte* subject to defeasance, the case is a typical one of suspended vesting. The gift is one of liferent followed by certain destinations of the fee prior to Robert John Bartholomew; then there is a destination to him with a destination-over. It is settled by a number of cases, of which *Bryson's Trustees* v. *Clark*[1] is the most familiar, that vesting is in such a case suspended. This claim therefore fails.

[1] 8 R. 142.

May 23, 1914.

Bannatyne's Trustees v. Watson's Trustees.

Lord Mackenzie.

The position of Eliza Cogan's trustees is, that from the date when she became the last survivor of the family the fee vested in her subject to defeasance only in the event of (1) the liferentrix leaving issue, or (2) in the event of herself predeceasing the liferentrix and leaving issue. We heard a good deal of argument on the question whether there could be vesting subject to defeasance in the event of there being two or more contingencies. In the view I take it is not necessary to express an opinion upon this point. The case should be decided upon another ground. I may, however, say, with reference to the argument, that I am unable to see why the mere fact that there are two contingencies (neither of which would *per se* be suspensive of vesting) must necessarily lead to the conclusion that they are not to be regarded as resolutive. A condition personal to the legatee suspends vesting. A condition which is not personal, which depends upon the existence of someone yet unborn, is *prima facie* resolutive. The combination of two or more resolutive conditions does not of necessity operate to make them suspensive. There is no reason in principle why a fee should not vest subject to divestiture upon one or more than one contingency. But it must always be a question on the language of the particular settlement whether the inference should be drawn that the testator meant there should be vesting. There is nothing inconsistent with this in what was said by Lord Kinnear in his judgment (in which I concurred) in the case of *Johnston's Trustees*.[1] I cannot regard the case of *Steel's Trustees*[2] as laying down an artificial rule which must be strictly limited. That this was not the view of the Lord President is shown by the judgment in *Dalhousie's Trustees*[3] as regards the share of Edward Bannerman Ramsay. The observations of Lord M'Laren in *Gardner* v. *Hamblin*[4] upon the application of the doctrine of vesting subject to defeasance are in accordance with what is above stated. A consideration of what was said in *Taylor* v. *Gilbert's Trustees*[5] confirms this view. This case also shows that vesting subject to defeasance need not necessarily be *a morte*. Lord Kyllachy's statement of the general rule in regard to the contingency of the birth of issue in *Thompson's Trustees*[6] is to the same effect.

We also heard argument upon whether there was what could be called a proper destination-over in the event of the failure of Eliza Cogan, the destination not being to a third party, nor to heirs, but to issue. This raises the question which is discussed by Lord Low in *Cairns' Trustees*,[7] as to the effect of the opinions expressed in *Bowman's Trustees*,[8] in view of the cases of *Parlane's Trustees*[9] and *Forrest's Trustees*.[10] This question also it is not necessary to consider, as, in my view, the case ought to be disposed of independently of this consideration.

Coming to what is the ground of my judgment, I do not think that the survivorship clause which is attached to the destination to the Cogan family ought to be construed as limited to survivorship of the three mem-

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[1] 1911 S. C. 722. [2] 16 R. 204. [3] 16 R. 681. [4] 2 F. 679.
[5] 5 R. 49, *per* Lord Justice-Clerk, at p. 57, 5 R. (H. L.) 217.
[6] 2 F. 470. [7] 1907 S. C. 117. [8] 1 F. (H. L.) 69.
[9] 4 F. 805. [10] 6 F. 616.

bers of the family *inter se*. If one looks at the earlier branches of the destination, what was evidently in the testator's mind when the word survivor was used was "surviving to take." In the case of the Cogan family the destination is to the three members of it "and the survivors and survivor of them." It was argued that, as the class was reduced to one, the effect of the clause was exhausted and the whole fee vested in Eliza Cogan on the death of Robert in 1886, Mary having died in 1885. The cases which were said to be analogous to the present are *Gardner* v. *Hamblin*,[1] *Ferguson's Trustees*,[2] *Lindsay's Trustees*,[3] and *Begg's Trustees*.[4] Reference was also made to M'Laren on Wills, i. 648. In the present case, however, on a sound construction of the special terms of this codicil the condition of Eliza Cogan taking any vested right was survivance of the period of distribution, the death of the liferentrix. The word "survivor" must be construed with reference to the same period as the word "survivors." The "survivor" could only take anything if he or she outlived the term at which the "survivors" would take anything. Now, on the death of the first of the Cogans, the two "survivors" would not take any vested right. They would take nothing unless they survived to take, *i.e.*, survived the period of distribution. The same construction ought, in my opinion, to be applied in the present case to the word "survivor." That also means "survive to take." As Eliza Cogan predeceased the liferentrix she did not survive to take, and upon this ground the contention on her behalf fails. This construction of the clause receives confirmation from the concluding words of the clause, "the issue, however, of any of them who may have predeceased leaving issue being entitled to the share which their parent would have taken on survivance." This shows that survivance is used with reference to the period at which the parent would have taken something. If the parent predeceases this period leaving issue, then the issue are to take. If the parent does not outlive this period, then he or she does not satisfy the meaning attached by the testator to the word "survivor," and takes no vested fee.

The first and second questions ought, in my opinion, to be answered in the negative, and the third in the affirmative.

LORD SKERRINGTON.—I concur in the result at which your Lordships have arrived. With reference to the observations made by your Lordship in the chair in regard to the doctrine of vesting subject to defeasance, I should be glad if, on some future occasion, it were found possible to reconsider certain of the decisions on this branch of the law.

THE COURT answered the first and second questions in the negative, and the third question in the affirmative.

MACONOCHIE, DUNCAN, & HARE, W.S.—W. & F. HALDANE, W.S.—MARTIN, MILLIGAN, & MACDONALD, W.S.—LIVINGSTON & DICKSON, W.S.—Agents.

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[1] 2 F. 679. [2] 10 S. L. T. 697. [3] 12 R. 964. [4] 1 F. 498.

No. 73.

May 26, 1914.

ALEXANDER SCOTT, Appellant.—*Kemp.*
ALEXANDER TYTLER NICOL (Alexander Scott's Trustee), Respondent.—*Valentine.*

Scott v. Scott's Trustee.

Process—Caution for expenses—Bankruptcy—Petition by bankrupt for discharge.

As a general rule a bankrupt applying to the Court for his discharge will not be ordained to find caution for the expenses of the application.

Circumstances in which the Court, applying this rule, *allowed* a bankrupt without finding caution to answer objections lodged by his trustee to his application for discharge.

2D DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

ON 26th January 1906 the estates of Alexander Scott, sheriff-officer, Huntly, Aberdeenshire, were sequestrated under the Bankruptcy (Scotland) Act, 1856, and Alexander Tytler Nicol, solicitor, was appointed trustee. No dividend was paid, and in November 1913 the bankrupt presented an application in the Sheriff Court at Aberdeen craving for his discharge. The application was duly advertised and was also, in terms of an order by the Sheriff-substitute, intimated to the Accountant of Court at Edinburgh to report whether the petitioner had fraudulently concealed any part of his estate or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy Act, 1856. The Accountant of Court stated that there was nothing unfavourable to report regarding the bankrupt, except that he did not lodge a state of affairs at the first meeting of creditors, though he made up a state of affairs subsequently.

On 21st November 1913 objections to the petition for discharge were lodged on behalf of the trustee and of Messrs R. D. Cruickshanks & Company, one of the only two creditors. The trustee objected to the petition on the ground that the bankrupt had not paid the trustee's outlays and expenses incurred in the sequestration proceedings, and had made no satisfactory provision for payment of them.

On 21st January 1914 the Sheriff-substitute (Laing) pronounced this interlocutor:—"Allows the pursuer to answer the objections by the trustee upon finding caution to the satisfaction of the Clerk of Court for the expenses of this application, and that within a week from this date."

The bankrupt appealed, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 26th May 1914.

Argued for the appellant;—The appellant desired to answer the trustee's objections, but submitted that he should not be ordained to find caution as a condition of doing so. There was no absolute rule that a bankrupt who sued an action must find caution for expenses.[1] As a general rule in proceedings for a bankrupt's discharge, to which the bankrupt was a party, the Court would not ordain him to find caution.[2] In the present instance there was nothing to take the case out of the general rule. The inability of the bankrupt to provide for the expenses of the sequestration might

[1] Heggie v. Heggie, (1855) 17 D. 802.

[2] Melrose-Drover, Limited, v. Heddle, (1905) 7 F. 852, *per* Lord President Dunedin, at p. 854; Hooper v. Fergusson & Co., (1850) 12 D. 1309.

be an obstacle to his obtaining his discharge, but was no reason for ordaining him to find caution.

Argued for the respondent (Alexander Scott's trustee);—It was a matter for the discretion of the Court whether or not, in an application such as the present, the bankrupt should be ordained to find caution.[1] The Sheriff-substitute in the exercise of this discretion had ordained the appellant to find caution, and his decision should not be interfered with. A bankrupt was not entitled to his discharge without providing for payment of the expenses incurred by the trustee in the sequestration.[2]

LORD DUNDAS.—This is an application by a bankrupt for his discharge. By the interlocutor appealed against the learned Sheriff-substitute allowed the pursuer to answer the objections by the trustee "upon finding caution to the satisfaction of the Clerk of Court for the expenses of this application, and that within a week from this date." The pursuer is willing, and apparently anxious, to answer the objections, but he objects strenuously to the condition of doing so upon caution, and that is the subject of this appeal. It may prove that the application for discharge will not be entirely plain sailing for the applicant, but the point at the moment, and the only point, is whether the condition of caution should be imposed upon him at this stage. I think it should not. I think he ought to be allowed to proceed in the meantime with his application unhampered by this obligation.

In the case of *Melrose-Drover*,[3] to which we were referred, Lord President Dunedin said that the petition before him was one by a bankrupt for his own discharge, "and that is in a different position from a litigation by him about other matters. I do not think that a bankrupt applying for his discharge should be hampered by being ordered by the Court to find caution"; and the other learned judges concurred. I do not take it that Lord Dunedin was there laying down a principle to which no exception could be found; but the general rule he states in perfectly distinct terms, and I cannot see anything in what we have before us to take this case out of the scope of that general rule.

I therefore move your Lordships to recall the interlocutor in so far as it orders caution to be found by the pursuer; and *quoad ultra* to adhere to the interlocutor and remit the matter back to the Sheriff-substitute.

LORD SALVESEN.—I concur. We are not in the habit of requiring a litigant to find caution, even though it be plain that he has no means to pay his opponent's expenses should he fail in his litigation. If so, the reasons for a similar practice are much stronger in the case of a man who has been divested of his estate, and who is seeking an opportunity to earn a livelihood free from the debts which led to his sequestration. Everything that he has hitherto earned has fallen into the net of the sequestration. He cannot, therefore, have any means from which to provide for the expenses of his opponents; and, if he has no means, it can only be

[1] Gilmour v. Donelly, (1899) 7 S. L. T. 267.
[2] M'Carter v. Aikman, (1893) 20 R. 1090.
[3] 7 F. 852.

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by the charity of his friends that he could implement the interlocutor of the Sheriff-substitute.

These considerations have led to the settling of a general rule that a bankrupt who is petitioning for his discharge should not be ordained to find caution; and I can find nothing so exceptional in this case, where as yet there has been no inquiry, as to justify a departure from it. I accordingly agree with your Lordship that we should recall the part of the interlocutor appealed against.

Lord Salvesen.

Lord Guthrie.—I am of the same opinion. There are cases in which a trustee in a sequestration, who depends on the assets of the estate to meet his expenses, has also the compulsitor that a discharge will not be granted unless the expenses incurred by him are paid. The course proposed by your Lordship does not in the least interfere—when the facts are ascertained and if the case be a suitable one for applying the compulsitor—with the preservation of the trustee's rights.

The Court pronounced this interlocutor:—"Sustain the appeal and recall the said interlocutor: Remit the cause to the Sheriff-substitute of new to allow the appellant to answer the objections by the trustee without finding caution, and to proceed as accords."

William Geddes, Solicitor—J. & A. F. Adam, W.S.—Agents.

No. 74.

May 26, 1914.

Anderson v. Dickie.

Robert Anderson, Pursuer (Reclaimer).—*Murray, K.C.*—*Chree, K.C.*—*MacRobert.*

Matthew Dickie, Defender (Respondent).—*Blackburn, K.C.*—*Christie, K.C.*—*Burnet.*

Property—Real burden—Servitude—Declaration in disposition that land should not be sold except under conditions as to building—Construction—Ground described as "occupied as" a "lawn"—Identification of ground.

The proprietor of lands, after feuing a portion thereof to A, disponed the remainder, with the mansion-house thereon, to B. The disposition to B contained a declaration that "it shall not be lawful to" B "or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued" to A and the mansion-house "excepting under the express conditions and declarations that there shall be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued," and that each of the houses should be of, and should be maintained at, a certain value, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of A and his foresaids in all time coming."

In an action to enforce this restriction, brought by a singular successor of A against a singular successor of B who proposed to build on his lands,—

Held that the terms of the declaration above quoted were not habile to constitute a real burden or servitude on the lands, but merely imposed a prohibition on B and his heirs—not against building on the lands—but against the sale or feuing of them except under the specified conditions; and defender *assoilzied.*

Held further (*per* Lord Guthrie) that the restriction could not in any event be enforced, in respect that the description of the ground alleged to be affected by the restriction was not sufficiently definite.

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2D DIVISION. Lord Skerrington.

ON 22nd November 1912 Robert Anderson, merchant, Glasgow, brought an action against Matthew Dickie, builder, Glasgow, concluding for declarator "that the defender is not entitled to erect any dwelling-houses other than one dwelling-house with suitable offices on any two acres of ground, and of the value of at least £900, on any part of the ground now or formerly occupied as the lawn between the ground feued by Thomas Smith to the pursuer's author, William Miller, by feu-contract dated 14th, 22nd, 27th, and 30th September 1852, and the mansion-house of Eastwood Park, in the parish of Eastwood and sheriffdom of Renfrew, all as said ground is marked numbers 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70 on the sketch or plan endorsed on the said feu-contract, and coloured blue on the plan produced herewith." The summons also concluded for interdict against the defender "erecting any dwelling-houses other than those above mentioned on any part of the said ground."

The pursuer was proprietor of the house and grounds of Eastwoodhill, Giffnock, being a portion extending to 4½ acres of the lands of Eastwood Park. This portion of ground was feued by Thomas Smith of Eastwood Park and others to William Miller, merchant, Glasgow, under a feu-contract in the year 1852; and the pursuer had right thereto under a duly recorded disposition by William Miller to the pursuer and James Anderson, merchant, Glasgow, in 1879 and 1880, and a further duly recorded disposition by the pursuer and James Anderson to the pursuer in 1881. The feu-contract between Smith and Miller contained the following declaration:—"Declaring also, as it is hereby expressly provided and declared, that it shall not be lawful to the said Thomas Smith or his foresaids or the other disponers to sell or feu any part of the said ground now occupied as the lawn between the ground hereby feued and the said present mansion-house of Eastwood Park, and as marked numbers 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70 on the said sketch or plan endorsed hereon, excepting under the express conditions and declarations that there shall be no more than one dwelling-house, with suitable offices, on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least Nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming, which restriction shall also be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming."

In 1864 Thomas Smith, by a disposition, which was duly recorded, disponed the remaining part of the lands of Eastwood Park to Joseph C. Wakefield, merchant, Glasgow. This part of the lands extended to 62 acres, and the mansion-house of Eastwood Park was situated upon it. The defender became proprietor of this part of the lands in virtue of a duly recorded disposition in 1877 by Wakefield to David Tod and a duly recorded disposition by Tod's testamentary trustees to the defender in 1910.

The disposition by Smith to Wakefield (the defender's author) contained the following declaration:—"And with and under the declaration that it shall not be lawful to the said Joseph Colen Wakefield or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued by me to William Miller, merchant in Glasgow, and the present mansion-house of

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Eastwood Park, excepting under the express conditions and declarations that there shall be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto shall be of the value of at least Nine hundred pounds sterling, and be maintained in good condition and of such value in all time coming, which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming." The disposition to Tod and the disposition to the defender by Tod's trustees were granted under burden of, *inter alia*, the real burdens, servitudes, and declarations so far as "still subsisting and not implemented, departed from, or discharged," specified in the disposition by Smith to Wakefield.

The pursuer averred that the declaration, restrictions, burdens, and servitudes set forth in the disposition by Smith to Wakefield appeared on the record, were made real burdens and servitudes on the subjects held by the defender in favour of the pursuer's lands, and were incorporated in and affected the defender's title. He also averred that the defender intended to erect upon the ground "now or formerly occupied as the lawn" tenements of dwelling-houses or other dwelling-houses contrary to these declarations and restrictions, and that these buildings would injure the amenity of the pursuer's property and cause him loss and damage. The pursuer further averred (in condescendence 5):—"The ground which at the date of the said feu-contract in favour of William Miller, and of the said disposition in favour of Joseph Colen Wakefield, was occupied as the lawn, comprises the whole ground between the Eastwood Park mansion-house and the feu given off to the said William Miller, and is shown coloured blue on the plan produced. Admitted that the defender's authors erected the usual offices attached to a dwelling-house on the area restricted as aforesaid. *Quoad ultra* the statements and explanations in answer, so far as not coinciding with pursuer's averments, are denied under reference to the titles of the parties."

The defender averred that there was no privity of contract or estate between him and the pursuer, and admitted that he proposed to erect certain buildings upon his lands. In answer to condescendence 5 for the pursuer he averred:—"Denied that the declarations and others mentioned are effectually made real burdens and servitudes on the subjects held by the defender in favour of the pursuer's lands. Denied further that the ground described as 'occupied as the lawn' comprises the whole ground between the Eastwood Park mansion-house and the feu given off to the said William Miller, which is shown coloured blue on the plan produced by the pursuer. Explained that the clause partially quoted from the disposition to Mr Wakefield, the defender's author, of 1864, has reference only to ground occupied as lawn at that date. Not known and not admitted that the ground then so occupied was the same as that referred to in the feu-contract between the said Thomas Smith and William Miller in 1852 and the relative instrument of sasine in favour of William Miller. In the disposition to the defender's said author there is no reference to the numbered sections" mentioned in the declaration quoted above appearing in the feu-contract between Smith and Miller, "nor is there any refer-

ence to the plan therein mentioned. The numbered sections in question embrace not only ground between the mansion-house of Eastwood Park and the land feued to Mr Miller, but also ground to the north of Eastwoodhill and other large portions of Eastwood Park which do not in any reasonable sense answer to the description of being 'between' the ground feued to Mr Miller and the mansion-house. In the plan annexed to the disposition in favour of Mr Wakefield there is no indication of what land was, as at the date of the disposition, 'occupied as the lawn'; and Mr Wakefield erected, without objection on the part of the pursuer's predecessor in title, large stables, coach-houses, piggeries, henhouses, gardener's house, and other buildings, all on the ground claimed to be restricted. Since the erection of the stables, coach-house, piggeries, and other buildings above mentioned, there is no longer any unencumbered prospect over the said ground between the pursuer's lands and the mansion-house of Eastwood Park, and in view of the erection of said buildings and of the possibility of the lawful erection of works and such like buildings, the pursuer has now no interest to object to the erection of dwelling-houses on any part of the defender's lands. Nor is there any other means of identification in any of the recorded writs forming part of the defender's progress of titles of the particular ground to which the alleged building restriction applies. The said restriction accordingly is entirely vague and indefinite, and is not binding on the defender as a singular successor. In any event, on a sound construction of the titles, the restriction is only directed against the erection of dwelling-houses on the land to which it may apply, and does not strike at the erection of works or other buildings not of the nature of dwelling-houses." The defender further averred that the plan endorsed on the feu-contract between Smith and Miller "did not enter the record, and that the ground referred to in the said disposition as 'now occupied as the lawn between the ground hereby feued and the present mansion-house of Eastwoodhill' is not otherwise identified with precision in the said feu-contract or in the recorded titles. The area of ground occupied as lawn in connection with the mansion-house of Eastwood Park has varied from time to time, and in any event the portion of the said lawn 'between' the ground feued in the said feu-contract and the mansion-house of Eastwood Park is only a very small portion of the total land from time to time occupied as lawn. The mansion-house of Eastwood Park since the date of the pursuer's feu-contract has been largely added to, and the frontage of the buildings to the lawn is now more than double the frontage as at the last-mentioned date."

The pursuer pleaded, *inter alia;*—(1) The property of the defender being burdened in favour of pursuer's property by the restriction as to the erection of buildings contained in his titles and set forth in the condescendence, the pursuer is entitled to decree of declarator as concluded for.

The defender pleaded, *inter alia;*—(3) The operations proposed by the defender not being illegal or contrary to his titles, the pursuer is not entitled to decree in terms of the conclusions of the summons, and the defender should be assoilzied. (4) The pursuer not being entitled on a sound construction of his titles to the decree sought by him, the defender should be assoilzied, with expenses.

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On 7th February 1913 the Lord Ordinary (Skerrington) allowed a proof before answer.*

A proof having been led, the Lord Ordinary on 18th June 1913 pronounced an interlocutor sustaining the third and fourth pleas in law for the defender, and assoilzieing him from the conclusions of the summons.†

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* "OPINION.—[After referring to the parties' titles and quoting the terms of the conclusions of the summons]—Though the pursuer has thus adopted the feu-contract of 1852 as showing the extent of the ground subject to the alleged restriction, his counsel stated that he did not found upon this deed as creating any real burden or servitude over the property now belonging to the defender. He refused to argue that the servitude which his client seeks to enforce was one of the known servitudes which would be effectual though it did not appear in the sasine of the servient tenement. The pursuer's case is that the disposal of the ground in 1852 was the same as in 1864.

"The clause in the disposition of 1864, which forms the commencement of the defender's title, is as follows:—[His Lordship quoted the clause.] The later titles merely refer to the real burden specified in this disposition, and do not purport in themselves to create any real burden or servitude in favour of Miller's feu.

"The defender's counsel argued that the clause above quoted was not intended to create and did not create an immediate real burden affecting a portion at least of the lands which formed the subject of the conveyance. He argued that it merely stated the terms of a restriction which must be inserted in any future disposition or feu-charter which might be granted by Mr Wakefield or his successors. In short, the question between the parties is whether the declaration that the restriction 'shall be a real burden' was intended to take effect as from the date of the infeftment to follow on the disposition of 1864, or as from the date of the infeftment following upon some deed which might be granted in the future. I think that the former construction is the more natural and is preferable. It is apparent both from the clause above quoted and also from the remainder of the disposition that the future tense is used throughout as equivalent to the present. I accordingly reject the argument that the words of the clause are not habile to create an immediate real burden. The defender's counsel further contended that the language of the clause was so vague as to make it impossible to ascertain the exact area which was subject to the alleged restriction and that the clause was therefore incapable of creating a real burden. I am of opinion that the pursuer is entitled to a proof for the purpose of defining, if he can, the extent of the ground which was occupied in 1864 'as the lawn between' his feu and the defender's mansion-house. If he is unable to discharge this burden the restriction will be inoperative. On the other hand, I do not think that it is possible to apply a stricter rule to a clause creating a real burden than to a clause which described the subjects conveyed. In the latter case a parole proof is always competent for the purpose of explaining the language of the conveyance, and I see no reason why a similar rule should not apply when the purpose is to ascertain the area which is subject to a real burden. I shall accordingly allow a proof."

† "OPINION.—In the note to the interlocutor of 7th February 1913, I stated that the pursuer was entitled to a proof for the purpose of defining, if he could, the extent of the ground which was occupied in 1864, 'as the lawn between' the feu now belonging to the pursuer and the mansion-house of Eastwood Park now belonging to the defender. That proof has now been led, and the evidence was specially directed to the year 1864." [His Lordship then examined the evidence and stated his reasons for holding

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The pursuer reclaimed, and the case was heard before the Second Division on 13th, 17th, and 18th March 1914.

Argued for the reclaimer;—(1) Under the disposition by Smith to Wakefield a valid and enforceable burden was imposed on the the defender's lands. On a sound construction of the declaration in that deed the words "which restriction" referred to the limitation as to the number of buildings to be placed on each acre of the lands, and a real burden to that effect was from the date of the deed placed on the lands disponed. But, even if the declaration were to be construed as specifying merely the conditions under which the lands were to be sold or feued, there would still be a burden on the lands to that effect enforceable either by the superior, Smith, or by the person in whose interest the burden was conceived.[1] The defender's contention that the burden was indefinite was founded on the assumption that the area of ground to which the burden attached was uncertain and could not be ascertained by proof. But the deed described this area as "the ground now occupied as the lawn," and occupation being the mode of delimiting the ground, it was permissible to show by proof what the extent of the occupation was.[2] In such cases the proof merely fulfilled the func-

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that "lawn" was not used in its restricted sense of mown turf but covered park land interspersed with trees; but that the only ground covered by the expression "lawn between the ground feued and the mansion-house" was the area marked No. 854 on an Ordnance Survey plan produced, and that the areas marked Nos. 889 and 884 were not included.]

"There remains the question whether the pursuer as a mere servitude holder has proved any legitimate interest to maintain the building restriction as affecting the area No. 854, seeing that I hold that the defender is free to build as he likes both on the area No. 889, which actually adjoins the pursuer's feu along the greater part of the western boundary, and also on the area No. 884, which lies only a short distance to the westward of the feu. The pursuer led no evidence to show that he had any such interest, as was only natural seeing that the view which I have suggested did not occur to either of the parties. If the only purpose and effect of the restriction had been to secure air, light, and prospect by limiting the number of buildings in the vicinity of the feu, I might have been entitled without special evidence to that effect to draw the inference that the restriction was of some value to the feu, even if it affected only the enclosure No. 854 as contrasted with the whole area claimed by the pursuer. But it is an integral part of the restriction that the dwelling-houses shall be of a certain pecuniary value, and also (as I construe it) that each building lot shall contain two acres—the evident object being to secure a superior class of dwelling-houses in the vicinity of the feu. I cannot assume without evidence that such a restriction would be of any value to the pursuer's feu if it is held to affect only the area No. 854, or that any reasonable persons would stipulate for or submit to any such restriction. The practical result of my opinion is to decide that the clause of restriction as expressed in the defender's title has been so badly blundered that it cannot receive any effect. I accordingly assoilzie the defender."

[1] Coutts v. Tailors of Aberdeen, (1840) 1 Rob. 296, *per* Lord Gillies, at pp. 306, 308, and 310.

[2] Caledonian Railway Co. v. Jamieson, (1899) 2 F. 100; Reid v. M'Coll, (1879) 7 R. 84, *per* Lord Justice-Clerk Moncreiff, at p. 90; Houstoun v. Barr, 1911 S. C. 134, *per* Lord Dundas, at p. 142; Gregson v. Alsop, (1897) 24 R. 1081.

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tion of a plan. The cases of *Magistrates of Arbroath* v. *Dickson*[1] and *Campbell's Trustees* v. *Corporation of Glasgow*[2] were distinguishable in respect that in these cases the burden was in its nature indefinite, whereas here, at the worst for the pursuer, it was only the area affected that was undefined.[3] (2) The pursuer had a title and interest to enforce the burden. Under the disposition by Smith to Wakefield an express right of enforcing the declaration as to building was reserved to the pursuer's author, and although this was not strictly a servitude on the defender's lands it operated as such. The words "Miller and his foresaids," meant "Miller and his heirs and assignees." If the pursuer had a title, it was presumed he had an interest to enforce the restriction until the defender proved the contrary.[4] There was no proof of that kind here. It did not avail the defender to allege that buildings which would be more objectionable than dwelling-houses might be erected on the ground without infringement of the declaration.[5]

Argued for the respondent;—(1) If there was any restriction enforceable against the defender it must be found in his titles, for where, as here, there was neither a question between the granter and the grantee, nor any prescriptive possession, other titles could not be referred to.[6] The titles of the defender, moreover, were to be construed strictly against the party contending that they contained a burden or restriction on the lands,[7] and the supposed intention of the parties to the deed could not be regarded.[8] In the present case there was no real burden on the defender's lands. The declaration was merely a personal condition in favour of the granter and his heirs, and the words "Miller and his foresaids," must be read as "Miller and his heirs," as there was nothing in the disposition to indicate what was meant by the word "foresaids." A real burden must be definite. Here the declaration was indefinite, for there was uncertainty in regard to the occupation at the crucial date, the date of the deed, and the words "between" and "lawn" were ambiguous. The parole proof was incompetent, and in any case did not clear up these ambiguities. Moreover, the declaration did not prohibit the defender's authors from building what houses they chose on the lands, but merely prohibited them from selling or feuing the lands except under the specified conditions. The declaration, therefore, could not in any event be used to control the defender in building on his lands. (2) The pursuer, accordingly, had no title or interest to enforce the restriction. Wakefield could

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[1] (1872) 10 Macph. 630. [2] (1902) 4 F. 752.

[3] As showing the meaning of the word "lawn," Palmer v. M'Cormick, (1889) 25 Ir. Rep. 110, was cited.

[4] Proprietors of Royal Exchange Buildings, Glasgow, Limited, v. Cotton, 1912 S. C. 1151, *per* Lord Kinnear, at p. 1158.

[5] Greenhill v. Allan, (1825) 4 S. 160.

[6] Magistrates of Arbroath v. Dickson, 10 Macph. 630, *per* Lord President Inglis, at p. 634; Campbell's Trustees v. Corporation of Glasgow, 4 F. 752, *per* Lord Kinnear, at p. 760; Caledonian Railway Co. v. Jamieson, 2 F. 100.

[7] Liddall v. Duncan, (1898) 25 R. 1119; Clark & Sons v. School Board of Perth, (1898) 25 R. 919; Cronin v. Sutherland, (1899) 2 F. 217.

[8] Craig v. Gould, (1861) 24 D. 20, *per* Lord Mackenzie (Ordinary), at p. 24; The Walker Trustees v. Haldane, (1902) 4 F. 594. Hislop v. MacRitchie's Trustees, (1881) 8 R. (H. L.) 95, at p. 102, was also referred to.

have feued the ground in lots of one acre or half an acre, and if so, the restriction as to the number of houses would have been ineffectual. Further, without feuing or selling he could himself have built upon the ground without any restraint under the declaration. A restriction so vague could not be enforced.

At advising on 26th May 1914,—

LORD DUNDAS.—The pursuer, Mr Anderson, is the owner of a small residential property called Eastwoodhill, about 4½ acres in extent, which was formerly part of the lands of Eastwood Park. The defender, Mr Dickie, a builder, acquired in 1910 the remaining lands of Eastwood Park, extending to about 62 acres, on which the mansion-house is situated. He proposes to erect, upon part of these lands, buildings, which the pursuer describes as tenements of dwelling-houses and alleges would be both contrary to certain restrictions contained in the defender's titles and injurious to the amenity and the value of the lands of Eastwoodhill.

The summons asks for declarator that the defender is not entitled to erect any dwelling-houses other than one dwelling-house with suitable offices on any two acres of the ground now or formerly occupied as the lawn between the ground disponed in 1852 by feu-contract by Thomas Smith to the pursuer's author, William Miller, and the mansion-house of Eastwood Park, all as said ground is marked numbers 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, and 70 on the sketch or plan endorsed on the said feu-contract, and coloured blue on a plan, No. 6 of process, produced by the pursuer. The wording of the summons is taken substantially from a clause in the said feu-contract of 1852, by which the granter expressly provided and declared that it should not be lawful to him or his foresaids to sell or feu any part of the ground then occupied as the lawn between the ground thereby feued and the present mansion-house of Eastwood Park, and as marked by the said numbers on the plan endorsed thereon —a copy of which is No. 33 of this process—excepting under the express conditions and declarations that there should be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued, and that each of the said dwelling-houses attached thereto should be of the value of at least £900 sterling, and be maintained in good condition and of such value in all time coming; "which restriction shall also be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming." The pursuer, however, does not found upon the terms of this feu-contract as creating any real burden or servitude over the lands now belonging to the defender. The Lord Ordinary, in the opinion which he delivered on 7th February 1913 when he allowed a proof, expressly so states the position taken up by the pursuer's counsel in the Outer House, adding that "he refused to argue that the servitude which his client seeks to enforce was one of the known servitudes which would be effectual though it did not appear in the sasine of the servient tenement." The same attitude was maintained by the pursuer's counsel at our bar. One need not, therefore, consider whether or not it might have been possible for the pursuer to argue successfully that a negative servitude—*non ædificandi*—was

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validly constituted over the defender's lands by the feu-contract of 1852, and is now enforceable by the pursuer, though not appearing in the titles by which the defender's lands are now held.

The pursuer bases his case upon a clause in a disposition in 1864 of the remaining lands of Eastwood Park by Mr Smith in favour of the defender's author, Mr Wakefield, which contains a declaration in terms almost identical with those of the feu-contract of 1852 already referred to, except that the specific numbers therein contained are not repeated, to the effect that it should not be lawful to Wakefield or his foresaids to sell or feu any part of "the ground occupied as the lawn," as described, except under the conditions and declarations above set forth, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of the said William Miller and his foresaids in all time coming." The first and principal question which we have to decide is whether or not, by the disposition of 1864, a real burden or servitude, now enforceable by the pursuer, was validly imposed upon the lands presently belonging to the defender. I have come to the conclusion that this question must be answered in the negative.

It seems pretty clear that the parties to this deed intended that these lands should be subjected to a real burden of some sort in favour of "William Miller and his foresaids." The defender's counsel pointed out that Miller's "foresaids" are nowhere described or defined in the preceding clauses of the disposition; but, while I note the point, I do not think it is of much value, especially, looking to the immediately succeeding words, "in all time coming." It is, however, by no means so clear what the real burden was intended to be; or whether any real burden at all was effectually constituted. The Lord Ordinary, in his first opinion already referred to, says,—"The question between the parties is whether the declaration that the restriction 'shall be a real burden' was intended to take effect as from the date of the infeftment to follow on the disposition of 1864, or as from the date of the infeftment following upon some deed which might be granted in the future. I think that the former construction is the more natural, and is preferable." If the Lord Ordinary means,—as I gather he does mean,—that the effect of the disposition and Wakefield's infeftment on it was to constitute a real burden on the lands, instantly operative, and restrictive of Wakefield's own right of building, I cannot agree with him. I attach no particular importance to the use of the words "shall be," as militating against the idea of instant and immediate constitution of a burden. But, as I read the clause, it imposes no restriction or limitation upon Wakefield or his heirs in the matter of building, but only declares that they shall not sell or feu to third parties except under the conditions specified. It is only in that event that any building restriction is contemplated. The point is a pure matter of construction; but I cannot construe the clause as the Lord Ordinary appears to do. I think it imposed no obligation on Wakefield or his heirs so long as they did not sell or feu. Nor, in my judgment, is it possible to read it as directly imposing upon the ground in the hands of Wakefield's singular successors the burden of a restriction which was not to bind himself. Even if the parties intended to make such an arrangement as that, it

seems to me very doubtful whether it could have been competently effected under our system of conveyancing. A restriction, in order to be a real burden, must affect the land itself, in whose hands soever it may be, not one or another of its successive owners. But, however this may be, I do not think the words of the clause can be construed as importing such a meaning. The clause, then, according to the proper construction of its language, does not, in my opinion, impose the contemplated building restriction directly as a burden upon the land at all, but merely places upon Wakefield and his heirs a personal prohibition against selling or feuing except under specified conditions, leaving it to him or them to constitute these as real burdens on the title of the disponee or feuar, when a sale or feu should take place. We are not concerned to speculate as to the reasons for so peculiar and hazardous an arrangement; nor, indeed, whether this, or something quite different, was what the parties really intended. In considering whether, or how far, a singular successor is effectually restricted in the use of his own property, it is not the intention but the import and effect of the deed that matters; and, on a proper construction of this clause in the disposition of 1864, I cannot see that any real burden or servitude has been effectually created as the pursuer contends. The prohibition imposed on Wakefield was not a real burden; and no machinery was provided for making it effectual against his singular successors. No real burden or servitude has in fact been created by the subsequent titles,—Wakefield's disposition to Tod in 1877, and the disposition by Tod's trustees to the defender in 1910. These deeds make no express mention of any building conditions or restrictions, but merely refer in general terms to the burdens, &c., specified in the disposition to Wakefield in 1864, "so far as applicable to the lands . . . and still subsisting." This reference, which is in the usual statutory form, cannot, of course, import into the later title any burden which is not to be found in Wakefield's own title. If the views which I have stated are correct, they afford sufficient grounds for the decision of the case in favour of the defender; and any allowance of proof was unnecessary.

Even if I could have agreed with the Lord Ordinary in holding that the words of the clause in the disposition of 1864 were (as he puts it) "habile to create an immediate real burden," it is obvious that the pursuer would still have serious obstacles to overcome. [His Lordship then discussed the extent of ground involved, and stated his reasons for holding that it included No. 889 as well as No. 854.] If this view of the matter were taken to be correct, there would be no occasion to consider whether or not the Lord Ordinary was right in deciding that the pursuer's interest to maintain the building restriction as affecting No. 854 failed because he was not entitled to maintain it as affecting No. 889. This point, it appears, was not argued to the Lord Ordinary; and I have considerable doubt as to the soundness of his opinion upon it. But I need not deal in further detail with this matter, or with the proper limits of the lawn, because (as already explained) I do not consider that these arise as subjects for decision in the case. I hold that, upon a sound construction of the disposition of 1864, no real burden or servitude was validly created

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over the lands now belonging to the defender; and I am accordingly of opinion, though not for the reasons stated by the Lord Ordinary, that the interlocutor reclaimed against is right, and ought to be adhered to.

LORD SALVESEN.—In this case I have found more difficulty in reaching a conclusion satisfactory to my own mind than your Lordships appear to have found. In the first place, I do not agree with the Lord Ordinary in the grounds on which he has assoilzied the defender. Even if I adopted his view—that the building restriction affected only area No. 854 and did not cover the area 889, which actually adjoins the pursuer's feu along the greater part of the western boundary—I am of opinion that the pursuer has sufficient interest to enforce it. If it is a valid restriction, it would be at least worth the defender's while to pay the pursuer for having it relaxed; and I cannot assume that if the object was to protect the amenity of the pursuer's house and grounds, the mere fact that the amenity might be partly destroyed by building on the area No. 889 would take away the pursuer's interest in protecting the amenity of his feu at another place. But my objection to the Lord Ordinary's decision goes deeper. [His Lordship then discussed the extent of ground involved and stated his reasons for holding that it was of greater extent than the Lord Ordinary had decided.] Nor do I think the restriction invalid because there is a certain indefiniteness as to the western boundary of the area affected by it. The Court, if necessary, would have to fix the line by reference to the description contained in the title; and for myself I should have little difficulty in doing so by drawing such a line from the mansion-house to the Paisley Road parallel to the line of the pursuer's feu. I go further and hold that, even if we could not fix the line of the western boundary of the area in question, the restriction would be enforceable if it were being violated at a point which clearly fell within its terms. In a popular sense, however, I think the area which I have referred to was, in view of the general use to which it was put at the date of the title, quite properly described as "the lawn between the ground feued to William Miller and the present mansion-house of Eastwood Park."

The more difficult question in my judgment is whether the clause quoted in cond. 4 is expressed in terms habile to impose a real burden on the lands such as the pursuer affirms. It must be confessed that it is not well expressed; and, as I think, it does not impose any obligation on the disponee to refrain from building houses upon the area in question to any extent that he might desire. If so, no greater burden is imposed upon the defender; for the disposition in his favour is granted under "the real burden, servitude, and declaration specified in the disposition in favour of his author, Mr Wakefield." There appears to me to be nothing, therefore, to prevent the defender from building on his own land; and once the dwelling-houses are erected there is nothing to restrict him from selling them to third parties. On this somewhat narrow ground, which turns entirely on the construction of the declaration founded on, I have come to be of opinion that the result at which the Lord Ordinary arrived ought to be affirmed.

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LORD GUTHRIE.—I am of opinion, with Lord Dundas, that the Lord Ordinary has rightly assoilzied the defender from the conclusions of the summons, but I am unable to concur in the ground on which the Lord Ordinary has proceeded. He has held that, had the pursuer proved a legitimate interest to maintain the building restriction in question, he would have decided in his favour, to the extent of holding that the area of ground belonging to the defender, numbered 854 in the Ordnance Survey map of 1857, is subject to the restriction alleged by the pursuer. In my opinion, if the defender's title validly imposed on the ground numbered 854 the building restriction alleged in favour of the pursuer's ground, it would have been for the defender to have proved that the pursuer had no legitimate interest, not for the pursuer to prove that he had such an interest.

Disagreeing as I do with the ground on which the Lord Ordinary proceeds, it becomes necessary to consider the question apart from the element of interest. It is admitted that the basis on which the summons is framed, namely, to identify the ground alleged to be restricted by reference to the numbers contained in the plan endorsed on the pursuer's author's title is inadmissible, because among other reasons the restriction, if it exists, not being one of the known servitudes effectual although not appearing in the title of the servient tenement, must be found in the defender's titles. Again, neither the area coloured blue in the plan produced with the summons, nor the part of it numbered 884 on which the defender is proposing to build, was seriously contended for. Indeed it was admitted that the plan produced would require amendment, in some method not distinctly defined. The pursuer argued for the area 854, which the Lord Ordinary thought restricted, and he proposed to add the area 889. In my opinion he is not entitled to have it held that any building restriction was validly imposed in favour of his feu on any part of the defender's lands. I do not differ from any of the grounds on which Lord Dundas has proceeded, but I am content to base my judgment against the pursuer on the ground that the alleged restriction is not sufficiently specific to be enforced. The same exact precision may not be required in the case of a building restriction as in the case of a money payment which is made a real burden on land, but in my opinion the restriction must be such that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles. In this case the alleged restriction applies to "the ground occupied as the lawn between the ground feued by me to William Miller, merchant in Glasgow, and the present mansion-house of Eastwood Park." Take first the word "lawn," this is an ambiguous word used in many senses, and I see no sufficient reason for preferring in this case the wide interpretation for which the pursuer contended as against the narrower one maintained by the defender. Suppose, however, the word "lawn" be taken as covering land part of which is under trees and part of which is occasionally ploughed, what are the limits of a lawn between ground contained within a certain feu and a mansion-house on the adjoining feu? What ground north, south, east, and west is covered by the word "between"? A number of suggestions were made, and here again I see no sufficient reason for preferring the suggestion, or rather the alternative suggestions, put forward by the pursuer. But if I am wrong in thinking

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that the extent of the restriction must be capable of ascertainment from the terms of the title of the servient subject alone, and if parole evidence was competent, the proof (while it may establish that, in a certain sense, part or parts of the ground were occupied as lawn at or about the time of the defender's author's title—*i.e.*, in 1860 the date of Mr Wakefield's entry, or in 1864 the actual date of his title) entirely fails to show what were the limits of the ground which in this sense ought to be considered as lawn between the pursuer's feu and the defender's mansion-house. Then the pursuer falls back on the argument, which the Lord Ordinary seems to accept, that, at all events, he has shown that area 854, and perhaps also area 889, must be treated as within the lawn mentioned in the defender's titles. I think there is neither principle nor authority for this view. No authority in point was quoted. It would admittedly not be permissible to hold a money payment to be a real burden on land if the total amount were left ambiguous, even if it were possible to be certain about the value of a part of the sum. I see no reason why a different rule should prevail in the case of a building restriction. I am therefore of opinion that the defender is entitled to absolvitor.

Lord Dundas intimated that the LORD JUSTICE-CLERK, who was absent at the advising, concurred in his opinion.

THE COURT adhered.

FYFE, IRELAND, & Co., W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 75.

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HUGH WATSON, Appellant.—*T. G. Robertson.*
WILLIAM BEARDMORE & COMPANY, LIMITED, Respondents.—*Horne, K.C.—J. H. Henderson.*

Watson v. William Beardmore & Co., Limited.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *First Schedule* (1) (*b*) *and* (16)—*Incapacity—Permanent injury—Chance of employment—Compensation—Review—Termination or suspension.*

A workman met with an accident which necessitated the amputation of the thumb of his left hand. In an arbitration under the Workmen's Compensation Act, 1906, after the workman had recovered from the effects of the operation, the arbitrator, after a proof, found that he was fit to resume his former work as a brakesman, and also that the loss of his thumb did "not impair his chance of employment in his former line of employment or in any other line of employment which he might reasonably hope to follow," and terminated the compensation.

In an appeal the workman maintained that the compensation should have been suspended and not ended.

Held that, notwithstanding the permanent and patent nature of the injury, the arbitrator, in view of his finding as to the workman's chance of employment, was entitled to end the compensation.

2D DIVISION. Sheriff of Lanarkshire.

IN an application in the Sheriff Court of Lanarkshire at Glasgow under the Workmen's Compensation Act, 1906, for review of a weekly payment agreed to be paid by William Beardmore & Company, Limited, Parkhead Forge, Glasgow, to Hugh Watson, brakesman there, the Sheriff-substitute (Thomson) ended the compensation and, at the request of the workman, stated a case for appeal.

The case set forth:—

"This is an arbitration under the Workmen's Compensation Act, 1906, brought in the Sheriff Court of Lanarkshire at Glasgow, at the instance of the respondents by minute of review, the first deliverance on which was dated 29th November 1913, in which the Sheriff was asked to review the weekly payment of thirteen shillings agreed to be paid by respondents to the appellant, the incapacity of the appellant for work, in respect of which the said weekly payment was agreed to, having entirely ceased or at least become greatly lessened at 28th October 1913, and to end the said weekly payment as at 28th October 1913, or such later date as the Court should decide, or to diminish the said weekly payment as at and from the foresaid date, all in terms of section 16 of the First Schedule of said Act.

"The case was heard before me, and proof, at which one of the medical referees appointed under said Act sat with me as medical assessor, was led on 7th January 1914, when the following facts were established:—(1) That the appellant, while acting as a brakesman in respondents' employment, met with an accident on 21st December 1912, as the result of which the appellant sustained a permanent injury in respect his left thumb was amputated at the metacarpophalangeal joint. (2) That the face of the stump is not tender, and the stump is freely moveable towards the other fingers or in extension. (3) That he is now fit to undertake, and was on 28th October 1913, when examined by Dr Knox (a medical practitioner selected by the respondents) fit to resume his former occupation. (4) That the loss of the left thumb at the metacarpophalangeal joint does not impair his chance of employment in his former line of employment or in any other line of employment which he might reasonably hope to follow.

"I therefore ended, as at 28th October 1913, the compensation payable to appellant in respect of said accident, and found him liable in expenses."

The question of law for the opinion of the Court was:—"Whether upon the evidence the arbitrator could competently end the compensation payable to the appellant in respect of said accident?"

The case was heard before the Second Division (without the Lord Justice-Clerk) on 27th May 1914.

Argued for the appellant;—The workman had sustained a permanent injury, which was both serious and patent,[1] and in such a case the only order which the arbitrator could pronounce, if he found that the man had recovered from the immediate effects of the accident, was one suspending the right to compensation,[2] so that the workman could at any time apply for compensation in the event of it appearing that the physical defect prevented him from obtaining employment.[3] The fourth finding, though in form a finding in fact, was of necessity a mere conjecture, since nothing

[1] Ball v. William Hunt & Sons, Limited, [1912] A. C. 496, also reported as a footnote to Duris v. Wilsons and Clyde Coal Co., Limited, 1912 S. C. (H. L.), at p. 77.

[2] Green v. Cammell, Laird, & Co., Limited, [1913] 3 K. B. 665, *per* Kennedy, L.J., at p. 669; Taylor v. London and North-Western Railway Co., [1912] A. C. 242.

[3] Dempsey v. Caldwell & Co., Limited, *supra*, p. 28.

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but time and experience could show whether or not the workman was "hampered in the labour market" by reason of the accident.[1] In other words, there was no evidence upon which it could competently be found that incapacity had ceased.[2] The arbitrator had taken too narrow a view in confining his attention to lines of employment which the appellant might "reasonably hope to follow," and in any event the case should be remitted to him in order that he might consider the workman's chances in the open labour market.

Argued for the respondents;—The arbitrator had considered the only two points relevant to the termination of the compensation, namely, the appellant's physical capacity to resume work and his chances of employment in the labour market. These were questions of fact, and the arbitrator's decision upon them was final, and not subject to review. In considering them he had rightly construed "work" as meaning work analogous to the appellant's former occupation. His findings involved the decision that the workman's injury, though permanent, was not serious. The decision in *Hargreave* v. *Haughhead Coal Company, Limited*,[3] showed that there was no universal rule to the effect that, in the case of permanent injury, it was impossible to end the compensation.

Lord Dundas.—We have here a stated case upon an application by the employers to review and end a weekly payment in respect that it is alleged that incapacity entirely ceased at a given date.

The learned arbitrator heard the case with the assistance of a medical referee as assessor, and among other facts it was proved that the appellant, while acting as a brakesman in the respondents' employment, met with an accident on 21st December 1912, as a result of which he sustained a permanent injury, in respect that his left thumb was amputated at the metacarpophalangeal joint. Further, that he is now fit to undertake, and was on 28th October 1913, when examined by Dr Knox (a medical practitioner selected by the respondents), fit to resume his former occupation. Then the fourth finding (which I quote in full), is "That the loss of the left thumb at the metacarpophalangeal joint does not impair his chance of employment in his former line of employment, or in any other line of employment which he might reasonably hope to follow." On these facts the learned arbitrator ended the compensation as at 28th October 1913; and the question of law put to us is whether upon the evidence he could competently so end the compensation.

There is no question, looking to the recent decision of the House of Lords in the case of *Gibson & Company*,[4] as to the competency of the arbitrator ending the compensation at a date prior to the application for review, and no point was made upon that at our bar. The sole question argued was whether he was entitled to end the compensation as he has done, or whether he was not bound to pronounce a suspensory order, which is now (I apprehend) quite settled to be a competent method of procedure in cases under this Act.

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[1] Birmingham Cabinet Manufacturing Co. v. Dudley, (1910) 3 Butterworth's W. C. C. 169, *per* Cozens Hardy, M.R., at p. 173.

[2] Euman v. Dalziel & Co., 1912 S. C. 966.

[3] 1912 S. C. (H. L.) 70.

[4] 1914, 1 S. L. T. 117, also reported *supra*, House of Lords Cases.

It is obvious that the fourth finding presents a very serious difficulty in the way of the appellant's argument. I read it as a finding in fact on a question of fact depending on the evidence and on the circumstances of the case. It was said that it necessarily and clearly was rather a matter of conjecture; but I do not think that is so, although the finding must involve to some extent a conclusion upon the weight and character of the conflicting opinions of medical men. I think it was a finding of fact on the whole circumstances which were before the Sheriff, and doubtless received good consideration by him, as to the man's prospects of employment in the open market. The Sheriff has evidently satisfied himself upon the merits of this question.

But we are asked to say that he has in doing so acted *ultra vires*, because it is said that finding 4 is inconsistent with the first finding which affirms the nature of the permanent injury sustained by the appellant. I do not agree with this. I do not think that the findings are contradictory, and I say so very much for the reasons which I expressed in analogous circumstances in the case of *Hargreaves*.[1] Mr Robertson in his able argument urged us to accept the view that the only proper and competent award in a case of serious and patent permanent injury is a suspensory order. I think his statement is far too broad, and I decline to accept it as put. In one of the recent English cases, *Green* v. *Cammell, Laird, & Company, Limited*,[2] Lord Justice Kennedy expressed the opinion "that in cases of a permanent physical injury . . . the arbitrator, if satisfied that the incapacity for work has for the time ceased, ought, as a general rule, not as a universal rule, inasmuch as in such a case an incapacity for work, due to the injury, may very possibly supervene at a later time, not to make an award simply terminating the weekly payments, but to make an order which keeps alive the employer's liability either by directing the weekly payment of a nominal sum or by a suspensory order." With that opinion so stated by the learned Lord Justice I have no fault to find; but I emphasize the fact that the rule is laid down by him as a general and not as a universal rule, and I do not think that it is applicable here. It seems to me that in the present case we have in finding 4, carefully prepared by the arbitrator, a finding in fact, and intended as such. I do not think there is a finding at all like it in any of the cases to which we have been referred. It has evidently been made by the arbitrator as a finding in fact embodying the result, in his opinion, of the evidence which he had before him. I cannot say that finding was incompetent or *ultra vires;* and I am for answering the question of law in the affirmative.

Lord Salvesen.—I concur. It is, I think, always a question of fact whether a particular injury to a workman will affect his earning capacity either in his own sphere of employment or, as the arbitrator puts it, in any line of employment which he may reasonably hope to follow.

In the course of the argument I put the illustration of a man receiving an injury to his face which left a permanent scar. Undoubtedly if the man were a waiter or a butler a disfigurement of that kind might very

[1] 1912 S. C. (H. L.) 70, at p. 72. [2] [1913] 3 K. B. 665, at p. 669.

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seriously affect his chances of employment and therefore his earning capacity, whereas a similar injury to a miner or an ordinary labourer would probably have no effect upon his following his ordinary occupation. Here we are dealing with a man who was above the rank of an ordinary labourer. He was a brakesman—a class of work that is usually entrusted only to a man who in addition to manual ability has also a certain reliability in the discharge of his somewhat responsible duties. Now, the learned arbitrator has addressed his mind to the facts bearing upon the case, and it seems to me that he has correctly interpreted the decisions of the House of Lords as to the scope of the inquiry. He has not to consider whether the man's chances of employment would be affected if he were a workman of a totally different class from that in which he was. He has not to consider, say, in the case of a clerk whether a slight injury to the left hand might, if he were thrown out of employment and had to turn to ordinary manual labour, affect his chances of employment as a manual labourer. He has to consider in each case what kind of employment a man is fitted by his previous training and by his physical attainments to follow, and to confine his attention to such employment as the man might reasonably adopt if he lost his situation in the particular employment which he had hitherto followed. He has held as matter of fact that this man's chance of employment in his former line of work and in any other line of employment which he might reasonably hope to follow has not been impaired. That being his conclusion in fact, which we cannot review, I do not see how he could do anything else but end the compensation. Had he found otherwise it might have been proper to have pronounced a suspensory order, even though the man was earning as high or higher wages in some form of employment than he had earned before; but in view of the facts which the arbitrator has found, and which I think were just the facts it was his duty to consider, he arrived at a right result in law in my opinion when he terminated the compensation.

Lord Guthrie.—I am of the same opinion. Mr Robertson argued alternatively either for a suspensory order or for a remit. I agree with your Lordships that the appellant is not entitled to either. In regard to his crave for a suspensory order one keeps in view that the injury here was to the left hand. I think the right hand cases which were mentioned to us involved very different considerations. One also keeps in view that so far as the present position is concerned there has been complete recovery, because the face of the stump, for what it is worth, is not tender, and the stump is freely moveable towards the other fingers or in extension.

Coming to the arbitrator's findings, Mr Robertson admitted that, when the arbitrator found that the loss of the left thumb at the metacarpophalangeal joint did not impair the appellant's chance of employment in his former line of employment, he must have had before him direct evidence on that particular point. But he said that the other limb of the finding, namely, "or in any other line of employment which he might reasonably hope to follow," necessarily involves a purely conjectural element. That depends on what is meant by "any other line of employment." I take it that the Sheriff must have proceeded on the view, which Mr

Horne maintained, namely, that he was bound to consider such work as a brakesman's work or any analogous work, and certainly was not bound to consider such work as Lord Salvesen referred to, such as the work of a clerk. If you take it in that limited sense in relation to his chances in the open market, or labour market, then the conjectural element is reduced to a minimum, and the Sheriff must have had before him evidence which enabled him, without entering into the sphere of conjecture at all, to come to the conclusion at which he has arrived.

Mr Robertson maintained the proposition, which I think Mr Horne was correct in saying was not a universal one, namely, that wherever an injury was not only permanent—using the expression of the arbitrator—but also patent and serious, then a suspensory order was the proper course to follow. I think Mr Horne was well-founded in distinguishing between these three words. "Patent injury" and "permanent injury" are absolute terms; "serious injury" is a relative term, and the Sheriff has found in this particular case that although the injury was permanent and patent, it was not serious *quoad* the chance of this man getting employment in the open market in the limited sense in which I have defined it.

I agree with your Lordship in the chair that the way in which it is proposed to use the case of *Green* v. *Cammell, Laird, & Company*,[1] and Lord Justice Kennedy's opinion, is not justifiable, because that opinion, while stating a general rule, in terms excludes the notion that it was meant to be universal.

As to the other point—the proposal to remit—it seems to me that there is nothing to remit. The Sheriff was not entitled to narrate the evidence of opinion, he was bound to state the facts, and he has done so. His duty was to state what the result in his view was of that evidence of opinion taken along with the facts, and he has done so and is final.

THE COURT answered the question of law in the affirmative.

E. ROLLAND M'NAB, S.S.C.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

WILLIAM HODGE COATS AND OTHERS (Archibald Coats's Trustees), Petitioners.—*Macmillan, K.C.—C. H. Brown.*

No. 76.

May 27, 1914.

Coats's Trustees.

Trust—Administration—Special powers—Nobile Officium—Authority to trustee to purchase trust subjects at public roup.

Circumstances in which testamentary trustees were authorised to sell pictures, forming part of the trust-estate, by public roup at prices not less than those put upon them in a valuation, under the express condition that one of the trustees as an individual should be entitled to bid for such pictures as he might desire.

ON 17th December 1913 a petition for special powers was presented by William Hodge Coats, John Alexander Spens, and Ernest Symington Coats, the trustees acting under the trust-disposition and settlement of Archibald Coats of Woodside, Paisley.

1ST DIVISION.

[1] [1913] 3 K. B. 665.

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Lord Salvesen.

seriously affect his chances of employment and therefore his earning capacity, whereas a similar injury to a miner or an ordinary labourer would probably have no effect upon his following his ordinary occupation.

Here we are dealing with a man who was above the rank of an ordinary labourer. He was a brakesman—a class of work that is usually entrusted only to a man who in addition to manual ability has also a certain reliability in the discharge of his somewhat responsible duties. Now, the learned arbitrator has addressed his mind to the facts bearing upon the case, and it seems to me that he has correctly interpreted the decisions of the House of Lords as to the scope of the inquiry. He has not to consider whether the man's chances of employment would be affected if he were a workman of a totally different class from that in which he was. He has not to consider, say, in the case of a clerk whether a slight injury to the left hand might, if he were thrown out of employment and had to turn to ordinary manual labour, affect his chances of employment as a manual labourer. He has to consider in each case what kind of employment a man is fitted by his previous training and by his physical attainments to follow, and to confine his attention to such employment as the man might reasonably adopt if he lost his situation in the particular employment which he had hitherto followed. He has held as matter of fact that this man's chance of employment in his former line of work and in any other line of employment which he might reasonably hope to follow has not been impaired. That being his conclusion in fact, which we cannot review, I do not see how he could do anything else but end the compensation. Had he found otherwise it might have been proper to have pronounced a suspensory order, even though the man was earning as high or higher wages in some form of employment than he had earned before; but in view of the facts which the arbitrator has found, and which I think were just the facts it was his duty to consider, he arrived at a right result in law in my opinion when he terminated the compensation.

Lord Guthrie.—I am of the same opinion. Mr Robertson argued alternatively either for a suspensory order or for a remit. I agree with your Lordships that the appellant is not entitled to either. In regard to his crave for a suspensory order one keeps in view that the injury here was to the left hand. I think the right hand cases which were mentioned to us involved very different considerations. One also keeps in view that so far as the present position is concerned there has been complete recovery, because the face of the stump, for what it is worth, is not tender, and the stump is freely moveable towards the other fingers or in extension.

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E. ROLLAND M'NAB, S.S.C.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

WILLIAM HODGE COATS AND OTHERS (Archibald Coats's Trustees), Petitioners.—*Macmillan, K.C.—C. H. Brown.*

No. 76.

May 27, 1914.

Coats's Trustees.

Trust—Administration—Special powers—Nobile Officium—Authority to trustee to purchase trust subjects at public roup.

Circumstances in which testamentary trustees were authorised to sell pictures, forming part of the trust-estate, by public roup at prices not less than those put upon them in a valuation, under the express condition that one of the trustees as an individual should be entitled to bid for such pictures as he might desire.

1ST DIVISION.

ON 17th December 1913 a petition for special powers was presented by William Hodge Coats, John Alexander Spens, and Ernest Symington Coats, the trustees acting under the trust-disposition and settlement of Archibald Coats of Woodside, Paisley.

[1] [1913] 3 K. B. 665.

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Archibald Coats died on 11th May 1912. He was survived by two sons, Peter Mackenzie Coats, who died on 9th February 1913, and the petitioner, William Hodge Coats, and by three daughters, Mrs Helen Elizabeth Coats or Chichester, Mrs Margaret Gordon Coats or Harker, and Miss Evelyn Dudley Coats.

By his trust-disposition and settlement the testator, after providing for payment of his debts and funeral expenses, and the expenses of executing the trust, and of certain legacies and provisions, provided, *inter alia*, as follows:—"(*Fifth*) I direct my trustees as soon as possible after my decease after paying over or providing for the aforesaid debts legacies and provisions to make a division of all the residue of my real heritable personal and moveable property and estate in the following proportions and subject to the provisions after specified namely my trustees shall hold and apply in the manner hereinafter provided one-tenth part of my personal and moveable property and estate for behoof of my daughter Evelyn Dudley Coats of Fernhurst Haslemere in the county of Surrey and they shall divide all my real and heritable property and the remaining nine-tenth parts of my personal and moveable property and estate among my said sons Peter Mackenzie Coats and William Hodge Coats and my daughter Helen Elizabeth Coats or Chichester . . . and my daughter Margaret Gordon Coats or Harker . . . equally among them in the manner and subject to the conditions hereinafter specified And I suggest to my trustees that the principle of the aforesaid division shall be so carried out by my trustees that each of my said children shall receive as nearly as may be a proportion corresponding to the amount of their shares respectively of each stock security or other asset forming part of my estate and in the case of any heritable real or other property which may not be readily divisible the same shall (subject to the special provisions hereinafter contained with reference to Embley Park aforesaid) be valued by my trustees and shall be assigned by them according to such valuation as part of any share or sold or disposed of as they according to the best of their judgment shall decide."

By the eleventh purpose of his trust-disposition and settlement the testator empowered his trustees to sell all or any part of the trust-estate either by public roup or private bargain.

The petition set forth, *inter alia*, as follows:—"(6) The testator left moveable estate of the value of over £1,000,000, as well as considerable heritable estate. Part of his moveable estate consists of a valuable collection of pictures. The petitioners have had an inventory and valuation of the most valuable pictures in the collection made by Messrs Christie, Manson, & Woods, London, which is dated 28th May 1913, and which is produced herewith and referred to, and is printed in the appendix hereto. The total value put upon the pictures in said inventory and valuation is £34,577, but, in respect that the collection comprises *inter alia* pictures by artists whose works generally fetch high prices, there is a possibility that some, at all events, of the pictures might realise at a public sale higher prices than those put thereon in said inventory and valuation. (7) The petitioners obtained said inventory and valuation with the view of obtaining guidance as to the value of said pictures and the proper course to follow in dealing with them. They proposed to assign the said pictures according to said valuation to the

petitioner William Hodge Coats, who, with his wife and son, lived with the said now deceased Peter Mackenzie Coats at Woodside aforesaid, where said pictures are, and which house the trustees are also assigning to the petitioner William Hodge Coats. The said Mrs Helen Elizabeth Coats or Chichester and Miss Evelyn Dudley Coats, who is claiming her legitim out of the estate of the testator, have, however, represented to the petitioners that the best way to ensure that said pictures shall realise their fair value is to sell them by public roup. Looking to these representations, the petitioners deem it proper that, at any rate, all the more valuable of said pictures should be sold by public roup. The petitioner William Hodge Coats, however, desires an opportunity to bid for and purchase at the sale such of said pictures as he may see fit. (8) The petitioners, the said John Alexander Spens and Ernest Symington Coats, are satisfied that it is not in conformity with the intentions and wishes of the testator that the petitioner William Hodge Coats should be debarred from acquiring said pictures or such of them as he desires, and they believe it to be in the interests of the trust-estate that if said pictures be sold by public roup the petitioner William Hodge Coats should have the right to bid for them at a sale thereof. The petitioner William Hodge Coats concurs in these views. The said Mrs Helen Elizabeth Coats or Chichester, Mrs Margaret Gordon Coats or Harker, and Miss Evelyn Dudley Coats concur in desiring that the petitioner William Hodge Coats should have power to bid at the sale of said pictures. . . ."

The petitioners prayed the Court "to authorise said pictures to be sold by public roup by the petitioners as trustees foresaid, on such terms as they consider to be most beneficial to the trust-estate, under the express condition that the said William Hodge Coats as an individual is to be entitled to bid at said sale for all of said pictures, or such of them as he may desire, or alternatively, to authorise said pictures to be sold by public roup by the petitioners, the said John Alexander Spens and Ernest Symington Coats, as trustees foresaid, or by such other person as your Lordships may appoint, on such terms as they consider most beneficial to the trust-estate, under the express condition that the said William Hodge Coats as an individual is to be entitled to bid as aforesaid. . . ."

No answers were lodged. Counsel for the petitioners were heard before the First Division (without Lord Johnston) on 27th May 1914.[1]

WITHOUT delivering opinions, the Court pronounced an interlocutor in the following terms:—"Authorise the pictures specified and contained in the inventory and valuation by Messrs Christie, Manson, & Woods, London, No. 10 of process, to be sold by public roup in London at the said Christie, Manson, & Woods's, by the petitioners as trustees of the late Archibald Coats at prices not less than those specified in

[1] *The following authorities were referred to:*—Gillies v. Maclachlan's Representatives, (1846) 8 D. 487, Lord Cunninghame, at p. 493, footnote; Taylor v. Watson, (1846) 8 D. 400, Lord Mackenzie, at p. 406; Campbell v. Walker, (1800) 5 Ves. 677; Farmer v. Dean, (1863) 32 Beav. 327; Lewin on Trusts, (12th ed.) 575.

May 27, 1914.

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the said inventory and valuation, and under the express condition that the petitioner William Hodge Coats, as an individual, is to be entitled to bid at the sale for all of said pictures, or such of them as he may desire, and decern."

J. & J. Ross, W.S., Agents.

No. 77.

May 28, 1914.

Lord Blythswood v. Glasgow and So.-Western Railway Co.

THE REVEREND THE RIGHT HONOURABLE SHOLTO DOUGLAS CAMPBELL, BARON BLYTHSWOOD OF BLYTHSWOOD, Petitioner (Respondent).—*C. H. Brown.*

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY AND ANOTHER, Respondents (Reclaimers).—*Blackburn, K.C.—D. P. Fleming.*

Compulsory Powers—Railway—Expenses—Compulsory taking of lands—Expenditure of purchase price on land to be entailed—Expenses of entailing—Lands Clauses Consolidation (Scotland) Act, 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 79.

An heir of entail in possession of an entailed estate, part of which had been taken by a railway company under compulsory powers, presented a petition under the Entail Acts for authority to uplift the purchase money paid in respect of the lands so taken, and to apply it in purchasing a heritable property held by him in fee-simple, to be settled on the heirs under the entail. The prayer of the petition having been granted the petitioner was found entitled to expenses in so far as the railway company was liable therefor in terms of the Lands Clauses Consolidation (Scotland) Act, 1845.

Held that under section 79 of that Act the expenses of a remit to a man of skill as well as of a remit to a man of business, for reports appropriate to an entail petition, were expenses that fell to be paid by the railway company.

Held further, by the Lord Ordinary (Anderson), that the expense of service of the petition upon the next heirs of entail did not fall to be paid by the company.

1st Division. Junior Lord Ordinary.

ON 3rd April 1913 the Reverend the Right Honourable Lord Blythswood, as heir of entail in possession of the estate of Blythswood, presented a petition under the Entail Acts for authority to uplift and apply consigned money, consisting of two sums of £82, 11s. 2d. and £1221 respectively, being purchase money paid by the Glasgow and South-Western Railway Company and by the Caledonian Railway Company (referred to in this report as the "Railway Companies,") in respect of certain portions of the entailed estate of Blythswood acquired by these Companies under powers contained in certain Acts of Parliament.

The petition set forth, *inter alia*:—

"That the Lands Clauses Consolidation (Scotland) Act, 1845, section 67, provides that the purchase money or compensation which shall be payable in respect of any lands or any interest therein purchased or taken by the promoters of the undertaking from any heir of entail and paid into the bank shall be applied under the authority of the Court of Session, *inter alia*, in the purchase of other lands to be conveyed, limited, and settled upon the same heirs and the like trusts and purposes and in the same manner as the lands in respect of which such money shall have been paid stood settled.

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Lord Blythswood v. Glasgow and So.-Western Railway Co.

"That the Act 11 and 12 Vict. cap. 36, section 26, provides that an heir of entail in possession of an entailed estate may, with the approbation of the Court, uplift and apply consigned money, the proceeds of the sale of or compensation for damage done to any portion of the entailed estate under the authority of any Act of Parliament, or any portion of the said money, in permanently improving such entailed estate. . . .

"That the petitioner is desirous to uplift the foresaid consigned money, consisting of the foresaid sums of £82, 11s. 2d. and £1221, with the interest that has accrued thereon since the 13th day of November 1911 and the 27th day of December 1912 respectively, and to apply the same in or towards the purchase, and acquisition as part of the entailed estate, of the following lands presently held by the petitioner in fee-simple, to be conveyed, limited, and settled upon the same heirs and the like trusts and purposes, and in the same manner as the remainder of the said entailed estate stands settled, viz., All and Whole the lands of Greenend or Greenhead—[Here followed a description of the lands].

"That the foresaid lands and others now proposed to be acquired and settled as part of the entailed estates were acquired by the petitioner at a price of £1966, 2s. 9d., with entry at the term of Whitsunday 1909, that they extend to 8 acres and 31 falls or thereby, and lie into the entailed estate, so that the acquisition of the lands would permanently improve the said estate. . . .

"That the procedure in this application is regulated by the Entail Acts, and especially by 38 and 39 Vict. cap. 61, sec. 12, and by the relative Acts of Sederunt."

The petition was served on the three next heirs of entail, and answers were lodged for Major-General Douglas, the next heir of entail, who did not admit that the entailed estate would be permanently improved by the acquisition of the lands which the petitioner proposed to purchase, and submitted that the price to be paid therefor was excessive.

On 11th July 1913 the Junior Lord Ordinary (Hunter), after consideration of a report by a man of business to whom a remit had been made in ordinary form, and of a report by a man of skill to whom a remit had been made to value the lands which the petitioner proposed to purchase, granted the prayer of the petition.

On 1st November 1913 the Lord Ordinary approved of a conveyance of the lands by the petitioner in favour of himself as heir of entail, and found the Railway Companies "liable to the petitioner in expenses, in so far as they are liable therefor in terms of the Lands Clauses Consolidation (Scotland) Act, 1845." *

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* The Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), sec. 79, enacts:—"In all cases of monies deposited in the bank under the provisions of this or the special Act . . . it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,) the expense of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and of re-entailing any of such lands, and incident thereto,

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Objections were taken by the Railway Companies, *inter alia*, to the following charges allowed in the Auditor's report on the petitioner's account of expenses (1) a charge of 11s. for service of the petition on the heirs of entail; (2) charges in connection with the remits to a man of business and to a man of skill, but only in so far as these applied to the employment of a man of skill.

On 14th March 1914 the Junior Lord Ordinary (Anderson) pronounced an interlocutor, *inter alia*, sustaining objection (1) and repelling objection (2).*

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and also the expense of obtaining the proper orders for any of the purposes aforesaid . . . and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants . . ."

* "OPINION.— . . . The Court granted the prayer of the petition, and authorised the petitioner to uplift the money so consigned in bank in order that he might apply it as he desires to do. The petitioner was found entitled generally to his expenses against the respondents, and he lodged an account of expenses, which has been dealt with by the Auditor, and the objections now stated have reference to the report which the Auditor has made upon the taxed account of expenses.

"I have had occasion before in dealing with cases of this character to advert to the general policy of the Lands Clauses Consolidation Act of 1845. The scheme of the Act, shortly stated, was just this, to saddle the promoters of the undertaking with the expenses to which the seller of the land has been put in connection with the reinvestment of the purchase price which he received for the lands taken by the promoters. I think that under the Act of Parliament I am bound to find that all expenses reasonably incurred by the owner of the land must be borne by the promoters of the undertakings who acquired the lands. Now, applying that principle to the objections in question, I have to consider the four objections which were taken to the Auditor's report by the respondents. The first objection has reference to the charges, amounting only to 11s., relating to the service of the petition upon the next heirs of entail. That amount is, as I have stated, a small sum, but the principle which regulates this charge is not unimportant. The petitioner is, as I have stated, entitled to all reasonable expenses incurred by him in reinvesting the money consigned in bank; but it is not necessary that the reinvestment should be in entailed land, and accordingly the Court, as I understand the decisions, have determined that where the reinvestment falls to be made in entailed land the petitioner in such a case will not be entitled to obtain from the Railway Company the expense of service upon the next heirs of entail. That seems to me to be decided in terms by the case of *Lady Willoughby de Eresby* in 13 R., at page 70, because it was there held that, no advertisement of the petition or service thereof upon the next heirs of entail being required by the Lands Clauses Consolidation Act, the expenses connected therewith fell to be borne by the petitioner and not by the promoters of the undertaking; and the reason is that it is not necessary that moneys obtained in the way I have suggested should be reinvested in entailed estates; and if the investment falls to be made in that particular way, then it is only right that the petitioner should bear the special expenses which are necessarily incurred in making such an investment. Accordingly, I decide, as I must do, holding that the decision is perfectly applicable to the present case, that the objection which is directed against the charges made for the service of the petition is well founded and must be sustained.

"But then, when I come to the next objection, which has reference to the fee paid to a man of skill, I think the situation is quite different. This charge has been considered by the Auditor, and has been sustained

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Lord Blythswood v. Glasgow and So.-Western Railway Co.

The Railway Companies reclaimed, and the case was heard before the First Division (without Lord Johnston) on 16th May 1914.

Argued for the reclaimers;—An heir of entail was not bound to reinvest consigned money in the purchase of land to be entailed, and if he chose to do so the extra expense thereby incurred fell to be borne by him. Only reasonable charges were payable by the Companies, and the purposes of the Lands Clauses Act[1] could have been carried out without a remit to a man of skill, whose report was rendered necessary by steps taken by the petitioner under the Entail Acts.[2] The respondents should not, therefore, be ordered to pay the expenses of procedure which was necessary under these Acts, but not under the Lands Clauses Act.[3] In the present petition there would have been no inquiry into the sufficiency of the value of the lands in question if the next heir of entail had not lodged answers raising that question.

Argued for the respondent;—The Lord Ordinary's decision with reference to the expenses which he had allowed was in accordance with established practice,[4] and was warranted as "reasonable" by the wide terms of section 79 of the Lands Clauses Act. Section 67 of that Act made it necessary that the Court should remit to a man

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by him; and it seems to me that although it is the case that by statute there must always be a man of business appointed in connection with those entail petitions, it does not necessarily follow that it is an unreasonable thing to employ a man of skill in connection with a matter of this sort. That is a matter which is entirely for the Auditor, and I must assume that he has considered the case upon the footing that the land which the man of skill was examining was proposed to be entailed. Accordingly, I do not see my way to interfere with the decision which the Auditor has pronounced upon this matter; and I do so simply upon this ground that it has not been made out to me that it was an unreasonable thing to employ a man of skill in connection with the proposed purchase.

"All that I was asked to do in connection with the charges in the account in connection with the employment of a man of business was to say what portion, if any, of the charges were applicable to the employment of a man of skill and what were not. I am not going to attempt to enter into such an examination of the charges made in connection with the employment of the man of business, even if I had thought it was unreasonable to employ a man of skill. But as I have decided in connection with that matter that it was not unreasonable to employ him, the charges in connection with the man of business' employment must be sustained *in toto* on this ground of decision. [His Lordship then dealt with other objections, and continued]—

"The result of the whole matter is that I sustain the objection to the extent of 11s., and *quoad ultra* I repel the objections, with modified expenses of two guineas against the respondents."

[1] Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 19), secs. 67 and 79.

[2] Entail (Scotland) Act, 1882 (45 and 46 Vict. cap. 53), sec. 23 (6).

[3] Erskine v. Aberdeen Railway Co., (1851) 14 D. 119; Drummond Hay v. North British Railway Co., (1873) 1 R. 180; Lady Willoughby de Eresby v. Callander and Oban Railway Co., (1885) 13 R. 70, Lord President Inglis, at p. 73; Stirling Stuart v. Caledonian Railway Co., (1893) 20 R. 932.

[4] Lady Willoughby de Eresby v. Callander and Oban Railway Co., 13 R. 70, Lord President Inglis, at p. 73; Smith on Expenses, 357.

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of skill in such a petition as the present, because it required purchase money in the case of lands taken from an heir of entail to be applied under the authority of the Court, and it was by a remit to a man of skill that the Court obtained the information necessary for the proper exercise of its authority.[1]

[No argument was presented to the Court with regard to the charge of 11s. for service on the next heirs.]

At advising on 28th May 1914,—

LORD PRESIDENT.—Although none of the cases cited to us was directly in point, all of them afford capital illustrations of the rule by which our decision must be governed. That rule was never better laid down than in the language of the Lord President (Boyle) in one of the earliest cases, *Erskine* v. *Aberdeen Railway Company*,[2] where he said, "We can award no expenses that the statute does not award. . . . We have no power to award any expenses against the Company except those of a question with the Company." If, therefore, the statute expressly warrants the charges which are here challenged, they must be allowed. If the statute does not expressly sanction these charges, they must be refused. I proceed, then, to consider whether or no the items in the appendix, which were made the subject of controversy here, are authorised by the statute.

The petitioner, who is heir of entail in possession of the estate of Blythswood, asks the authority of the Court to uplift and apply a sum of money due to him by the Railway Companies as compensation for a portion of the Blythswood estate taken by virtue of their compulsory powers. His proposal is that the money be applied in the purchase of a heritable property of which he is the fee-simple proprietor, to be settled when purchased upon the same series of heirs and in the same manner as the remainder of the Blythswood estate.

Now, this proposal is directly sanctioned by the Lands Clauses Act, 1845,[3] for, by section 67, it is provided that compensation money may be applied "in the purchase of other lands, to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled." There is, therefore, express authority for this mode of applying the compensation money and, if the petitioner's proposal is carried into effect, then the statute expressly provides that he shall have from the Railway Company all expense necessarily incurred thereby, because, by the 79th section, it is provided that it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters, that is to say, the expenses of the reinvestment of the compensation money "in the purchase of other lands, and of re-entailing"—that, of course, ought to be entailing—"any of such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid."

The Railway Companies, however, challenged certain items here as not

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[1] Entail (Scotland) Act, 1882, sec. 23 (6).

[2] 14 D. 119, at p. 120.

[3] 8 and 9 Vict. cap. 19.

in practice incurred when compensation money is applied as is proposed under this petition. They direct special attention to charges incident to a remit to a man of skill and say that, while a remit to a man of business is ordinary and proper expenditure, sanctioned by practice and principle, remits to a man of skill fall outwith the ordinary practice. We thought it necessary to confer with the Auditor before giving any opinion upon this question. He assures us that, in an application such as the present, it is the regular practice to remit not only to a man of business but also to a man of skill; and, if that is so, then the statute expressly warrants this expenditure and we ought to allow these items. I come to the conclusion, therefore, that the objections stated by the Railway Companies ought to be repelled and, for different reasons no doubt, that the interlocutor of the Lord Ordinary ought to be affirmed.

I should say that I have formed no opinion, and express no opinion, upon the small item, which may raise a question of principle, disallowed by the Lord Ordinary, with regard to which we heard no argument.

LORD MACKENZIE and LORD SKERRINGTON concurred.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—HOPE, TODD, & KIRK, W.S.—STRATHERN & BLAIR, W.S.—Agents.

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Inland Revenue v. Juridical Society of Edinburgh.

RICHARD FARMER (Surveyor of Taxes, Edinburgh), Appellant.—*Sol.-Gen. Morison—R. C. Henderson.*
THE JURIDICAL SOCIETY OF EDINBURGH, Respondents.—*Anderson, K.C.—A. M. Mackay.*

Revenue—Income-Tax—Exemption—Literary or scientific institution—Income-Tax Act, 1842 (*5 and 6 Vict. cap.* 35), *Schedule (A), Rule No. VI.*

The Income-Tax Act, 1842, Schedule (A), Rule No. VI., exempts from income-tax "any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded, by lectures or otherwise."

The Juridical Society of Edinburgh, which was composed of persons who were, or intended to become, Advocates or Writers to the Signet, maintained a library chiefly of law books, and published from time to time a style book of legal forms. It also held debates on legal questions, attendance at which was optional.

Held that the Society's premises were not exempt from income-tax under the above provision, in respect that the Society was not a literary or scientific institution but an association whose main objects were professional.

1ST DIVISION.

THE JURIDICAL SOCIETY OF EDINBURGH appealed to the General Commissioners of Income-Tax for the county of Edinburgh, against an assessment for the year ending 5th April 1911, under Schedule (A) of the Income-Tax Acts on £90, being the net annual value of their premises at 40 Charlotte Square, Edinburgh, the question being whether the Society was exempted as a literary or scientific insti-

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tution in the sense of the Income-Tax Act, 1842, Schedule (A), Rule No. VI.*

The Commissioners sustained the appeal, whereupon the Surveyor of Taxes asked for and obtained a stated case on appeal.

The case set forth that the following facts were admitted or proved:—

"2. The premises are owned and occupied by the Society, and are used solely for the purposes of the Society, to which purposes they are legally appropriated and applied by virtue of the disposition of the property to the trustees for the Society, and of the rules of the Society. . . .

"3. The premises consist of two main rooms, one being a hall in which the Society's meetings are held, the other containing a library mainly but not exclusively of law books. The use of the library is confined to members of the Society, and the books may not be borrowed out. There are also five rooms on an upper floor inhabited by the Society's caretaker and his family free of rent. There is also an upper room which members in lesser numbers than a full meeting of the Society may use for law debates, or for reading and hearing essays. The caretaker is employed to protect and clean the premises. He performs no other duties for the Society.

"4. The Society was formed on 27th February 1773 by twelve gentlemen who, from a consideration of the advantages resulting from societies for the cultivation of any science, associated themselves into a society for the study of law, and approved of rules for its regulation. The members of the Society were at first drawn almost exclusively from apprentices to Writers to the Signet.

"5. From its institution the Society's procedure was by way of compulsory weekly meetings during the session of the Supreme Court to consider subjects suitable to its purposes or objects. The subjects considered by the Society at its institution were purely legal, but a few years later there was introduced the practice of hearing literary essays read and of the discussion of speculative questions. After a few years these discussions ceased to be part of the syllabus, but the periodical debates and essays on subjects of general legal interest were maintained. Formal pleadings upon hypothetical cases were afterwards introduced. Attendance at meetings was at first compulsory on all members under sanction of expulsion. In or about 1784 the sanction of expulsion ceased, and thereafter three years' attendance earned the privilege of 'extraordinary membership,' whereby attendance became voluntary. Up till 1904, when attendance became voluntary, ordinary members of the Society were bound to attend all the weekly meetings for the purposes mentioned under sanction of substantial fines.

"6. Besides the duties above mentioned, the early members un-

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* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35) Schedule (A), Rule No. VI. provides for exemption from the duties chargeable under that Schedule, *inter alia*, in the following case, viz.:—"For the duties charged on . . . any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded, by lectures or otherwise; provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same."

dertook two matters. The one was the conception and execution of the system of styles, and the other was the formation of a library. The Society from its institution was anxious to be possessed of such books and papers as might be of use to the members in their studies, but having no premises of its own it had no convenience for the formation of an extensive library. In 1775 the Society recommended the treasurer to purchase a copy of Erskine's Principles for the use of members present at the meetings. This formed the foundation of the library, which was gradually augmented, and in 1797 it received an addition, consisting of the books belonging to the Logical Society, with which the Juridical Society then formed a union, and which was founded in 1793 for purposes similar to those of the Juridical Society.

"7. The formation of a collection of styles was one of the first matters that received the attention of the Society, and on 19th June 1773 a committee was appointed to make up a full style book. This compilation was not intended for publication but only for the use of the members. It, however, formed the basis of the work which was afterwards published in 1787 under the name of "A System of Conveyancing." Various editions have from time to time been published to keep the styles up to date. The sixth edition was published in 1907 and 1908. The various editions occupied at and about their various dates a very large portion of the time and energies of the members, and these were given voluntarily by the members, and either gratuitously, or in some cases, for an honorarium awarded by the Society, but such honoraria were entirely incommensurate with the work and experience required.

"8. The preface to the first edition of the first volume (1786) of the styles, *inter alia*, states :—'The Juridical Society has existed for about thirteen years. The improvement of the members in the knowledge of law and conveyancing was the original design of this institution; an object which, being in itself important, has been invariably prosecuted by the Society. . . . The private conveniency and benefit of the individual members suggested originally the design of the present compilation. In its progress, however, it occurred to the Society that the publication of the styles might be attended with some degree of utility to the public. In this view they are now humbly offered.'

"9. The Society suffered considerable inconvenience from not having premises of its own, but in 1829 it purchased the property, No. 40 Charlotte Square, which it still occupies, and which forms the subject of the present case.

"10. In 1830 a committee was appointed to report whether it would be proper or expedient, *inter alia*, to establish lectures in connection with the Society on detached branches of the public law and the law of Scotland. At a special meeting of the Society the report was unanimously approved of. The conditions of the lectureship provided that the classes should be opened to students of law of every description; that a fee of £2, 5s. should be charged; and that the lecturer should receive the use of the Society's hall. No receipts of money or profits were taken by the Society for these classes. A lecturer thereafter was appointed, and the first course of lectures commenced in November 1831. The class was conducted with considerable success till 1847. In the following year the lecturer resigned. No successor was appointed, and though the lec-

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tures were never formally discontinued the lectureship remained in abeyance.

"11. In 1870 it was proposed to resume the lectures, which had fallen into abeyance in 1848, and after consideration a series of forty lectures by different lecturers on separate subjects was resolved on instead of a course of lectures by one person. The lectures were so well attended that it was decided to have another course in the next session, but, although a series was arranged, only two lectures were delivered. Since that date no lectures open to the public or to students of law outwith the Society have been delivered.

"12. At an extraordinary meeting of the Society, held on 9th November 1904, the laws were revised and adopted. . . .

"13. The laws of the Society as then adjusted (which in this respect are the same as in 1848) state the objects of the Society to be 'the advancement of the science of law and the pursuit of general literature.'* The Society is strictly exclusive, and none but members are entitled to be within the premises (bye-law 2). The Society is a voluntary one, unincorporate, and without formal registration of any kind. Membership of the Society does not confer any professional qualification or distinction.

"14. Membership of the Society is restricted to (*a*) members of the Faculty of Advocates; (*b*) Writers to the Signet; (*c*) gentlemen who state on honour that they intend to become members of the Faculty of Advocates, or that they are, or have been, apprentices to Writers to the Signet, or intend to enter that profession. If any member admitted under a statement of intention under heading (*c*) fail within six years of admission to the Society to become a member of the Faculty of Advocates or a Writer to the Signet, he ceases to be a member unless satisfactory reasons for delay are given. Candidates for admission apply by petition addressed to the secretary. The committee, if unanimous, and if no objections have been lodged, has power to admit the petitioner after notice has been given on the notice-board in the Society's premises. In the event of the committee not being unanimous, or if any objec-

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* The laws of the Society contained, *inter alia*, the following provisions:—

"I.—PURPOSES OF THE SOCIETY.

"1. The objects of the Society shall be the advancement of the science of law and the pursuit of general literature.

"II.—MEMBERS.

. . . . . .

"4. Petitions for admission shall be received only from members of the Faculty of Advocates, or Writers to the Signet, or gentlemen who state on honour that they intend to become members of the Faculty of Advocates, or that they are, or have been, apprentices to Writers to the Signet, or intend to enter that profession.

. . . . . .

"IX.—DEBATES, LECTURES, &C.

"28. If any members of the Society desire to have the use of the upper room for law debates or for reading and hearing essays, such use shall be granted upon their making requisition in writing to the secretary.

"29. The committee shall have power to arrange for lectures or addresses to be delivered on legal or literary subjects of interest to the members of the Society."

tions have been lodged, then the election to membership is decided by vote or ballot at the next general meeting of the Society.

"15. Members pay an entrance fee of £5, 5s., and an annual quota of £2, 2s. in each of the first four years of membership; or alternatively, a single composition payment of £12, 12s. Any member failing to pay the dues exigible by the Society ceases to be a member, and forfeits all rights to the property of the Society, and his name is struck off the roll; but he may be reinstated by the committee on payment of arrears if he give a satisfactory explanation in writing.

"16. The business of the Society is conducted, subject to the control of the Society in general meeting, by the committee, consisting of the president, treasurer, secretary, and librarian, and five other members elected by the Society at the annual general meeting. The Society's property is now vested in the office-bearers as trustees for the Society and subject to its directions.

"17. For the year ended 31st October 1910 (which may be accepted as typical) the revenue of the Society was . . . £97, 1s. 6d.; the expenditure . . . £152, 1s. 4d. The deficiency of £54, 19s. 10d. was made up out of capital accumulated from previous surpluses.

"18. The members of the Society make very frequent and full use of the premises and of the library for the study of law, private study and research, the preparation of articles, lectures, text-books, &c., to be published and delivered by members and tending to advance the science of law, and the revision periodically of the Juridical Styles.

"19. The Society in 1863 first appointed a committee to consider and report upon a bill then before Parliament to amend the law of procedure (which bill ultimately led up to the Court of Session Act, 1868). Since that time it has appointed committees upon bills before Parliament affecting either judicial procedure or conveyancing.

"20. In 1843 an Act (6 and 7 Vict. cap. 36) was passed exempting lands and buildings occupied by scientific and literary societies from the payment of local rates. Since 1844 till the present time the Society has enjoyed exemption from local rates. It was proved before the Commissioners that a certificate was in 1845 obtained from the Lord Advocate's Depute for certifying the rules of friendly societies (the proper authority under the said Act), to the effect that the Society was entitled to the benefit of the Act; and it was likewise proved that such certificate had been duly lodged with the Clerk of the Peace for the burgh of Edinburgh, although the principal thereof cannot now be found and produced.

"21. From the imposition of property and income-tax until the year 1909-10 no assessment to tax has been made upon the Society. In the said year 1909-10 an assessment was laid on, the Assessor being of opinion that the premises were liable to property tax, and that they were in past years omitted from assessments erroneously or through oversight. The tax for that year was paid, the treasurer being at the time ill and having delegated his duties to clerks. Otherwise no property tax has ever been paid by the Society."

The contentions of the parties were as follows:—

For the Society it was contended:—"The Society is a literary or scientific institution within the meaning of 5 and 6 Vict. cap. 35, section 61, Schedule A, Rule VI. The property of the Society on

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which the Assessor proposes to assess the Society under Schedule A for income-tax consists of premises devoted solely to the purposes of the institution, in which no payment is made or demanded for any instruction there afforded, and it is not occupied by any officer of the Society, or other persons paying rent. The laws of the Society declare (Law I.):—'The objects of the Society shall be the advancement of the science of law and the pursuit of general literature.' There is nothing in the remaining rules inconsistent with that governing purpose, and it has not been proved that the activities of the Society or the application of its said premises or of its funds has in any degree transgressed or exceeded that general purpose. From the imposition of income-tax until the year 1909-10 no assessment to income-tax, Schedule A, has been made upon the Society, and there are no recent changes of circumstances to render the Society liable to be assessed now. The Society has enjoyed immunity from local rates for sixty-eight years upon an almost identical exemption clause, viz., that in the 1843 Act. The Society's property is devoted solely to the study of law, literature, and research work, and the Society has, by the publication of the Juridical Styles, advanced the science of law in Scotland. The Society's whole income is necessary for, and is expended in, the upkeep of the buildings and the library, which are themselves necessary for the promotion of the objects of the Society. The Acts, 5 and 6 Vict. cap. 35, and 16 and 17 Vict. cap. 34, do not require as a requisite for exemption any definite alienation of the property in question. The rule No. VI. of Schedule A of the first-mentioned Act does not require any particular type of constitution or legal personality. The Society has a legal status. The Society referred to the case of *Inland Revenue* v. *Forrest* (*Institute of Civil Engineers*).[1]"

For the Surveyor of Taxes it was contended:—"(*a*) That the Society is not a literary or scientific institution within the meaning of No. VI. of Schedule A of 5 and 6 Vict. cap. 35, but is to all intents and purposes a professional association formed to facilitate intercourse among its members, to provide a library for them, and to assist them in legal studies. (*b*) That the Society has no legal status as a society, but is simply a voluntary association of individual members of the profession of law. (*c*) That the building in question at 40 Charlotte Square, Edinburgh, is not definitely alienated for literary or scientific purposes, but remains the property of certain persons who are at liberty to realise it at any time and divide the proceeds amongst themselves. (*d*) That the 1843 Act (6 and 7 Vict. cap. 36) has no reference to income-tax. The Surveyor referred to the case of *Inland Revenue* (*Sulley*) v. *Royal College of Surgeons, Edinburgh.*[2]"

The case was heard before the First Division (without Lord Johnston) on 28th May 1914.[3]

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[1] (1890) 15 App. Cas. 334. [2] (1892) 19 R. 751, 3 Tax Cases, 173.

[3] *For the appellant (the Surveyor of Taxes) reference was made to the following authorities:*—Inland Revenue v. Royal College of Surgeons, Edinburgh, 19 R. 751; Inland Revenue v. Magistrates of Dundee, (1897) 24 R. 930; Mayor, &c., of Manchester v. M'Adam, [1896] A. C. 500; also the following cases under the Scientific Societies Act, 1843 (6 and 7 Vict. cap. 36), sec. 1, viz.:—The Queen v. Brandt, (1851) 16 Q. B. 462; The Queen v. Gaskell, (1851) 16 Q. B. 472; and the following cases under the Customs and Inland Revenue Act, 1885 (48 and 49 Vict. cap. 51),

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LORD PRESIDENT.—The Surveyor of Taxes, in this case, appeals against a determination of the Commissioners of Income-tax exempting the Juridical Society from assessment for income-tax on the ground that it is a "literary or scientific institution," and, if this can be accurately predicated, it is conceded that the Society ought to be exempted.

There is no definition in any of the statutes of what is meant by a "literary or scientific institution," but there is an admirable description given by Lord M'Laren in the case of *Inland Revenue* v. *Royal College of Surgeons of Edinburgh*,[1] which, when examined, will be found in all its branches to exclude the present respondents, and his Lordship proceeds further to draw in very accurate and scientific terms the distinction between such an institution as the Juridical Society or the Royal College of Surgeons and the Institute of Civil Engineers. Moreover, each one of the particulars which Lord Watson enumerates in his very elaborate judgment in the Institute of Civil Engineers' case,[2] is distinctive of the Institute, but has no sort of relation, I think, to the Juridical Society. It is quite true that the rules of the Society start remarkably well, because they set out as the objects to be achieved "the advancement of the science of law and the pursuit of general literature." No doubt, to some extent, the science of law is advanced and the pursuit of general literature is encouraged by the Society, but when one proceeds further and finds that every student of pure law—law for its own sake—and every lover of literature or science, unless he be an Advocate or a Writer to the Signet, or a person intending to become either the one or the other, finds its doors closed against him, as he will by the 4th law, then it seems to me extremely difficult to predicate of such a society either that it is designed to achieve the objects which it purports to have in view, or that it can in any sense be called a "literary or scientific institution." We are not left to grope in the dark as to the present scope of its operations. They are very clearly set out in the 18th article of the case, which concludes with an object on which some stress was laid by Mr Mackay, to wit, the production and periodical revision of the Juridical Styles. No doubt that may be a contribution to the science of law, but it is a contribution which would never have been made except by men who, in making it, were desirous of providing better and improved implements for the practice of their own profession. It seems to me that, reading the whole of the articles of this Special Case, which sets out the objects and purposes of the Society and the mode by which it seeks to achieve its aim, you reach the conclusion which is admirably expressed in the first of the contentions for the Surveyor of Taxes, that it is "a professional association formed to facilitate intercourse among its members, to provide a library for them,

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sec. 11 (3), viz.:—Society of Writers to the Signet v. Inland Revenue, (1886) 14 R. 34; Inland Revenue v. Forrest, (1890) 15 App. Cas. 334; *in re* Royal College of Surgeons of England, [1899] 1 Q. B. 871.

For the respondents reference was made to the following authorities:—Inland Revenue v. Royal College of Surgeons, Edinburgh, 19 R. 751, *per* Lord M'Laren, at p. 757; Inland Revenue v. Forrest, 15 App. Cas. 334; Churchwardens of Birmingham v. Shaw, (1849) 10 Q. B. 868.

[1] 19 R. 751. [2] Inland Revenue v. Forrest, 15 App. Cas. 334.

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and to assist them in legal studies." If that correctly summarizes the aims and objects of the Society, then it appears to me that the test laid down by Lord Adam in the *Royal College of Surgeons'* case[1] is easily applicable. You can then predicate of it that it is in the main professional and only incidentally scientific, and not in the main scientific and only incidentally professional.

For these reasons, I think that the Commissioners have come to a wrong conclusion here, that their determination ought to be recalled, and that we ought to find that the premises at 40 Charlotte Square are liable in assessment for income-tax.

LORD MACKENZIE.—I am of the same opinion. The question that we have here to determine is whether the Juridical Society is a "literary or scientific institution" within the meaning of the Act of 1842. Unless it is, it is not entitled to the exemption contended for. The test to be applied I take from the opinion of Lord Adam in the case of *Inland Revenue* v. *Royal College of Surgeons of Edinburgh*,[1] a case which was decided under the Act with which we are here dealing. Lord Adam says:—"If the main and leading object of the institution be that of advancing the interests of a profession, then the fact that it may incidentally, and as a consequence, promote science will not the less make it other than a professional institution, and as such not entitled to the exemption claimed." When one turns to the rules of the Society, one no doubt finds that the purpose is set out in the first rule in a manner which is favourable to the contention for the Society, because it is there stated that "The objects of the Society shall be the advancement of the science of law and the pursuit of general literature." But of course it will not do to stop there. It is necessary to ascertain how far the rules of the Society and the practice of the Society do really carry out what may be called the preamble in this instance. As your Lordship has already pointed out, the membership is strictly limited, and that has great weight with me, because, although no doubt the mere fact that there is a limited membership does not necessarily debar those members from the pursuit of law as a pure science, I certainly think it does throw considerable light upon the use which is made of the Juridical Society. If the membership had been open to all the world, and if it consisted of persons who out of purely altruistic motives had desired to study law as a pure science, that might have had some effect upon our decision. The membership is strictly limited to members of the Faculty of Advocates, Writers to the Signet, and gentlemen who make a statement that they intend to become members of one or other of these branches of the profession. In regard to the lectures, these have ceased for a long number of years, since 1870. With regard to one of the matters upon which stress was laid, namely, the publication of the Juridical Styles, as being evidence of a desire on the part of the Society to benefit the profession at large, I would call attention to what is said in article 8 of the case. The original idea seems to have been that of "the private conveniency and benefit of the individual

[1] 19 R. 751.

members." It was that idea which originally suggested the design of the compilation. "In its progress, however," it is stated, "it occurred to the Society that the publication of the Styles might be attended with some degree of utility to the public." This statement, I think, exactly fits Lord Adam's test, and shows that it was merely in consequence of what was being done in the professional interests of the members that there was an indirect benefit to the public.

The facts in the present case are in marked contrast with those set out in the case upon which the respondents mainly relied, *Inland Revenue* v. *Forrest*.[1] It was there proved that the primary purpose of the Institute was the general advancement and promotion of science; here the primary purpose of the Juridical Society is professional, and accordingly I think the Society is not entitled to exemption.

LORD SKERRINGTON.—I agree with your Lordships. The case is one in which there has been a copious citation of authorities, but I think that it admits of being decided without any reference to previous cases. The question, as I view it, is one purely of fact. I do not think that any person who is acquainted with the ordinary use of language, and who reads this Special Case, would assert of the Juridical Society that it is either a literary or a scientific institution. I say that without the slightest disrespect to the Commissioners who came to an opposite conclusion, because if they had felt themselves at liberty to decide this question, as I think it ought to be decided, as a question of common sense, and if they had not been embarrassed by legal authorities, they would probably have come to the same conclusion as I do. I do not attach very great importance to the exclusive character of the membership of this Society, because there is no reason why a small fraction of the legal professional men of a comparatively small country like Scotland should not band together for the laudable purposes expressed in Law 1 of the Rules and Laws of the Juridical Society, namely, the advancement of the science of law and the pursuit of general literature. The only question before us is whether the Society, as it exists at present, answers the description of being a literary or scientific institution. I am disposed to think that if the Society should at some future time live up to the high ideal expressed in its first rule, it may be able to come back to us and, upon a different state of facts, obtain a decision to the opposite effect from that which we are about to pronounce.

THE COURT reversed the determination of the Commissioners, found that the premises in question were assessable to income-tax, and remitted to the Commissioners to assess the same.

SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—E. M. WEDDERBURN, W.S.—Agents.

[1] 15 App. Cas. 334.

No. 79.
May 30, 1914.

ALEXANDER COOK, Pursuer (Appellant).—*Moncrieff, K.C.*—*Fenton.*
THE BONNYBRIDGE SILICA AND FIRECLAY COMPANY, LIMITED, Defenders (Respondents).—*Horne, K.C.*—*Aitchison.*

Cook v. Bonnybridge Silica and Fireclay Co., Limited.

Process—Appeal—Competency—Master and Servant—Action of damages by father of deceased workman against son's employers—Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *secs.* 13 *and* 14.

The Workmen's Compensation Act, 1906, enacts, sec. 14, that, where an injured "workman" raises an action in the Sheriff Court against his employer concluding for damages under the Employers Liability Act, 1880, or alternatively under that Act or at common law, the action "shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law." Sec. 13 enacts:—"Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable."

Held that the limitation of appeal in sec. 14 with regard to actions at the instance of workmen was made applicable by sec. 13 to actions at the instance of the persons specified in the latter section; and accordingly that an appeal (not on a question of law) in an action of damages for the death of a workman, brought by his father against his employers at common law or under the Employers Liability Act, 1880, was incompetent.

Dicta in *Lawrie* v. *Banknock Coal Co., Limited*, 1912 S. C. (H. L.) 20, *followed.*

2D DIVISION. Sheriff of Stirling, Dumbarton, and Clackmannan.

(REPORTED *ante*, 1911 S. C. 177.)

On 2nd May 1910 Alexander Cook, labourer, Grangemouth, brought an action in the Sheriff Court at Falkirk against the Bonnybridge Silica and Fireclay Company, Limited, concluding for damages of £500 at common law, or alternatively of £200 under the Employers Liability Act, 1880, in respect of the death of his son, who, it was averred, was, while working in the defenders' employment, killed by an accident due to the fault of the defenders or their manager.

The procedure in the Sheriff Court up to the date of a prior appeal by the defenders is set forth in the report in 1911 S. C. 177. As a result of that appeal the case was remitted to the Sheriff-substitute to proceed with the proof allowed by a previous interlocutor in the Sheriff Court.

The proof having thereafter been led, the Sheriff-substitute (Moffatt), on 6th October 1911, pronounced an interlocutor assoilzieing the defenders, and this interlocutor was, on 2nd December 1911, adhered to by the Sheriff (Lees).

The pursuer thereupon appealed to the Court of Session, and the case was heard before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Hunter) on 22nd, 23rd, and 31st January, and 3rd March 1914. At the hearing counsel for the defenders objected that, in respect of sections 13 and 14 of the Workmen's Compensation Act, 1906, the appeal was incompetent; and counsel were heard both on this point (which alone is the subject of this report) and on the merits.

At the hearing the undernoted authorities were referred to on the question of the competency of the appeal.[1]

At advising on 30th March 1914,—

LORD SALVESEN.—[After dealing with the merits and holding that the judgment appealed from was right]—I have dealt with the appeal on the merits on the footing that it is a competent appeal. I reserve my opinion on this point, for as the same question can probably never arise again it is unnecessary to pronounce upon it. All I say is that the grounds of the decision of the First Division in *Lawrie's* case[2] appear to me inconsistent with the views of several of the noble and learned Lords who considered the appeal.

LORD GUTHRIE.—On the question of competency I agree with Lord Hunter's opinion, which I have had an opportunity of reading. [His Lordship then dealt with the merits, and held that the judgment appealed from was right.]

LORD HUNTER.—On a careful perusal of the opinions delivered by the House of Lords in the case of *Lawrie* v. *Banknock Coal Company, Limited*,[3] I am unable to hold that the present appeal is competent. By section 14 of the Workmen's Compensation Act, 1906, it is provided—[his Lordship read the section]. In terms of the definition clause in that Act (section 13) "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants or other person to whom or for whose benefit compensation is payable." By section 30 of the Sheriff Courts (Scotland) Act, 1907, it was provided that cases above £50 in value originating in the Sheriff Court "other than claims by employees against employers . . . for damages under the Employers Liability Act, 1880, or alternatively at common law or under the Employers Liability Act, 1880," may be remitted to the Court of Session for jury trial. Section 52 of the same Act enacted that "all statutes . . . now in force so far as the same are inconsistent with the provisions of this Act are also hereby repealed."

In the case of *Lawrie*[4] the question arose as to the right of the father of a deceased workman, who had raised an action in the Sheriff Court against his son's employers for damages under the Employers Liability Act and alternatively at common law, to have the case remitted to the Court of Session for jury trial. The First Division, composed of Lord President Dunedin, Lord Johnston, and Lord Mackenzie, were of opinion

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[1] Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), secs. 13 and 14 (quoted in the rubric), also sec. 1 (2) (*b*), and First Schedule, (1) (*a*) (3); Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), secs. 28, 30, and 31; Sheriff Courts (Scotland) Act, 1913 (2 and 3 Geo. V. cap. 28); Lawrie v. Banknock Coal Co., Limited, 1911 S. C. 817, 1912 S. C. (H. L.) 20; Whitton v. Ewing, Aitken, & Edgar, 1911 S. C. 781.

[2] 1911 S. C. 817, 1912 S. C. (H. L.) 20.

[3] 1912 S. C. (H. L.) 20.

[4] 1911 S. C. 817.

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that, even if the right of the pursuer to have the cause remitted to the Court of Session for jury trial had been taken away by section 14 of the Workmen's Compensation Act, 1906, it had been restored by the Act of 1907. Lord Dunedin also expressed the opinion—and Lord Mackenzie concurred in his opinion—that section 14 of the Workmen's Compensation Act did not take away a father's right to appeal from the Sheriff Court to the Court of Session. His Lordship thought that section 13 was not introduced with reference to section 14, but that on the assumption that it applied it was not meant to make a right of appeal in an action at law depend upon a fact (*i.e.* the fact of dependence) which would have to be inquired into antecedently, and which has no relevance to an action at law. He also said,[1] "But the chief ground upon which I should have held that the right was not taken away is that the right of the father to sue is quite independent of any idea of workmen's compensation, and that therefore nothing but clear enactment could take that right away." Lord Johnston took a different view. After referring to the language of section 13 of the 1906 Act he continued, "Primarily this refers to compensation under the Act. But when applied to section 14—unless 'workman' is to have a different meaning in section 14 from that which it has in the rest of the Act, which the context does not provide—then having regard to the terms of the 14th section and to those of the Employers Liability Act, 1880, compensation has, I think, a different and wider meaning, the result being that the restriction of removal and appeal to the Court of Session covers not merely actions raised by the workman himself, but those raised by the specified relations after his death."

The House of Lords affirmed the Court of Session upon the ground that the right of appeal, if taken away by the earlier Act, had been restored by the later Act.[2] There is, therefore, no decision by that House upon the effect of sections 13 and 14 of the Workmen's Compensation Act on the right of a father to appeal an action of damages by him for his son's death. At the same time, this question was discussed by the different Judges who took part in the decision. The Lord Chancellor said: "Upon this subject I agree with the reasoning of Lord Johnston. Taking sections 13 and 14 together of the Workmen's Compensation Act, 1906, it seems to me that removal and appeal to the Court of Session are barred (save on a question of law) not only where the action is raised by the workman himself, but also where it is raised by his legal personal representative or his dependants or other persons to whom or for whose benefit compensation is payable. No doubt this is expressed awkwardly by a mere definition clause; and in view of the contrary opinion expressed by the Lord President, I cannot say it is free from doubt. I feel that this view leaves anomalies, and may make the right to appeal turn upon the dependency of a father upon a deceased son, which may be a disputed fact and may be irrelevant to the action, as pointed out by the Lord President. But I think, upon the whole, that these sections have the effect described by Lord Johnston, though I do not desire to rest my conclusion upon that ground." Lord Atkinson,

[1] 1911 S. C. 817, at p. 820.

[2] 1912 S. C. (H. L.) 20.

although not expressing a final opinion upon the question, said that undoubtedly the inclination of his mind was that section 14 of the Workmen's Compensation Act was meant to deal with all actions under that Act, and that therefore the word "workman" must get the extended meaning put upon it by the definition clause. Lord Gorell, though with considerable doubt, took a different view, but Lord Shaw agreed with the Lord Chancellor.

By the First Schedule to the recent Sheriff Courts (Scotland) Act, 1913,[1] amending the Sheriff Courts Act, 1907, it is provided that the word "employee" in the amended Act includes the legal personal representative of an employee and any person who, by the law of Scotland, may be entitled to solatium in respect of the death of an employee. The effect of this provision, when read into section 30 of the Sheriff Courts Act, 1907, is to take away from a pursuer who has a claim against the employer of a deceased relative the right of appeal to the Court of Session, and, under section 31 of that Act, to give him a right to jury trial in the Sheriff Court. The present case was raised before the 1913 Act was passed, and is consequently not affected by its provisions. At the same time, the Act is silent as to the effect of sections 13 and 14 of the Workmen's Compensation Act, and I think that it manifestly proceeds upon the assumption that the view expressed by the Lord Chancellor in the case of *Lawrie*[2] upon those sections is well founded. I confess that I was inclined to sustain the appellant's appeal, as the respondents have already, without challenge, had the benefit of an incompetent appeal; but I have not been able to discover any legal ground upon which I could give effect to this view.

THE following interlocutor, which was dated 20th March and was signed on 30th May 1914, was pronounced:—"Recall the interlocutors appealed against: Find in fact—[Here followed twenty-two findings in fact]: Find in law (1) that the defenders are not liable in reparation to the pursuer in common law or under the Employers Liability Act, 1880; and (2) that in any event the appeal is incompetent: Therefore of new assoilzie the defenders from the conclusions of the action, but in respect that the objection to the competency of the appeal was not stated by the defenders *in limine*, find no expenses due to or by either of the parties except in so far as already found due; and decern."

Ross & Ross, S.S.C.—ROBERT MILLER, S.S.C.—Agents.

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[1] 2 and 3 Geo. V. cap. 28.

[2] 1912 S. C. (H. L.) 20.

No. 80.
June 2, 1914.
Coats's Trustees v. Coats.

WILLIAM HODGE COATS AND OTHERS (Archibald Coats's Trustees), First Parties.—*Macmillan, K.C.—C. H. Brown.*
MISS EVELYN DUDLEY COATS, Second Party.—*Blackburn, K.C.—Watson, K.C.—Armit.*
WILLIAM HODGE COATS AND OTHERS, Third, Fourth, and Fifth Parties.—*Macmillan, K.C.—C. H. Brown.*

Succession — Legitim — Collatio inter liberos — Only one child claiming legitim.

Where only one of several children claims legitim, the rest having accepted testamentary provisions in lieu thereof, there is no room for *collatio inter liberos*, and the legitim fund consists of one-half or one-third, as the case may be, of the free estate, without imputation of advances made by the parent in his lifetime either to the child claiming or to any of the other children.

Monteith v. *Monteith's Trustees*, (1882) 9 R. 982, *followed*; *Nisbet's Trustees* v. *Nisbet*, (1868) 6 Macph. 567, *disapproved*.

1ST DIVISION. ON 23rd May 1913 a Special Case was presented to the Court to determine the constitution of the legitim fund of the estate of the late Archibald Coats (hereinafter referred to as "the truster").

The truster died on 11th May 1912 predeceased by his wife, and survived by five children,—two sons, two married daughters, and one unmarried daughter. The truster had no marriage-contract, but he left a trust-disposition and settlement, the terms of which are referred to below. The parties to the case were *first*, the trustees acting under this settlement; *second*, Miss Evelyn Dudley Coats, the unmarried daughter; *third*, the other surviving children, and the representatives of one of the sons, who had died after the truster; and, *fourth* and *fifth*, the children of the two married daughters respectively.

By his settlement the truster directed his trustees, *inter alia*, to hold one-tenth part of his moveable estate for behoof of the second party and to divide the remaining nine-tenths among his four other surviving children, subject to the conditions contained in the settlement. It was declared that the provisions of the settlement in favour of his children should be accepted by them in full satisfaction of legitim and of all other claims competent to them through the truster's decease, and that any child claiming legitim should forfeit all right to any provision in the settlement in his or her favour.

The case set forth:—"6. Miss Evelyn Dudley Coats, who is the second party hereto, has intimated to the first parties that she claims her share of legitim. The other four children of the truster accepted the provisions of the settlement. The three present survivors of these other four children and Mr William Hodge Coats as sole trustee and residuary legatee of Mr Peter Mackenzie Coats, the truster's other child, who survived him but has since died, are the third parties hereto. They do not claim legitim. The truster left a large move able estate which may, for the purposes of this case, be estimated at £1,000,000 net, without prejudice to the final adjustment of the amount between the parties. The second party received from the truster various advances in money which the parties are agreed she would have required to collate had she and her brothers and sisters all been claiming legitim. For the purposes of this case these advances may be estimated at £20,000, without prejudice to a

final adjustment of the amount between the parties, and apart from the provision made by the truster by the deeds immediately to be referred to."

There were then narrated (Arts. 7, 8, 9, and 10) certain other provisions or advances which the truster had made during his life for or to the second party, her two married sisters, and her two brothers. These were a trust fund of £10,000 for behoof of the second party; similar trust funds amounting in all to £200,000 for behoof of her married sisters; and advances to her brothers amounting in all to £120,000.

The case also set forth:—"12. Further, the parties are agreed that if all the said advances to and provisions in favour of the truster's children are to be taken into account in calculating the amount of the legitim fund, the second party will receive as her share of said fund a larger amount than if none of said advances and provisions, or only the advances to and provisions for her, were taken into account.

"13. In these circumstances questions have arisen between the parties as to the manner of computing the legitim fund and ascertaining the share thereof payable to the second party. The first, third, fourth, and fifth parties contend (1) that none of the advances to or provisions in favour of the truster's children fall to be taken into account in ascertaining the amount of the legitim fund, which consists of one-half of the truster's moveable estate as at his death; and that from the second party's one-fifth share thereof there falls to be deducted, in terms of the truster's settlement, and particularly the fourteenth purpose thereof,* the amount of the advances and provisions made to her; or alternatively (2) that the legitim fund consists of one-half of the moveable estate of the truster as at his death plus the amount of the advances and provisions made to the second party only, and that from her one-fifth share of this fund there falls to be deducted the amount of said advances and provisions to her. The second party contends (1) that in ascertaining the amount of the legitim fund, not only the advances to herself but also the advances to the other children of the truster fall to be taken into account, and that she is entitled, as her share of legitim, to one-fifth of the fund so ascertained under deduction of the advances to herself; alternatively (2) the second party maintains that none of the advances to herself or the other children fall to be taken into

* The fourteenth purpose was as follows:—"(Fourteenth) I hereby direct, appoint, and declare that my daughter Evelyn Dudley Coats and all persons claiming through her shall be bound to impute, in or towards satisfaction and discharge of any claim for legitim, or any other legal claim or claims which she or those in her right are entitled to hereunder, or may be able to establish against my means and estate, all gifts, benefits, or provisions which I have already made or conferred, or may hereafter make or confer, to, for, or upon her, and which in the opinion of my trustees form proper deductions from such claim or claims, and particularly but without prejudice to said generalities, the provisions in her favour made by me in a certain assignation dated the thirteenth day of January One thousand eight hundred and ninety-one, and recorded in the Books of Council and Session on the twenty-eighth day of January One thousand eight hundred and ninety-one, executed by me in favour of myself and my said sons Peter Mackenzie Coats and William Hodge Coats, for the purposes therein specified."

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account in ascertaining her share of legitim; (3) in any event, that the testator could not by his will effectively impose conditions as to the advances already made by him, and that any such direction by him as to the deduction of said advances for purposes of legitim are ineffectual."

The questions of law for the opinion of the Court included the following:—"(1) For the purpose of ascertaining the second party's share of legitim, does the legitim fund consist of—(*a*) one-half of the moveable estate *in bonis* of the truster at his death; or (*b*) that sum plus the advances to and provisions made by the truster in favour of the second party as set forth in articles 6, 7, and 8 of the case; or (*c*) that sum plus the advances and provisions made by the truster in favour of all his children as set forth in articles 6, 7, 8, 9, and 10 of the case?"

The case was heard before the First Division (without Lord Johnston) on 22nd, 23rd, 26th, and 27th May 1914.

Argued for the second party;—In dealing with a claim for legitim it was necessary, *ante omnia*, to ascertain what was the legitim fund, after taking into account all the circumstances which might affect the constitution of the fund. Each child became entitled on the parent's death to a certain share of the fund, not necessarily to an equal share, but to one which fell to be ascertained by a calculation which involved a computation of advances, so far as these were attributable to legitim, made by the parent in his lifetime.[1] It was not the case that an equal share of the legitim fund vested in each child at the parent's death, although a statement to this effect was made by Lord Rutherfurd Clark in *Monteith* v. *Monteith's Trustees*,[2] and was adopted by Lord Kinnear in *Young* v. *Young's Trustees*.[3] What vested then was only a right of credit, though not of a specific nature until its amount should be ascertained.[4] Collation was an equitable doctrine regulating the distribution of the fund, so ascertained, among the children. No doubt it involved the existence of more than one child with a right to claim legitim,[5] but it was immaterial whether more than one claim was actually made. The amount of the fund could not be affected by the number of children who happened to claim, or not to claim, upon it. Once its amount was fixed, and the proportion of that fixed sum due to any particular child was ascertained, the rule of *collatio inter liberos* having been applied in the process, that child remained entitled to his or her ascertained portion, irrespective of whether any other child elected to claim or not to claim his or her ascertained portion. This was the result of the decision in *Nisbet's* case[6] and was sound law which should be applied in the present case. The share of any child who renounced legitim, after the parent's death, enured to the benefit of the estate, or, as it had been usually expressed, to the

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[1] Ersk. Inst. III. ix. 24, 25; Bell's Prin. 1587-90; Nisbet's Trustees v. Nisbet, (1868) 6 Macph. 567, *per* Lord Cowan, at pp. 571, 573; Fisher v. Dixon, (1841) 3 D. 1181, *per* Lord Fullarton, at p. 1185; M'Laren on Wills and Succession (3rd ed.), 164-7.

[2] (1882) 9 R. 982, at p. 1008.

[3] 1910 S. C. 275, at p. 287.

[4] Fraser, Husband and Wife (2nd ed.), p. 997.

[5] Clark v. Burns & Stewart, (1835) 13 S. 326; Breadalbane v. Chandos, (1836) 2 Sh. & M'L. 377; Keith's Trustees v. Keith, (1857) 19 D. 1040.

[6] 6 Macph. 567.

benefit of the general disponee.[1] It was immaterial whether the general disponee was to be looked upon as the assignee of the children not claiming—the ground of judgment in *Nisbet's* case[2] which had been expressly disapproved in *Monteith's* case[3]—or as a debtor with one claim against him *pro tanto* discharged. The result arrived at in *Nisbet's* case[2] was quite consistent with the legal principles which were here stated, and was sound in law. *Monteith's* case[3] was wrongly decided in so far as it was inconsistent with *Nisbet's* case,[2] and so were the cases following thereon, including that of *Collins*,[4] where the whole authorities on this branch of the law were reviewed by Lord Stormonth-Darling. It was to be remarked that *Nisbet's* case[2] was not referred to in the judgments in *Monteith's* case,[3] and appeared to have been referred to in argument upon a subsidiary question only. The Court should therefore answer question (1) (*c*) in the affirmative. If, however, a negative answer was to be returned to this question the Court should refuse effect to the second branch of the argument for the other parties, and should answer question 1 (*a*) in the affirmative and question 1 (*b*) in the negative. There was no reason, either in law or in equity, for including in the legitim fund advances made to the child who claimed upon it when similar advances made to the children who did not claim were not so treated.

Argued for the first, third, fourth, and fifth parties;—At the parent's death there vested in each child an aliquot share of the legitim fund, this fund being one-half, or one-third, as the case might be, of the free moveable estate,[5] subject always to the equity of collation. The question here raised was as to the parties between whom this equity was pleadable,—was it pleadable between actual claimants, or between possible claimants?—the children who had renounced during the parent's life being excluded from both of these categories. Much of the difficulty which surrounded this question arose from a misunderstanding of the nature of *collatio inter liberos*. The equity was a duty or obligation[6] imposed upon the child claiming to account for advances received, not a right to call on others claiming to do so.[7] If a child elected not to claim legitim after the parent's death, in other words if he chose not to exact payment of a debt due to him by the estate, the benefit of this renunciation enured to the estate.[8] Two views had been taken of the effect of such a renunciation. The first was that of *Nisbet's* case,[2] viz., that the general disponee was the assignee of the children who did not claim. This view had been rejected in *Monteith's* case,[3]

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[1] Fisher v. Dixon, (1840) 2 D. 1121, *per* Lord Fullarton, at p. 1138, (1843) 2 Bell's App. 63, *per* Lord Cottenham, at p. 71; Lashley v. Hog, (1804) 4 Pat. 581, *per* Lord Chancellor Eldon, at p. 642; Young's Trustees v. Young, 1910 S. C. 275, *per* Lord Johnston, at pp. 292-3.

[2] 6 Macph. 567 [3] 9 R. 982.

[4] Collins v. Collins' Trustees, (1898) 5 S. L. T. 256, 35 S. L. R. 641.

[5] Ersk. Inst. III. ix. 16; Bell's Prin. 1586; Keith's Trustees v. Keith, 19 D. 1040, *per* Lord Curriehill, at p. 1066; Fisher v. Dixon, 2 D. 1121, *per* Lord Fullarton, at p. 1145; Nisbet's Trustees v. Nisbet, 6 Macph. 567, *per* Lord Cowan, at p. 573.

[6] Stair, III. viii. 26.

[7] Ersk. III. ix. 24; Bell's Prin. 1589.

[8] Henderson v. Henderson, (1728) M. 8187; Robertson v. M'Vean, (1813) 2 Bell's App. 87; Fisher v. Dixon, 2 D. 1121, *per* Lord Fullarton, at p. 1138.

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and the law there laid down, and followed in subsequent cases, was directly applicable to the present case, viz., that collation was an equity which was pleadable only between actual claimants.[1] If the second party's view of the legal position of collation were sound it might lead to the result of one child being entitled to claim more than the whole amount of the legitim fund, which would be absurd, especially as it had never been suggested, and could not be suggested, that a child might be compelled to refund advances already received. But though the children who did not claim legitim were not bound to impute the advances made to them, the second party was, in the circumstances of the present case, bound to impute her advances. This was not strictly an application of the doctrine of collation, but of a kindred equitable doctrine from which *collatio inter liberos* sprang, viz., that a person claiming payment of a debt must give credit for what he has already been paid.

At advising on 2nd June 1914,—

LORD PRESIDENT.—This is one of those comparatively rare cases in which we are asked to say what is the law of Scotland. It would be strange indeed if only now, for the first time, the Court were invited to define the true limits and scope of the doctrine of collation *inter liberos*; but, undoubtedly, to decide this case it will be necessary to expound the doctrine once more,—for I cannot think it is for the first time.

The facts are few and simple. The testator died on 11th May 1912, survived by five children. By his trust-disposition and settlement, purporting to convey his whole estate, he made certain provisions for each of his five children. He had already, during his lifetime, made to all of them advances which are of a quality which renders them subject to collation. Only one child claims legitim. The other four refrain. They are content to take their testamentary provisions. The free executry amounts, we are asked to assume, to £1,000,000, and the only question put to us is this—what amount of that sum must be paid to the child who claims legitim? I answer, without hesitation, £100,000, being one-fifth of one-half of the free executry.

My reason is because, where only one child claims legitim, there is no room for the doctrine of collation. *Collatio bonorum inter liberos* is an obligation incumbent, by the law of Scotland, on children—I lay stress on the plural—on children who are actually claiming their share of the legitim fund, to compel other children who are also claiming on the fund to bring into computation advances which they have received from their father during his lifetime. It is an equitable doctrine introduced for the purpose of securing equality in the distribution of the legitim fund among the children who are actual claimants on the fund. It has no place among others than children. Its basis is a double fiction. It assumes that the

[1] Clark v. Burns & Stewart, 13 S. 326; Breadalbane v. Chandos, 2 Sh. & M'L. 377; Keith's Trustees v. Keith, 19 D. 1040, *per* Lord Curriehill, at p. 1066; Monteith's Trustees v. Monteith, 9 R. 982, *per* Lord Rutherfurd Clark, at p. 1008; Young's Trustees v. Young, 1910 S. C. 275, *per* Lord Kinnear, at p. 287; Collins v. Collins' Trustees, 5 S. L. T. 258, 35 S. L. R. 641.

father has paid a part or the whole of his indebtedness at a time when no relationship of debtor and creditor existed between the father and the child. It further assumes that the payment is made out of the legitim fund although confessedly the legitim fund is at the time non-existent. Now, it is apparent that a doctrine which rests on a foundation so narrow and so purely artificial is not susceptible of what is called logical extension. The attempt to give it reasoned expansion will inevitably end in confusion. The subtleties and intricacies, such as they are, which have encrusted themselves upon the doctrine are due entirely to a failure accurately to observe the terms in which the doctrine is explained by Stair and Erskine.

The situation in a case such as this is singularly free from complexity. The whole estate passes under the father's settlement subject to claims. One claim is that of a child for her share of the legitim fund. She may take it or she may leave it. If she takes it, the debt is extinguished; if she leaves it, it passes under the father's settlement—that is all.

Now, after the closely reasoned opinion of Lord Fullarton in the case of *Fisher* v. *Dixon*,[1] and the admirably condensed summary of that opinion in the judgment of Lord Murray,[2] it is not easy to explain what Lord President Dunedin would, I have no doubt, have called the "divergent rills." It would be idle indeed to review the authorities on this question. So far as authorities prior to the year 1857 are concerned, that task has been well accomplished by Lord Ardmillan in his judgment in *Keith's Trustees*,[3] which was affirmed by this Division of the Court. And so far as authorities down to 1898 are concerned, the task was equally well accomplished by Lord Stormonth-Darling in a judgment which was not submitted to review.[4] It would be equally idle, I think, to summarize the results of that review, for that task has been accomplished, once and for all, by Lord Rutherfurd Clark in his opinion in *Monteith* v. *Monteith's Trustees*,[5] which I, for my part, adopt in its entirety. A close examination will show that it is exhaustive and leaves no points open. It would be idle indeed to attempt to repeat, in other and inferior language, what Lord Rutherfurd Clark has so well expressed. His judgment was adopted and approved by, I think, the Lord President (Dunedin), and certainly by Lord Kinnear, in the comparatively recent case of *Young* v. *Young's Trustees*.[6] Nothing could be clearer than Lord Kinnear's opinion when he said: "I think it is the result of all the authorities that collation of legitim is an equitable claim competent only to the children competing on the legitim fund, who are entitled to draw in advances which another child may have received in circumstances which give rise to that equity." And, again, "it is obvious that the right which is described at full length as *collatio inter liberos* is a right competent to the competing children alone."[7]

But I must acknowledge that I cannot follow Lord Kinnear when he says that he thinks that the exposition of the doctrine given by Lord Rutherfurd Clark in *Monteith's Trustees*,[5] and by himself in *Young's Trustees*,[8] is not inconsistent with anything that was decided in *Nisbet's Trus-*

[1] 2 D. 1121, at p. 1138. [2] *Ibid.*, at p. 1149. [3] 19 D. 1040.
[4] Collins v. Collins' Trustees, 35 S. L. R. 641.
[5] 9 R. 982. [6] 1910 S. C. 275, at p. 287. [7] *Ibid.*, at p. 288.
[8] 1910 S. C. 275.

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tees v. *Nisbet*.[1] I think that it was inconsistent with what was decided in *Nisbet's Trustees*,[1] that *Nisbet's Trustees*[1] proceeds on a complete misconception of the principles of law laid down and applied in *Fisher* v. *Dixon*,[2] that the reasoning on which the judgment rests is fallacious, that the judgment itself cannot be supported, and that this decision can no longer be regarded as sound law. A close examination of *Nisbet's Trustees*[1] clearly shows that the learned Judges of the Second Division there understood that they were deciding the point before them for the first time. It is equally clear from an examination of that decision that the point which they believed they were deciding was the very point that was decided in *Monteith's Trustees*,[3] and that we are invited to decide to-day. That is unmistakable from the abridgment of the argument found in the report. It is equally clear from the opinion of Lord Neaves who says[4] "There is no doubt that the advances in question would need to be collated in a direct competition between several children claiming the legitim. But the question is, whether this equally holds where all the other children accept the conventional provisions instead of legitim." Now, that is the very question which was decided in *Monteith's Trustees*,[3] and which we are to decide to-day. It is not difficult to trace the fallacy which pervades the judgment in *Nisbet's Trustees*.[1] It is this, that a child who refrains from claiming his debt—his share of the legitim—does not extinguish the claim, but keeps it open and assigns it to the general disponee and with it a right, which the child himself could only claim if he were asking payment of the legitim fund in competition with other children, to compel these other children to bring into computation the advances which they have received. As Lord Cowan puts it, the general disponee takes the place of the child in every question that can be raised with regard to the amount of the claim upon the legitim fund, even although the child himself could not claim upon it. The same fallacy reappears, in a somewhat different form, in Lord Benholme's opinion, where he says that there is no distinction between the legitim fund proper and the collated fund, and that the presumed assignation by a child who refrains from claiming legitim carries both the legitim fund and the collated fund to the general disponee. Now, that never was at any time the law of Scotland. It is contrary to all the authorities prior to *Nisbet's Trustees*[1] and subsequent to *Nisbet's Trustees*.[1] There will be found in *Monteith's Trustees*[3] what I regard as a final and exhaustive exploration of the doctrine of *collatio bonorum inter liberos*. It is in complete harmony with all the authorities, and I think we must now hold that *Monteith's Trustees*[3] has implicitly, if not explicitly, overruled *Nisbet's Trustees*.[1] Holding that view, it appears to me that we cannot otherwise answer the question put to us here than thus: 1 (*a*) in the affirmative; 1 (*b*) and 1 (*c*) in the negative.

Lord Mackenzie.—The foundation of the second party's argument upon the first point in the case is that the doctrine of *collatio bonorum inter liberos* applies, although she is the only child claiming legitim, and

[1] 6 Macph. 567. [2] 2 D. 1121. [3] 9 R. 982.
[4] 6 Macph., at p. 576.

although the other members of the family are content with their conventional provisions. According to her contention, the matter ought to be dealt with as if all the brothers and sisters were claiming legitim. The amount of the legitim fund, the second party argues, is not one-half of the moveable estate of the deceased which was *in bonis* at the date of his decease; it is one-half of that estate plus the funds previously advanced to children which are properly subject to collation. Collation, according to this theory, is not a mere option. It is a quality of the right which vests, and affects at death the interest of the child in the legitim fund. The benefit which the general disponee takes is what is left, *i.e.*, is not in this case each child's one-fifth of one-half of the moveable estate, but that proportion diminished by the amount of the advances which have been made to the child by the parent during his life.

It was maintained on behalf of the second party that her contention did not depend on the view that the general disponee is in the position of an assignee of the other children who do not claim, a view which was founded on expressions in the judgment of Lord Cottenham in *Fisher* v. *Dixon*,[1] and is the basis of the reasoning of Lord Cowan in *Nisbet's* case.[2] That view is not consistent with what was said by the majority in *Monteith's* case.[3] The argument was that, although in *Monteith*[3] the case of *Nisbet*[2] was considered solely from the point of view of whether a general disponee could be regarded as an assignee, there was involved in *Nisbet*[2] a further question, which was not dealt with in *Monteith*,[3] viz., what is the amount of the share that vests in the child? As I understand the contention, counsel for the second party adopted the view of Lord Benholme in *Nisbet*,[2] that, in fixing the amount which vests in each child, the amount of the advances which are properly subject to collation must be taken into account. If the amount of the advances is large enough to operate a discharge of the child's share of legitim, then, it is said, this enures to the benefit of the other child or children, although the benefit of the acceptance by the child of its conventional provisions would enure to the general disponee. This contention appears to me to be contrary to the weight of authority. The true view, in my opinion, is that the legitim fund is one-half or one-third, as the case may be, of the moveable estate. An aliquot part vests at death, subject always to the equity which exists between children who may at a later stage come in to compete, by which a duty is imposed on each to collate the advances received during the lifetime of the father. The legitim fund is not the one-half or one-third plus the advances. Collation does not operate automatically when there is more than one child entitled to take. It operates only when there is competition between children, at the period of distribution. The passage in Ersk. Inst. III. ix. 24, bears this out. The answer to the question, What is the amount of the share that vests? depends upon the answer to the earlier question, Who are to be brought in? In my opinion, children cannot be brought in who are not competing.

We had an elaborate argument, with a citation of all the authorities. In such a question I think it enough to state the conclusion to which I

[1] 2 Bell's App. 63, at p. 71. [2] 6 Macph. 567. [3] 9 R. 982.

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come with the authorities which seem to me to support it, viz. :—*Clark* v. *Burns & Stewart*,[1] *Keith's Trustees* v. *Keith and Villiers*,[2] *Breadalbane* v. *Chandos*,[3] *Monteith* v. *Gifford*,[4] *Young* v. *Young's Trustees*,[5] *Collins* v. *Collins' Trustees*.[6] More particularly I refer to the opinion of Lord Rutherfurd Clark in *Monteith*[4] and the endorsation of that opinion by Lord Kinnear in *Young's Trustees*.[5]

The second question is whether, if the advances of all are not to be brought into account, the advances to the second party herself must be. I do not think they ought. Regarding, as I do, the judgment in *Monteith's* case[7] as sound, the case of *Nisbet*[8] ought not, in my opinion, to be followed. The reasoning upon which that judgment proceeds is inconsistent with *Monteith*.[7] Nor can I hold that the conclusion reached in *Nisbet's* case[8] ought to be supported upon what was termed a wider equity than is involved in collation, under which the second party, it was said, was bound to impute the amount of the advance. I refer on this matter to what was said by Lord Ardmillan in *Keith*[9] and Lord Stormonth-Darling in *Collins*.[6]

I therefore concur in the judgment proposed.

Lord Skerrington.—I agree with your Lordships. Shortly stated, the contention of the second party comes to this, that collation operates automatically and *ipso jure* in every case where a person dies survived by several children who are entitled to claim legitim, and that, upon the death, there vests in each of these children a right to a share of the legitim fund neither more nor less than what each child would receive if all of them collated.

The best that can be said in favour of this view is that it is perhaps the logical consequence of the decision in the case of *Nisbet*.[8] For my own part I am unable to reconcile that case with the later case of *Monteith's Trustees*,[7] and I adopt the statement of the law of collation which was made by Lord Rutherfurd Clark in *Monteith's* case.[7] In the present case, as there is only one child claiming legitim, the doctrine of collation cannot be invoked either in her favour or to her prejudice.

The Court answered question 1 (*a*) in the affirmative, and questions 1 (*b*) and (*c*) in the negative.

J. & J. Ross, W.S.—Hope, Todd, & Kirk, W.S.—Agents.

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[1] 13 S. 326, Lord Moncreiff, at p. 334.
[2] 19 D. 1040, Lord Ardmillan, at p. 1052, and Lord Curriehill, at p. 1066.
[3] 2 S. & M'L. 377, at p. 401.
[4] 9 R. 982, Lord Justice-Clerk, at p. 988, and Lord Rutherfurd Clark, at p. 1008.
[5] 1910 S. C. 275, Lord Kinnear, at p. 287.
[6] 35 S. L. R. 641, Lord Stormonth-Darling.
[7] 9 R. 982. [8] 6 Macph. 567. [9] 19 D., at p. 1048.

No. 81.

June 5, 1914.

Newton v. Methven.

RICHARD NEWTON, Pursuer (Appellant).—*A. A. Fraser.*
JAMES COX METHVEN, Defender (Respondent).—*W. A. Fleming.*

Process—Appeal—Competency—Printing of record—Failure to print amendments—C. A. S., 1913, *D. iii.* 1.

In an appeal from the Sheriff Court the print of the record, which had been duly printed and boxed to the Court within fourteen days, did not give effect to certain adjustments which had been put upon the open record in the Sheriff Court.

Held that there had been no failure to print and box in the sense of the C. A. S., 1913, D. iii. 1, and appellant *allowed* to box corrected prints.

1ST DIVISION. Sheriff of Forfarshire.

IN November 1913 Richard Newton, caulker, brought an action in the Sheriff Court at Dundee against James Cox Methven, residing there, and, on 17th November 1914, the Sheriff-substitute (Neish) assoilzied the defender.

The pursuer appealed to the Court of Session, and boxed prints of the note of appeal, record, interlocutors, and proof within fourteen days, in terms of C. A. S., 1913, D. iii. 1.*

On 5th June 1914 counsel were heard in the Single Bills of the First Division (without Lord Johnston) upon a note presented by the pursuer.

The note after setting forth the foregoing facts proceeded:—

"The appellant, following the usual practice, printed the record from the certified copy initial writ. The certified copy initial writ did not contain adjustments of parties put on at the closing of the record, so as to conform with the principal initial writ as adjusted. The record as printed is thus inaccurate.

"May it therefore please your Lordship to move the Court to appoint the appellant to correct the record by including the amendments as set forth in the principal initial writ; or to do further or otherwise in the premises as to your Lordship shall seem proper."

Counsel for the appellant submitted that the mistake in printing had occurred *per incuriam*, and was not of a nature to interfere with the due disposal of the appeal, but that he desired to lodge corrected prints for the convenience of the Court.

Counsel for the respondent submitted that, as the Court had no power to dispense with observance of the Act of Sederunt regulating procedure in Appeals,[1] the present appeal must be held to have been abandoned.[2]

LORD PRESIDENT.—In this case the failure, as I understand, has been to print the adjustments which were made in the Sheriff Court upon the

* The Codifying Act of Sederunt, 1913, D. iii. 1, enacts:—"The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any. . . . And if the appellant shall fail, within the said period of fourteen days, to print and box, or lodge and furnish, the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as hereinafter provided."

[1] Taylor v. Macilwain, (1900) 3 F. 1; Lee v. Maxton, (1904) 6 F. 346; Bennie v. Cross & Co., (1904) 6 F. 538.

[2] Codifying Act of Sederunt, 1913, D. iii. 1.

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open record, and there are mere inaccuracies to be corrected. The appellant proposes to box clean prints giving effect to these adjustments, and seeks to be allowed to do so. The record has been printed and boxed timeously, and, accordingly, I think this proposal is reasonable, and that the motion should be granted.

LORD MACKENZIE.—I agree. The mere fact that there are certain inaccuracies in the print does not make the case one in which there was any failure to lodge timeously.

LORD SKERRINGTON concurred.

THE COURT pronounced an interlocutor in the following terms:—"Allow the appellant to box and lodge corrected prints of the record containing the amendments made on initial writ, the expense thereof to be borne by the appellant: Find respondent entitled to the modified sum of £2, 2s. of expenses, and decern against appellant for payment accordingly."

CLARK & MACDONALD, S.S.C.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

No. 82.

June 5, 1914.

Burns v. North British Railway Co.

MRS BRIDGET REYNOLDS OR BURNS, Pursuer.—*G. Watt, K.C.*—*D. P. Fleming.*

THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Sol.-Gen. Morison*—*E. O. Inglis.*

Reparation—Negligence—Railway—Passenger on railway platform struck by open door of train in motion—Contributory negligence.

In an action of damages for personal injuries, brought against a railway company, it was proved that the pursuer, while walking along one of the platforms of the defenders' station, was struck by an open door of a train which entered the station from behind her. The door, which had no handle on the inside, was on the side of the train which was next the platform only at the station of departure and at the station in question; at the ten intermediate stations the opposite side of the train had been next the platform. There was evidence to show that the door was swinging open and that the compartment was empty when the train entered the station in question, but it was not proved how the door came to be open, or whether the compartment was occupied in the course of the train's journey.

The jury having returned a verdict for the pursuer, the defenders obtained a rule, and argued that there was no evidence of fault on their part, and that, in any event, the pursuer was guilty of contributory negligence in walking too near the edge of the platform.

Held (1) (*diss.* Lord Salvesen) that there was evidence on which the jury might infer negligence on the part of the defenders; and (2) that in the circumstances the pursuer had not been guilty of contributory negligence; and rule *discharged.*

2D DIVISION. Lord Cullen and a Jury.

MRS BRIDGET REYNOLDS OR BURNS, with the concurrence of her husband, brought an action against the North British Railway Company, concluding for damages in respect of personal injuries received by her through the negligence of the defenders.

On 5th and 6th November 1913 the case was tried before Lord Cullen and a jury. The evidence led by the pursuer was to the

effect that while walking eastwards along one of the platforms in the defenders' underground station at Queen Street, Glasgow, she was struck on the shoulder by the open door of a compartment of a train which entered the station from the west. The train had started from Bowling, and there were ten stations (of which Charing Cross was the last) at which the train stopped before arriving at Queen Street Station. At Bowling and at Queen Street the door in question was next the platforms; at the intermediate stations the opposite side of the train had been next the platforms. The further evidence led at the trial sufficiently appears from the opinions of the Judges.

The jury having returned a verdict for the pursuer, the defenders obtained a rule to show cause why the verdict should not be set aside and a new trial granted. On 19th and 20th March 1914 the parties were heard on the rule before the Second Division (Lord Dundas being absent) with Lord Cullen.

Argued for the pursuer;—(1) There was evidence before the jury from which they were entitled to infer negligence on the part of the defenders. It was the duty of a railway company to see that all the doors of a train were properly shut at each station through which the train passed. The fact that the door of an unoccupied compartment was swinging open when the train entered Queen Street Station indicated that the door was not properly closed when the train left the previous station. Hence arose a presumption of negligence on the part of the defenders,[1] and this presumption had not been rebutted. (2) There was nothing in the conduct of the pursuer to support a plea of contributory negligence.

Argued for the defenders;—(1) The sole fact on which the pursuer relied was that the door of the compartment was swinging open when the train entered Queen Street Station; but this fact did not establish negligence on the part of the defenders, seeing that it was proved (*a*) that the doors of the train were all properly shut at Bowling Station, (*b*) that the door in question was in no way defective, (*c*) that from the nature of the lock the door could not automatically swing open; and seeing also that there was no evidence to exclude the possibility that someone in the compartment during the course of the train's journey from Bowling had opened the door, or at any rate released the lock. There was no evidence, therefore, to support the verdict.[2] In the case of *Gee*[3] no evidence had been led for the defence. (2) The pursuer had been guilty of contributory negligence.[4] A railway company's only duty towards persons awaiting the arrival of a train was to provide a platform or place where such persons could safely remain till the train drew up. If this duty was fulfilled, it lay on those who resorted to that platform or place to use reasonable vigilance,

[1] Gee v. Metropolitan Railway Co., (1873) L. R., 8 Q. B. 161. Wilson v. North British Railway Co., (1873) 1 R. 172, was also cited.

[2] Drury v. North-Eastern Railway, [1901] 2 K. B. 322: Metropolitan Railway Co. v. Jackson, (1877) 3 App. Cas. 193; Murray v. Metropolitan District Railway Co., (1873) 27 L. T. 762. Tough v. North British Railway Co., *supra*, p. 291, was also referred to.

[3] L. R., 8 Q. B. 161.

[4] Siner v. Great Western Railway Co., (1869) L. R., 4 Exch. 117; Adams v. Lancashire and Yorkshire Railway Co., (1869) L. R., 4 C. P. 739; Bridges v. Directors of North London Railway Co., (1874) L. R., 7 H. L. 213.

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and not to stand within range of the dangers which were associated with moving trains. To the pursuer's failure to do so were due the injuries which she had received.

At advising on 5th June 1914,—

LORD CULLEN.—The pursuer alleges that, while she was walking along the platform of the defenders' low-level station at Queen Street, Glasgow, she was struck and injured by an open door on a passenger train which came into the station from behind her. The defenders do not dispute that there was evidence on which the jury were entitled to hold that the pursuer was so struck and injured.

The pursuer ascribes the fact of the open door to the fault of the defenders. The defenders deny fault. The jury have found in the pursuer's favour. Two questions have been argued. First, whether there was evidence on which the jury could reasonably hold the defenders at fault. Second, whether, if so, the pursuer is chargeable with contributory fault.

The train in question was a local one, which had come from Bowling to Queen Street, and had stopped at a number of intervening stations. There was evidence to show (1) that the door which struck the pursuer was seen swinging open as the train came towards Queen Street platform from the tunnel adjoining the station; (2) that the compartment in question was then empty; and (3) that the door had been on the platform side of the train at Bowling, as it was again at Queen Street, but that during the journey the door was on the off-side of the train, so that there was no occasion for any passenger to open it. Further, it is common ground that the door opened only by an outside handle, without any inside loop capable of being turned by a passenger inadvertently handling it.

On this evidence the pursuer maintains that she presented a *prima facie* case against the defenders, and I think she is right. The case of *Gee* v. *Metropolitan Railway Company*[1] appears to me to support this view. It is, no doubt, possible that the door may have been opened by a passenger in the course of the journey. This possibility, however, is a remote one, seeing that no passenger had any occasion to open the door and that it could not have been opened inadvertently from the inside. I do not think that the pursuer was called on to lead evidence to negative this possibility.

If I am right in thinking that the pursuer presented a *prima facie* case against the defenders, the onus lay on the defenders to satisfy the jury by evidence that the fact of the open door was due to the action of some person for whom they are not responsible. The defenders led no evidence to show directly that the door had in fact been opened by a passenger or by any one for whom they are not responsible. They adduced the guard of the train, who, acknowledging it to be his duty to see all the carriage doors secured at Bowling, deponed that he always performed this duty, and, in particular, that he performed it on the occasion of the journey in question. It was, I think, for the jury who saw and heard this witness to weigh the reliability of his testimony. The defenders further adduced the fireman on the engine of the train and employees at

[1] L. R., 8 Q. B. 161.

signal cabins *en route*, who said that it was their duty to note such a thing as an open door, and that they did not observe any open door on the train in question. These witnesses include the signalman at the cabin just adjoining the Queen Street platform. But, if the evidence for the pursuer was believed by the jury, the door in question was swinging open as the train came in from the said signal cabin to the platform. It was for the jury to judge what weight they attached to the testimony of these witnesses. And it has to be kept in view that, as common experience has shown, a railway carriage door which is only partially fastened at the start of the train journey may remain closed for a considerable time before it yields to the jolting of the train and swings patently open.

On the whole matter, holding as I do that the pursuer presented a *prima facie* case against the defenders, I think that it was for the jury to say whether the rebutting evidence adduced by the defenders displaced to their satisfaction the pursuer's case. The question is not whether the jury came to the best conclusion. The question is whether there was evidence before them on which they could, by a reasonable exercise of the power of judgment on the facts reposed in them, return the verdict they did; and in my opinion that question should be answered in the affirmative.

The second question raised is whether, if the defenders were at fault, the pursuer is chargeable with contributory fault, in respect of her having walked along the platform near enough to the edge of it to be struck by the open door which projected only 1 foot 8 inches over the platform. This question does not seem to me to be attended with difficulty. The short answer to it is, I think, that, in a question with the defenders, the pursuer in using the platform was entitled to regulate her actions on the assumption that the defenders would do their duty, and that there would not, by their fault, be an open door capable of injuring persons legitimately frequenting their platform.

Following the views which I have expressed, I am of opinion that the rule should be discharged.

Lord Justice-Clerk.—This case is one which is undoubtedly narrow upon the evidence, but I have come to the conclusion that there is no ground for holding that the jury have given a verdict which was unjustifiable as being contrary to the evidence. It appears to me that there was evidence on which it might be held that there was fault attributable to the Company, and that the attempt to make out a case of contributory negligence has failed.

It is settled by the case of *Gee*[1] that the fact that a carriage door is swinging open when a train is running on the line affords *prima facie* evidence that due attention has not been paid to seeing that the door was securely fastened when the train left a previous station. In the present case I am of opinion that the jury were entitled to hold that, when the carriage, the door of which struck the pursuer, emerged from the tunnel which is at the end of the station, that door was swinging open. It is suggested that it might have been opened by someone

[1] L. R., 8 Q. B. 161.

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inside the carriage with a view to alighting. But this suggestion cannot, I think, be accepted. A passenger who intends to alight at a station and eases the lock of the door on entering the station, does not allow the door to swing open, but keeps his hand upon it. Such a passenger is also looking forward, and would see anyone near the edge of the platform, and it is to be presumed would not leave the door open so as to strike any person he saw. And there is no evidence of any passenger alighting from the carriage in question. On the contrary, the evidence is that there was no one in the compartment as the carriage passed along the platform to the spot where the pursuer was standing. No doubt there is only one witness who speaks to this, but a fact of this kind does not require to be proved by more than one witness, and the jury were quite entitled to accept the evidence of the witness who spoke to having observed the fact. To this there is no satisfactory counter evidence; and the jury were quite entitled to disregard the evidence of the guard of the train, by which he endeavoured to prove that there were passengers in the compartment. He did not say that he observed that the compartment was occupied, but merely made the round assertion that there must have been passengers in the compartment, because he thought himself justified in saying that there never was such a thing as an empty compartment on his train. I think the jury rightly rejected that evidence. I should unhesitatingly have rejected it myself.

Then it is said that the railway servants stated that all the doors on that side of the train had been securely fastened when the train started from the station of departure, and that at all the intervening stations this door was not alongside the platform, but came alongside a platform only on arriving at Queen Street, where there is an island platform, so that the off side of the train becomes the entering and alighting side. This is true, but one knows quite well that railway officials are always prepared to say quite positively that everything was secure, basing their statement on practice, and being sure that they have always carried out their duty efficiently. But it is quite well known that, at times when it is believed that all the doors are fast when a train leaves a station, cases do in fact occur in which a door is not properly fast. *Gee's* case[1] is an instance of this, and it is common knowledge that every now and again a person leaning against a door without first testing it falls out, because it has not been made secure. And such accidents do happen notwithstanding the fact that for long stretches of a journey the door, though not fast, is apparently fast, until something occurs to move it.

Again it is said that, if the door had been open, it would have been observed by the fireman looking along the train, or by a signalman, or by some other Company servant. But it does not appear to me that this is in any way certain. A door which appears to be closed from its lying up to the carriage frame, may go forward without swinging open, but at some point of the journey, where the train rounds a short radius curve, or receives a jerk in crossing points, it may swing open; and this may happen even after many stations have been passed. Here I think the jury were

[1] L. R., 8 Q. B. 161.

entitled to hold that the swinging open of the door was attributable to want of care on the part of the railway servants in seeing that it was properly made fast.

It only remains to consider whether there is any ground for attributing such negligence to the pursuer as would bar her claim for damages. It was strenuously maintained that, when a train that is to stop at a station is entering it, it is a fault for anyone on the platform to stand so near the edge of it that an open door may strike him. I cannot assent to that. I hold that the jury were entitled to judge of the question of contributory negligence. Whatever may be the danger of being near the edge of the platform when an express train is rushing through at a high speed and is therefore making a violent draught of air, in this case it must be remembered that the pursuer proposed to enter the train as a traveller. Moreover, there is the additional element here that the servants of the Company had, by placing loaded luggage barrows between the station's seat and the edge of the platform, narrowed the available platform to a considerable degree.

On the whole matter I am satisfied that sufficient ground has not been shown for making this rule absolute, and that it ought to be discharged.

Lord Salvesen.—The facts in this case are unusual. The pursuer was on the platform of the defenders' Queen Street low-level station waiting for a train which was due at 2.45 P.M. there and by which she intended to proceed to Armadale. The platform is what is known as an "island platform," and along the centre line there were several fixed seats for the convenience of passengers. Some barrows had been placed outside one of the seats and so had narrowed the space available for foot traffic opposite the place where the barrows were standing. To get past the barrows the pursuer had to approach nearer the edge of the platform than she would otherwise have required to do. While she was walking along this comparatively narrow space she was struck on the left shoulder by an open carriage door of a passenger train which had approached from behind, and received certain injuries which it is unnecessary to detail. The only other fact which has a bearing on the liability of the defenders is that the compartment, the door of which had swung open, was empty; but the proof of this depends upon the evidence of a single witness—Mrs Spiers. Evidence was led for the defenders which I shall afterwards refer to, and at the conclusion of the trial the jury brought in a verdict in favour of the pursuer, thereby affirming that the accident with which she met was due to the fault of the defenders' servants, and impliedly negativing the plea of contributory negligence.

As regards the implied finding, I do not think any exception can be taken. It was strenuously urged, indeed, that no person is entitled to be so near the edge of a railway platform when a train is approaching that he may be injured by a door which has been negligently left open by the servants of the railway company or has been negligently opened by a passenger proposing to alight. No doubt a person who is more than usually careful of his safety will avoid running any risk at all by standing well back, but I cannot hold that it is the duty of an intending passenger

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to contemplate a carriage door being open before the train has stopped, so as to relieve the person by whose negligence that has happened from all liability for the consequences. Still less do I think that the Railway Company can in this case support such a plea, seeing that the space available for passengers moving along the platform had been considerably narrowed by the barrows I have already referred to. It is common ground that if the train had been in its normal state with all the doors securely fastened the pursuer would not have suffered any injury. When an express train is passing through a station and the travelling public on the platform are warned of its approach, it may well be that it is their duty to keep so far from the edge of the platform that the suction produced by the rapidly moving engine and carriages will not tend to draw them into a position of danger; but this does not apply to a train which is slowing up at a station preparatory to stopping and allowing passengers to alight.

The true point of the case (which seems to have been lost sight of in the multitude of issues raised by the defence) is whether negligence may legally be inferred from this carriage door having been open in the circumstances disclosed in the evidence. That it may be so in some cases is plain from the decision in *Gee*.[1] In that case the only evidence led was that of the plaintiff and his brother who, at Victoria station, had entered an empty compartment which had come from Westminster and was about to start for the Aldersgate Street station. The plaintiff seated himself on the off side of the carriage nearest the six foot way. During the journey he stood up and leant his hand on a bar across the window of the off side of the carriage. It immediately flew open and the plaintiff fell out and was injured. These facts were held to justify a verdict in favour of the plaintiff. It is however very significant to notice that no evidence of any kind was led for the defendants; and the only point which was really argued was, not whether there had been negligence on the part of the defendants' servants in not securely fastening the door, but whether that negligence alone had caused the accident, the proximate cause of which was the plaintiff pressing against the door. In the argument submitted in support of the rule negligence of the defendants' servants was assumed; and indeed on any other assumption it is difficult to understand why the Railway Company offered no evidence. For aught that appears the off side of the carriage was the working side at the station which immediately preceded that at which the plaintiff entered the compartment. If so, as the evidence showed that the plaintiff and his brother had not in any way tampered with the fastenings of the door, the inference was clear that it had not been properly fastened as it ought to have been before the train left the previous station; and, as the compartment was empty when they entered it, the notion of the fastenings having been tampered with by any passenger was excluded.

In the present case the facts are very different. The witness Mackie, who was the passenger guard of the train the open door of which injured the pursuer, gave evidence to the effect that at Bowling he had properly shut the doors of all the carriages on the right-hand side of the train in

[1] L. R., 8 Q. B. 161.

the direction in which it was going—the then working side—which was the same side which the train presented when it entered Queen Street low-level station; that thereafter there were ten stations at which the train stopped, but at all of these the working side was the left-hand side of the train; and that Queen Street was the first station at which the train stopped where people had to get out on the right-hand side of the train. Between Bowling and Queen Street stations, therefore, no passenger had occasion to use the side on which the door was that swung open as the train approached Queen Street platform. The same witness depones that at Charing Cross station he saw the non-working side of the train and that there were no doors open upon it when it left the station. The fireman of the train who stood at the non-working side of the engine also deponed that no doors were open on that side when the train left Charing Cross. There was other evidence to the same effect. Accepting the evidence for the pursuer the cause of the accident must have been either (1) that the door had been closed but insufficiently fastened at Bowling and had sprung open of its own accord just before the train reached Queen Street station; or (2) that it had been originally properly fastened at Bowling, but that the fastening had been tampered with at some intermediate point by a passenger so that it was apt to open when the train passed round a curve, or that it had been gradually loosened by the vibration of the train until it had actually swung open. If either alternative infers negligence against the defenders then the verdict must stand; but if, on the other hand, the latter alternative is one which is consistent with the defenders' servants not being in any way to blame it humbly appears to me that the verdict cannot be supported.

The fact that the carriage was empty as it approached Queen Street station demonstrates only that the door had not been properly fastened when it left Charing Cross station. It does not exclude the view that some passenger at an earlier point may have tampered with the fastening and perhaps opened the door and afterwards pulled it to without locking the handle. There is no direct evidence as to whether the carriage in question had been occupied after the train left Bowling, but there is general evidence to the effect that this particular train was well patronised, and therefore that it was extremely unlikely that this carriage should have been empty all the time that the train took to travel past the ten stations to Queen Street. It was said on behalf of the pursuer that it was extremely improbable that any person would have touched the handle of what was the off-side door between any of these previous stations. I see no improbability of the kind. It is familiar enough that people open a carriage door some little time before they are approaching a station; and if they are not acquainted with the line, they may open the wrong door, in which case, when they discover their mistake, they would be very likely merely to pull it to without locking the handle. At all events, this hypothesis appears to me to be just as probable as that this particular door should have remained closed all the way from Bowling to Charing Cross, and should have swung open only just before the train entered Queen Street station. There is evidence to exclude the pursuer's theory if Mackie's statement is accepted and there was no counter evidence.

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On the other hand, there was no evidence at all to exclude the possibility of an intermediate passenger having tampered with the fastening. There is no evidence which enables the Court, any more than the jury, to decide in favour of the one hypothesis rather than the other. Each appears to me equally probable: both are certainly possible explanations.

All this, however, would not avail the defenders if they have a duty to examine the off-side doors of a train similar to that which is imposed upon them of examining and closing all the doors on the working side. The rules of the Railway Company do not provide for any such inspection, nor is there any evidence of other railway companies doing so. It is difficult to see how, in the ordinary working of a train, such an inspection could be carried out without causing very great delay and consequent inconvenience to passengers. To do the work efficiently, some person would have to travel along the footboard adjoining the six-foot way and see that every fastening was in position. From the near side of the train this cannot be seen where the fastening is one which opens only from the outside, as was the case with the fastening here. The duty of the Railway Company's servants under the rules is to close the windows on the off side of the train in empty compartments; but that duty is not prescribed for the safety of passengers, but for the protection of the Railway Company's own property. If a carriage door on the off side were seen to be open, it would certainly be negligence on the part of the guard who observed it if he did not close it; and perhaps it would be negligence if he failed to observe a carriage door that was in fact open on the off side and so failed to close it. But I cannot affirm on the evidence that it constitutes fault on the part of a railway company not to provide for a system of inspection of the handles of carriages on the off side of a train; and, indeed, I do not recollect that this was maintained on behalf of the pursuer.

I am accordingly of opinion that the mere fact of the door in question having swung open before it reached the platform on which the pursuer was walking is not a sufficient ground for inferring that it had not been properly fastened through the fault of the defenders' servants; and that, therefore, there was no evidence on which the jury could base a finding of fault.

Lord Guthrie.—The defenders deny fault and allege contributory negligence. I think fault, leading to the accident, has been proved against them, and that they have failed to establish contributory negligence.

At the trial, the defenders endeavoured to show that there had not been, and could not have been, any accident. This attitude was abandoned in the argument before us, when the case was taken on the footing (1) that the train in question came alongside the platform with a door of a compartment swinging open, and (2) that the pursuer was struck by that door.

The pursuer contended that these facts were sufficient to raise a presumption of fault on the part of the Railway Company, and, therefore, to shift the onus, which she admitted lay on her in the first instance, to prove fault. She founded on *Gee* v. *Metropolitan Railway Company*.[1] In

[1] L. R., 8 Q. B. 161.

that case the plaintiff entered, at Victoria, a train which had come from Westminster. When the train was approaching Sloane Square he stood up, and took hold of and leaned on the small brass rod across the window of the off-side door of the compartment, intending to put his head out to see the signal lights. The door flew open; he fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The railway company led no evidence. The jury found for the plaintiff, and the Queen's Bench and Exchequer Chamber held that there was sufficient evidence and that the verdict ought to stand. The Judges (who all gave opinions) were Cockburn, C.J., Blackburn, J., Mellor, J., Quain, J., Kelly, C.B., Martin, B., Keating, J., Brett, J., Cleasby, B., and Grove, J. If that decision, pronounced by an exceptionally strong bench, be sound, it is an authority in the pursuer's favour. There was no evidence that the compartment was unoccupied between Westminster and Victoria, and the railway company argued that the door might have been unlocked and left unfastened by a passenger travelling between these stations. Similarly, in the present case, the defenders argue that the door, which was swinging open when the train came into Queen Street Station, may have been unlocked by a passenger travelling between any of the ten stations stopped at in the journey from Bowling to Queen Street. This argument failed in *Gee's* case.[1] Should it prevail in the present case?

If it was held in *Gee's* case[1] that the mere fact of a railway carriage door flying open, while the train was in motion, raised a presumption of fault on the part of the company, it is not necessary to affirm that proposition in this case. I accept the view put forward by the Solicitor-General that it is a question of circumstances whether any such presumption of fault arises. For instance, if it had been proved that the compartment, of which the door was swinging open, had contained a passenger or passengers when it arrived at Queen Street, I should have doubted, looking to the known custom of people to open the doors of carriages before the stoppage of trains despite the endeavours and warnings of railway companies to prevent the practice, whether any such presumption arose. But in this case it is proved that, when the train came in sight at Queen Street out of the tunnel and beyond the signal bridge, there was no person in the compartment. That seems to me a circumstance which, taken in conjunction with the open door, is sufficient to throw the onus on the defenders of clearing themselves from the fault, which, otherwise, is the reasonable inference. They might perhaps have done so by evidence that the compartment was occupied during some part of the journey between Bowling and Queen Street. They say they have done so, and they rely on the cross-examination of Mackie, the guard. The passage in his evidence is as follows:—"Assuming that a carriage door was swinging open as it came out of the tunnel, or through the signal bridge at Queen Street station, and that no one was in the compartment, how do you account for that? (A.) I would say it was not right, because that is a very well-filled train coming from Bowling, and there is not a compartment that is not used. (Q.) You never, on

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any occasion, have an unoccupied compartment? (A.) Not one. (Q.) And there never are such? (A.) No. (Q.) Assuming there was a vacant compartment, and that as the train came out of the tunnel, or from under the bridge at the signal cabin, the door was swinging open, must that not have been due to it not having been closed at Bowling? (A.) No. I would say that was impossible." That evidence, on the face of it, is not reliable, because it makes two obviously incorrect assertions, first, that Mackie had never seen an unoccupied compartment on the journey between Bowling and Queen Street, and, second, that it was "impossible" that the door was not fastened at Bowling. It may be the misfortune of the defenders that, looking to the day of the week (Monday) and the season of the year (February), no presumption of heavy traffic arises in their favour, and it may also be their misfortune that, owing to information of the accident not being lodged on the spot, they were unable to produce evidence of the compartment being occupied between Bowling and Charing Cross. But the result is that, in my opinion, there is no reliable evidence on which to found the defenders' suggestion that the door may have been opened and not re-fastened *en route* before leaving Charing Cross, by a passenger, mischievously, or by mistake. If so, it seems to me that the reasonable inference is the one maintained by the pursuer, namely, that the door, owing to the defenders' negligence, was not fastened at Bowling. The defenders only suggest a possibility, without any evidence to raise it to a probability. The pursuer founds on a proved fact as to the state of the train when it reached Queen Street station, which, unless effaced by evidence as to the position of the door at an earlier part of the journey, leads, in my opinion, to reasonable proof of fault. Mackie's statement as to the doors being fastened at Bowling is merely a statement of practice, and not from recollection of this particular train.

As to contributory negligence, it appears that there was a clear space of some four feet between the edge of the platform and the barrows on the platform, and that the pursuer must have been walking some two feet from the edge of the platform. In the absence of any warning from the defenders' servants I do not think the defenders have proved contributory negligence. The pursuer was not bound to assume that the defenders might work their line in disobedience to their own rules. It is said that she should have anticipated that passengers might be opening doors in preparation for alighting. But, when this takes place, the door is not usually flung fully open, but is held in the passenger's hand. It was also suggested that she might just as well have been struck by a passenger looking out of the window. But, in that case, if it were possible for such a passenger to have leaned out far enough to have come against the pursuer, he would have been looking the way the train was going and would have avoided the pursuer.

On the whole matter, I think the verdict ought to stand.

THE COURT discharged the rule.

PURVES & SIMPSON, S.S.C.—JAMES WATSON, S.S.C.—Agents.

CHRISTINA GAUDIE OR CRAIG, Appellant.—*Christie, K.C.*—*T. D. K. Murray.*
JAMES CORMACK AND OTHERS (Owners of S.S. "Calabria"), Respondents.—*Horne, K.C.*—*Normand.*

No. 83.

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Craig v. Owners of s.s. "Calabria."

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Seaman returning to vessel—Fall from quay.*

A seaman employed on a ship in port went ashore after work was over, as he was entitled to do, partly to buy food (which under his contract of employment he was bound to provide for himself) and partly to see the town. On returning to the vessel, before he had reached the gangway which was the only access from the quay to the vessel, he accidentally fell from the quay into the water and was drowned. The passage-way along the quay from the gangway to beyond the point where the man fell was narrowed to a width of two feet by a row of barrels which were standing on the quay.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the accident did not arise out of the seaman's employment.

Held that there was evidence to warrant the arbitrator's finding.

2D DIVISION. Sheriff of the Lothians and Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Leith between Mrs Christina Gaudie or Craig, widow of the deceased John Craig, as an individual and as tutrix for her pupil children, and James Cormack and others, the registered owners of the s.s. "Calabria" of Leith, the Sheriff-substitute (Guy) refused compensation and, at the request of the applicant, stated a case for appeal.

The case set forth:—

"On 9th September 1913 the said John Craig was in the employment of the respondents as a marine donkeyman on board their steamship "Calabria," then lying at the port of Riga. He was engaged for six months from 29th August 1913, subject to dismissal on twenty-four hours' notice. It was part of the said John Craig's contract, as well as of the other seamen's contracts, that they had to provide their own food and necessaries for the voyage, which they provided for themselves either before the voyage began or on shore when the vessel was in port. When the vessel was in port, and after working-hours (which were usually from 7 A.M. till 5 P.M.) were over, unless the members of the crew had special instructions to the contrary, their time was at their own disposal, and they were at liberty to go ashore for the purpose of providing food and necessaries, or for their own private purposes. When the vessel was in port the men had their usual lodging on board, though they were only bound to be at their work when in port at 7 A.M. The deceased John Craig, prior to his death, had always slept on board the vessel. On said date, between 6 and 7 P.M., Craig left the ship and went ashore, partly for the purpose of procuring provisions and partly for the purpose of seeing the town. In the course of returning to the vessel between 10 and 11 P.M. of said date, and before he had reached the gangway between the quay and the vessel, he accidentally stumbled and fell into the water between the quay and the vessel, and was drowned.

"On the occasion in question the gangway from the vessel to the quay, which was the only access to and from the vessel, was

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placed amidships. Opposite the gangway, and extending about 50 or 60 feet in each direction, there was a row of barrels situated about 2 feet from the edge of the quay, making it necessary for the crew, in leaving the vessel, to proceed along this passage at the edge of the quay 50 or 60 feet in either direction till they came to an opening left in the row of barrels to afford a means of passage over the remainder of the quay and thence to the town. It was thus also necessary for them, on returning to the ship, to walk along the said passage between the barrels and the edge of the quay, a distance of 50 or 60 feet.

"On the occasion of the accident Craig was returning to the vessel with three other members of the crew, and he was about 12 feet from the gangway when he accidentally stumbled and fell into the water as aforesaid, and was drowned.

"In these circumstances, I found that the said accident did not arise either out of or in the course of the deceased's employment with the respondents.

"I therefore assoilzied the respondents, and found the appellant liable to the respondents in expenses."

The question of law for the opinion of the Court was:—"Did the said accident arise out of and in the course of the employment of the said deceased John Craig with the respondents?"

The case was heard before the Second Division (without the Lord Justice-Clerk) on 26th May 1914, when the undernoted authorities were cited.[1]

At advising on 6th June 1914,—

LORD DUNDAS.—The stated case sets forth the facts admitted or proved, and I need not repeat them. The respondents' counsel conceded at our bar that, in view of some of the decided cases, they could not maintain that the accident did not arise in the course of the deceased's employment. The question, therefore, is narrowed to whether or not the arbitrator was warranted by the facts in deciding that the accident did not arise out of the employment. My opinion is that he was so warranted. The facts disclose that the deceased was about twelve feet from the gangway when he stumbled, and fell into the water. He was at the time returning to

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[1] *For the Appellant*:—Moore v. Manchester Liners, Limited, [1910] A. C. 498; Kitchenham v. Owners of s.s. "Johannesburg," [1911] 1 K. B. 523, *per* Fletcher-Moulton, L.J., at p. 526-7, *affd.* [1911] A. C. 417; Leach v. Oakley, Street, & Co., [1911] 1 K. B. 523; Jackson v. General Steam Fishing Co., Limited, 1909 S. C. (H. L.) 37; Robertson v. Allan Brothers & Co., (1908) 1 Butterworth's W. C. C. 172; Gane v. Norton Hill Colliery Co., [1909] 2 K. B. 539.

For the Respondents:—Moore v. Manchester Liners, Limited, [1910] A. C. 498; Kitchenham v. Owners of s.s. "Johannesburg," [1911] 1 K. B. 523, [1911] A. C. 417; Jackson v. General Steam Fishing Co., Limited, 1909 S. C. (H. L.) 37; Fletcher v. Owners of "Duchess," [1911] A. C. 671; Biggart v. s.s. "Minnesota," (1911) 5 Butterworth's W. C. C. 68; Dixon v. s.s. "Ambient," (1912) 5 Butterworth's W. C. C. 428; Cook v. s.s. "Montreal," (1913) 6 Butterworth's W. C. C. 220; Webber v. Wansbrough Paper Co., Limited, (1913) 6 Butterworth's W. C. C. 583; Gilbert v. Owners of Steam Trawler "Nizam," [1910] 2 K. B. 555; Anderson v. Fife Coal Co., 1910 S. C. 8; Mitchell v. s.s. "Saxon," (1912) 5 Butterworth's W. C. C. 623.

his ship,—*ex concessis*, in the course of his employment; but I am unable to see that his mishap arose in any way out of his employment. I think it arose from a risk common to everyone, namely, that of falling from the edge of a quay into water. It is not enough for the applicant to say that the accident would not have happened if the man had not been engaged in the particular employment, or if he had not been at that particular place; she must show that it was in some way specially connected with his work and employment. I think the case would have been materially different if, at the time of the accident, the man had reached the gangway and fallen off it into the water and the risk was one due to the means of access to the ship.

The appellant's counsel founded strongly upon some passages in the opinion of Lord Moulton (then L.J.) in *Kitchenham's* case[1]; but I do not think they avail him much when the opinion is read as a whole, and having due regard to the facts of the case. It is true that the learned Judge, in the course of some general observations, said he did not think the dividing line is when the man actually touches the ship or the special means of access to it. He instanced, as a case of that kind, where the accident might be held to arise out of the employment, one where a sailor, returning to his ship in a dense fog, and trying to find the gangway (which his Lordship supposed to be unlighted), falls into the water and is drowned; but went on to say: "but if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment." Now, in *Kitchenham's* case,[2] there was no evidence to show whether or not the deceased had reached the gangway when he fell into the water. Lord Moulton, on the facts, concluded that the man had not reached it; and said that the evidence was "not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf"; that it "falls short of what is necessary"; and "though one may think it possible, and even probable, that he was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case." The widow's application therefore failed in *Kitchenham's* case,[2] and the judgment was affirmed by the House of Lords[3]; while the decision was different in *Leach's* case,[2] which the Court of Appeal disposed of at the same time,—where the deceased had arrived at and passed on to the gangway when the accident occurred. It seems clear, therefore, that in these cases, as in many of the others cited to us, the question whether the deceased had, or had not, reached the gangway, or other means of access to the ship, was regarded by the Court as a material, if not a crucial, one; and I do not think there is anything to the contrary in Lord Moulton's general observations when they are read along with the reasons assigned by his Lordship for the disposal of the two cases then before him. Indeed, I apprehend that Lord Moulton would have decided

[1] [1911] 1 K. B. 523, at p. 527.
[2] [1911] 1 K. B. 523. [3] [1911] A. C. 417.

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Kitchenham's case[1] in the opposite sense if it had been proved, as it was in *Leach's* case,[1] that the death was due to the means of access to the ship. I rather think that in all the cases in which an accident of this sort has been held to have arisen out of the employment the deceased had reached the ship, or the gangway, or other means of access to it, when the accident occurred. Now, in the present case, the man stumbled and fell before he had got nearer than about twelve feet to the gangway. I do not think he had "taken any specific step towards getting on board the vessel," or was doing anything "specifically connected with his employment on the ship." He fell into the water from the passage-way on the quayside. The passage-way was narrowed to a width of about two feet by a row of barrels, but there is no suggestion that the shipowners were in any way responsible for the presence of these barrels on the quay. The narrow passage-way cannot, therefore, be regarded as if it were a special mode of access to the ship provided by the employers. It appears to me that the accident might have happened to any man who chanced to be walking along that quayside, and was not specifically connected with, or incidental to, the employment of the deceased.

We ought, in my judgment, to answer the question put to us, by finding that it was conceded by the respondents' counsel that the accident arose in the course of the employment; but that there was evidence to warrant the arbitrator's finding that it did not arise out of the said employment; and that he rightly assoilzied the respondents.

LORD SALVESEN.—In this case the Sheriff-substitute has found that the accident to the late John Craig did not arise either in the course of, or out of, his employment. As regards the first matter I think he has not had sufficient regard to the decisions of the House of Lords in the cases of *Moore*[2] and *Kitchenham*.[3] It was settled by these two cases that a seaman who goes on shore for his own purposes, but with the assent, express or implied, of his employers, continues in his employment, so that, if he meets with an accident while he is on shore, and before he reaches his employer's premises, that accident arises in the course of his employment, but not necessarily out of it.

The question whether the deceased workman in this case met with an accident arising out of his employment appears to me to be settled in the negative by the same two authorities. He was returning to his ship, but had not reached the gangway, when he accidentally stumbled and fell into the water between the quay and the vessel. Had he reached the gangway the case would have been ruled by the decision in *Leach*.[1] The gangway was the access provided from the quay to the ship and formed part of the employer's premises. The danger which attends a seaman crossing it is a risk arising out of his employment. It is not one to which the general public are exposed. On the other hand, the risk of falling from a quay is common to everyone, and is not therefore connected with the seaman's employment—*Fletcher*.[4] It is, in my opinion, nothing to the purpose that

[1] [1911] 1 K. B. 523. [2] [1910] A. C. 498. [3] [1911] A. C. 417.
[4] [1911] A. C. 671.

the quay along which the deceased had to pass was obstructed by cargo so that there was only a clear passage of two feet along the edge of it; nor is it of any consequence that it was necessary for the seaman to traverse this route in order to get back to his work. There is no finding that the shipowners were in any way responsible for the condition of the quay; or even that it was cargo from their vessel which was stored upon it. It is the port authority and not the shipowner who is responsible for the safety of the docks and quays. The accident might just as easily have occurred through the man's stumbling over a mooring rope stretching between a ship and the quay. All such risks are risks which the seaman takes when he is on shore for his own purposes, and do not arise out of his employment.

It was indeed suggested that, as this man went ashore to provide himself with food and necessaries for the voyage under a contract with his employers that he was to provide his own food while at sea, he was engaged on his employer's business. I think it would be as reasonable to say that when a man goes to his home to sleep or to have his dinner he is on his master's business, because unless he takes necessary food and rest he will be unable to do his work. The answer is—that he is taking food or rest as the case may be for his own purposes and in order to enable him to fulfil his contract with his employer. I have no difficulty therefore in rejecting this argument.

LORD GUTHRIE.—I am of the same opinion. The Sheriff-substitute's findings clearly show that the case does not raise the difficult questions which have to be dealt with when an employee is injured away from his master's premises, or the accesses to them, whether on land or water, but on his master's business. Craig was on what the law considers his own business, even although part of it consisted in procuring provisions (it might have been clothing) for his use on board ship. Nor does any question of fact arise on the case as stated as to whether the narrowed quay, along which Craig had to walk in order to reach the gangway, might not be fairly treated as a continuation of the gangway. There is nothing in the case to suggest that those on board Craig's ship had anything to do with the operations which resulted in the quay being so narrowed, or that the narrowed quay led only to Craig's ship, or that the narrowed space stopped at Craig's ship.

THE COURT pronounced this interlocutor:—"Answer the question of law by finding that it was conceded by the respondents' counsel that the accident referred to in the case arose in the course of the deceased John Craig's employment, but that there was evidence to warrant the arbitrator's finding that it did not arise out of the said employment: Therefore affirm the award of the arbitrator, and decern."

T. M. POLE, Solicitor—BOYD, JAMESON, & YOUNG, W.S.—Agents.

No. 84.

June 6, 1914.

Aitken v. Finlayson, Bousfield, & Co., Limited.

MRS AGNES ADAM OR AITKEN AND OTHERS, Appellants.—*Lippe—A. Crawford.*

FINLAYSON, BOUSFIELD, & COMPANY, LIMITED, Respondents.—*Moncrieff, K.C.—Fenton.*

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Injury by "accident"—Accident arising out of and in the course of the employment—Death due to apoplexy brought on by over exertion.*

A gatekeeper employed at a flax mill—whose duty it was, besides attending to the gate, to take charge of the ambulance appliances for use in cases of accidents occurring in the works, to telephone for the doctor in case of necessity, and to attend personally to minor accidents—was informed, while on duty, of a scaffold accident in the works to some slaters, who were not in the employment of the flax spinners but who were engaged in doing work at the mill. The gatekeeper ran to the scene of the accident, and then back to the gate to telephone for a doctor. The exertion of running, and the excitement, brought on an apoplectic shock, from which he died in a few hours.

Held that the death of the workman was due to an accident, within the meaning of the Act, arising out of and in the course of his employment.

2D DIVISION. Sheriff of Renfrew and Bute.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Paisley between Mrs Agnes Adam or Aitken and others and Finlayson, Bousfield, & Company, Limited, flax spinners, Johnstone, the Sheriff-substitute (Blair) refused compensation, and, at the request of the applicants, stated a case for appeal.

The case set forth that the following facts were admitted or proved:—"(1) That the appellants are the sole dependants of the deceased Alexander Aitken, a workman in the employment of the respondents, who died on 13th August 1913, aged about thirty-eight; (2) That the deceased had been in the respondents' employment as aforesaid for over twenty years; (3) That his wages for the three years previous to his death amounted in all to the sum of £250, 15s. 3d.; (4) That the deceased's duties were to attend to the gate and to take charge of the ambulance appliances, &c., for use in cases of accidents occurring in the works, to telephone for the doctor or ambulance should necessity arise, to attend personally to any minor accidents; and generally to attend to the telephone in the morning before the office staff arrived; (5) That he had no instructions not to attend to accidents to workmen who might not be in the employment of the respondents, who were engaged to do certain repairs on the respondents' premises and were in the course of carrying out those repairs; (6) That about 7.30 A.M. in the morning of 13th August 1913, and before the office staff had arrived, the deceased was on duty at the respondents' works, and was informed of a scaffold accident in another part of the works, which happened to some slaters who were not in the respondents' employment, but who were at the time engaged in doing work for the respondents in their premises; (7) On being so informed of the accident he ran from the gate to the scene of the accident, a distance of 100 yards or thereby, and ran back to the gate in order to telephone for the services of a doctor and an ambulance; (8) That while engaged in

telephoning for the doctor and the ambulance, he was seized with an apoplectic shock, which terminated fatally about 1.30 on the same day; (9) That the cause of the said shock was the exertion caused by running as quickly as he could to and from the gate and the scene of the accident, and the resultant excitement arising from the scaffold accident; (10) That the deceased had been about ten years ago a professional football player; (11) That athleticism of a strenuous kind tends to produce a hypertrophied heart and also arterial degeneration; (12) That apoplexy is a disease due to arterial degeneration; (13) That the deceased did not exhibit or complain of any of the antecedent symptoms sometimes discernible in or suggestive of arterial degeneration, such as Bright's disease or syphilis, nor had he any illness of any kind indicative of arterial disorder; (14) That the deceased was of somewhat short stature, stout, with a thick neck and a florid complexion, and that apoplexy occurs more frequently amongst persons of that description than amongst thin, spare, wiry men; (15) That the deceased's death was due to apoplexy brought on by the exertion of running as quickly as he could and the excitement caused by the scaffold accident."

The case further stated:—"On the foregoing facts I held in law (1) That the death of the deceased was not due to injury by accident within the meaning of the Workmen's Compensation Act, 1906, in respect that the act of running as described in the foregoing findings was not an accident of such a kind as entitles to compensation, and (2) That even if it was an accident within the meaning of the Act, it did not occur in the course of the deceased's employment or arise out of it, in respect that he had no special instructions to attend to, or not to attend to, workmen, not in his master's employment, who might happen to be injured within the works. And therefore I held that the appellants were not entitled to compensation."

The questions of law for the opinion of the Court were:—"(1) Whether the death of Alexander Aitken was due to an injury by accident within the meaning of the Workmen's Compensation Act, 1906; and (2) If the foregoing question be answered in the affirmative, whether his death was due to any injury by accident arising out of and in the course of his employment within the meaning of the said Act."

The case was heard before the Second Division (without the Lord Justice-Clerk) on 28th May 1914.

Argued for the appellants;—(1) The death resulted from a shock of apoplexy, which was an unexpected and fortuitous occurrence, and therefore an accident within the meaning of the Act.[1] The accident was referable to a definite and ascertained event, in which respect the case was distinguishable from *Ritchie* v. *Kerr*.[2] (2) The accident arose out of and in the course of the employment.[3] The danger of over-exerting himself in an emergency was a risk incidental to the employment of the workman.

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[1] Fenton v. Thorley & Co., Limited, [1903] A. C. 443; Clover, Clayton, & Co., Limited, v. Hughes, [1910] A. C. 242; Stewart v. Wilsons and Clyde Coal Co., Limited, (1902) 5 F. 120.

[2] 1913 S. C. 613.

[3] Moore v. Manchester Liners, Limited, [1910] A. C. 498; Wicks v. Dowell & Co., Limited, [1905] 2 K. B. 225.

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Argued for the respondents;—(1) The facts proved did not disclose "injury by accident."[1] Death was due to apoplexy, and apoplexy was a disease, not an accident.[2] It was not even a disease brought on by an accident, as in *Brintons, Limited*, v. *Turvey*.[3] The fact that the disease would not—or might not—have supervened but for the occurrence of the scaffold accident, and the consequent developments, was not enough to support the proposition that death was the result of an accident. To hold that it did would be to extend the decisions in *Drylie*[4] and *Brown*[5] further than they were intended to apply. [Lord Dundas referred to *Guthrie* v. *Kinghorn*.[6]] (2) In any event the accident did not arise either out of or in the course of the deceased's employment. He had no duty towards the victims of the scaffold accident, and in going to their assistance, he was not acting in his employers' interest, however meritorious his conduct might have been.[7]

At advising on 6th June 1914,—

LORD DUNDAS.—[After narrating the facts stated in the case]—Upon these facts the learned arbitrator held (1) that the death was not due to injury by accident within the meaning of the Act of 1906; and (2) that, even on the contrary assumption, it did not arise out of or in the course of the employment, and he therefore decided that the appellants were not entitled to compensation. I regret that I find myself compelled to differ from the arbitrator upon both of these heads; but holding, as I do, a clear opinion that there was here a "personal injury by accident arising out of and in the course of the employment," and that, upon the facts proved, it was not competent for him to refuse compensation, I am bound to answer the questions put to us in the affirmative.

I think that there was here, upon the facts found in the stated case, a definite accident, from which this man's death directly resulted. An accident occurred in the works; Aitken, in consequence, ran to the scene of it, and back to the gate; the exertion caused by his running, and the excitement resulting from the accident, caused him to have an apoplectic seizure, and the seizure caused his death. That we are entitled, and indeed bound, to take the scaffold accident into account seems clear from the recent decisions in *Brown* v. *John Watson, Limited*,[5] (in the House of Lords), and *Drylie* v. *Alloa Coal Company, Limited*,[4] (decided by a majority of seven Judges, and approved by the House of Lords in *Brown's* case[5]). But, even apart from that extraneous circumstance, I should hold that the proved facts disclose an "accident" within the meaning of

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[1] Ritchie v. Kerr, 1913 S. C. 613; Coe v. Fife Coal Co., Limited, 1909 S. C. 393.

[2] O'Hara v. Hayes, (1910) 3 Butterworth's W. C. C. 586.

[3] [1905] A. C. 230.

[4] Drylie v. Alloa Coal Co., Limited, 1913 S. C. 549.

[5] Brown v. John Watson, Limited, April 28, 1914, reported *supra*, House of Lords Cases.

[6] 1913 S. C. 1155.

[7] Mullen v. Stewart & Co., Limited, 1908 S. C. 991; Blakey v. Robson, Eckford, & Co., Limited, 1912 S. C. 334; Rodger v. Paisley School Board, 1912 S. C. 584.

the statute and the purport of decided cases. The apoplectic seizure which caused Aitken's death is, by the findings in fact, shown to have been the direct effect of his abnormal effort in running to the scene of the slaters' mishap and back to the gate. It is not, I think, of any use to refer in detail to the numerous decisions bearing upon this point, but I may say that the facts in, *e.g.*, the well-known case of *Clover, Clayton, & Company*[1]—the aneurism case—appear to me to be less (rather than more) favourable to the theory of injury by accident than those here present.

That the accident arose in the course of Aitken's employment appears to me to be clear. I think the only suggestion to the contrary was based upon the view that, as the slaters were not employees of the respondents, Aitken put himself out of the course of his employment in going to their aid. The arbitrator finds that Aitken "had no instructions not to attend to accidents to workmen who might not be in the employment of the respondents, who were engaged to do certain repairs on the respondents' premises and were in the course of carrying out these repairs." The view suggested, but not, I think, very seriously pressed by counsel is, in my judgment, too narrow to compel or to justify our acceptance of it.

Lastly, I am of opinion that the accident arose out of Aitken's employment. The man's duties, as described in the fourth finding, seem to me clearly to include his prompt attendance, in case of any accident occurring in the works, either personally, or by telephonic communication with the doctor. The apoplectic seizure resulted from Aitken's perhaps too zealous effort at speed in the performance of his duty.

Upon the whole matter, therefore, I am for answering the questions in the affirmative, and remitting to the learned arbitrator to assess compensation.

Lord Salvesen.—The first question in this case is whether the death of Alexander Aitken was due to an injury by accident within the meaning of the Workmen's Compensation Act, 1906. Apart from authority, I should not myself have differed from the view at which the arbitrator arrived; but I am unable to distinguish this case from that of *Clover, Clayton, & Company, Limited.*[1] There a man, who was suffering from a serious aneurism, suddenly fell down dead from rupture of the aneurism while tightening a nut by means of a spanner. The man at the time was engaged at his ordinary work; and, according to the evidence, might have died in his sleep from the same cause, although the slight strain which he experienced when screwing the nut probably accelerated the rupture. Here the deceased's death was due to apoplexy brought on by the unusual exertion of running as quickly as he could to the scene of an accident which had occurred within the works in which he was employed, and of running back at the same pace to summon assistance by telephone. It is immaterial whether this exertion caused a shock, as the arbitrator describes it, or, as I think is more likely, that it resulted in the bursting of one or more small blood-vessels in the brain. As in *Clover's* case,[1] the

[1] [1910] A. C. 242.

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man fell down suddenly in a dying condition, as the result of part of his vital organism giving way; and this, according to Lord Macnaghten, constitutes an accident in the popular sense of the word. It is all in favour of this theory, according to later decisions, that the inducing cause of the unusual exertion to which he exposed himself, was an abnormal occurrence in the works in which he was engaged.

That this accident occurred in the course of his employment, I think, almost goes without saying on the facts which are here found. It happened while the workman was on his employers' premises, which he never for a moment left, and during his ordinary working hours. All this is, however, not conclusive as to whether it arose out of his employment. If the accident, to the scene of which the deceased man ran, had happened on the street, I should have held him to have been a mere volunteer; and, however meritorious his intervention might have been, it would not have been within his duty to his employers. But here we are expressly told "that the deceased's duties were to attend to the gate, and to take charge of the ambulance appliances, &c., for use in the case of accidents occurring in the works, to telephone for the doctor or ambulance, should necessity arise, to attend personally to any minor accidents, and generally to attend to the telephone in the morning before the office staff arrived." Now, it so happened that the workmen who met with the accident in question were not in the direct employment of the respondents, but were the servants of a contractor whom they had employed to do certain repairs on their premises; but the deceased had no instructions not to attend to such accidents, and in the absence of such instructions I cannot see that he was doing anything but his duty in informing himself as to whether any of the persons injured could be properly treated by himself or required more highly skilled assistance. The zeal with which he discharged his duty cannot be made a point against him, although but for that probably he would not have suffered any injury. It was ingeniously argued, on a construction of the findings in fact, that the deceased's duty was at the gate alone, and that he ought not to have left the gate under any circumstances, but should have awaited the arrival of any injured persons who might meet with accidents in his employers' works, and have treated them with the ambulance appliances he had there at hand, or, if the cases were too serious, have telephoned for the doctor and the ambulance. I do not think this is a fair interpretation of the findings in fact. It would be an odd limitation to put upon a man, whose duty it was to attend personally to minor accidents, that he should not himself go to ascertain the nature of an accident and bring his appliances to the spot where the injured man was; and I cannot conceive that it makes any difference that the injured persons happened, as it turned out, not to be directly employed by the respondents. I am therefore of opinion that this accident arose out of the employment of the deceased.

Lord Guthrie.—It seems to me that the findings of the arbitrator necessarily lead to the result arrived at by your Lordships. The respondents founded on the twelfth finding, which is "that apoplexy is a disease

due to arterial degeneration." That finding is not, as I understand, expressed with scientific accuracy. But in any case, the twelfth finding must be taken along with the ninth finding that the apoplexy—that is to say, the bursting of a blood vessel or of blood vessels in the brain—was directly caused, and not merely accelerated, by the exertion and excitement which were the natural although not the inevitable consequences of the deceased's efficient performance of duties cast upon him by the occurrence of the accident detailed in the sixth finding. The respondents founded strongly on the Scotch case of *Ritchie* v. *Kerr*,[1] and the Irish case of *O'Hara* v. *Hayes*.[2] These cases are not applicable to the present case. In both these cases it was held that the workman was engaged in the ordinary performance of his normal duties; the present case was clearly a case of emergency.

THE COURT answered the questions of law in the affirmative, recalled the decision of the arbitrator, and remitted to him to assess the compensation due.

JOHN BAIRD, Solicitor—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 85.

June 11, 1914.

Clarke v. Edinburgh and District Tramways Co., Limited.

MRS ANNIE BATCHELOR OR CLARKE, Pursuer (Reclaimer).—*Maclaren.*
THE EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED, Defenders (Respondents).—*G. Watt, K.C.—Black.*

Process—Record—Reparation—Negligence—Relevancy of alternative and inconsistent averments of fact.

In an action of damages for personal injuries against a tramway company the pursuer averred that she was injured by being thrown off a tramway car, owing to the car starting violently forward as she was about to alight at one of the car's ordinary stopping-places. She averred fault on the part of the conductor of the car, in respect that he had failed to observe that she was about to alight and had failed to give a signal to the driver to stop the car; or, alternatively, fault on the part of the driver, in respect that he had disregarded a signal to stop given him by the conductor.

Held (*rev.* judgment of Lord Anderson) that, although these alternative averments of fact were contradictory and mutually exclusive of each other, yet, as either one or the other would, if proved, infer liability on the part of the defenders, the pursuer had stated a relevant case.

Dictum of Lord President M'Neill in *Finnie* v. *Logie*, (1859) 21 D. 825, *applied.*

Process—Proof—Witnesses—Order to furnish pursuer with names of defenders' employees.

In an action of damages for personal injuries, brought against a tramway company, the pursuer averred that she was injured through the fault either of the conductor or of the driver of a car belonging to the defenders. After the record was closed, but before issues were adjusted, the pursuer moved for an order on the defenders to supply her with the names of the driver and conductor in question.

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[1] 1913 S. C. 613.

[2] 3 Butterworth's W. C. C. 586.

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1st Division. Ld Anderson.

The Lord Ordinary (Anderson) having refused the motion, *held* that the motion ought to have been granted.

Observation of Lord President Dunedin in *Henderson* v. *Patrick Thomson, Limited*, 1911 S. C. 246, *applied*.

On 21st November 1913 Mrs Annie Batchelor or Clarke brought an action of damages for personal injuries against the Edinburgh and District Tramways Company, Limited.

The pursuer averred that, on an evening named, she and her husband were travelling by one of the defenders' cars, and that, as the car approached one of the places fixed by the defenders at which all cars should stop for the purpose of setting down and picking up passengers, (Cond. 4) ". . . the pursuer and her husband rose from their seats inside the car and proceeded to the rear platform of said car in order to be in readiness to alight whenever said car should stop at said stopping-place. When pursuer and her husband arrived at said rear platform the car was already slowing down, and the pursuer took hold of the handrail at the window of said car with her right hand in order to steady herself. Instead of the car coming slowly to a stop, as it should have done, suddenly and without warning the car started violently forward with a jerk which threw the pursuer off her feet from said platform and precipitated her from said car on to the street." The pursuer then averred that, as the result of this fall, she sustained certain injuries, and proceeded:—(Cond. 6) "The said accident was occasioned by the fault of the defenders, or of those for whom they are responsible. It is the duty of the driver of a car to obey the signals of the conductor with regard to passengers desiring to alight. It is the duty of the conductor of a car to be on the rear platform of said car, or at least to be in such a position on said car when it is approaching a stopping-place that he can see whether there are any passengers who desire to alight. It is also his duty when approaching said stopping-place to keep a careful lookout to see whether there are any passengers on said car who desire to alight at said stopping-place, and to signal the driver to stop when there are such passengers. On the night in question the conductor of said car, as the car approached said stopping-place, was inside the car at the end next the driver making entries in an official book kept in a receptacle at said end of the car. The pursuer and her husband were seated near the rear end of the inside of said car, and when they proceeded from their seats to the rear platform for the purpose of alighting at said stopping-place the conductor was so engrossed in making entries in said book that he negligently, and in breach of duty, failed to observe that the pursuer and her husband had left the inside of said car for the purpose of alighting. He made no attempt to ascertain by personal inspection whether there were any passengers on the rear platform desiring to alight, and gave no signal to the driver to stop at said stopping-place. The driver of said car had slowed down the car and was preparing to bring the car gently to a stop, but when he received no signal to stop he instantly, and with a violent jerk, set the car in motion again, when the pursuer had been led to believe by the slowing down of said car that the said car was about to stop. The pursuer was thus taken unawares, and the accident resulted. The said accident was accordingly caused by the conductor's neglect of duty

in not ascertaining that the pursuer and her husband were standing at the rear platform of the car expecting said car to stop at said stopping-place, and preparing to alight, and in leading the driver to believe after the said driver had slowed down with a view to stopping, that there were no passengers desiring to alight. Alternatively the driver of said car was at fault. On the night in question the driver, as the car approached said stopping-place, released the gripper from the cable and slowed down the car in order to be in a position to bring his car to a stop at said stopping-place in as speedy a manner as possible, as it was the last journey for the night. When the car came close to said stopping-place there were no passengers at said stopping-place who desired to board said car, and the driver, in disregard of a signal from the conductor that passengers desired to alight, suddenly and without warning applied the gripper to the cable, and with a jerk set the car in motion at full speed, and caused the pursuer to be precipitated from the rear platform of said car on to the street, with the result as aforementioned. The said accident was accordingly due to the disregard by said driver of the conductor's signal to stop at said stopping-place."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been injured through the fault of the defenders in one or other of the alternative methods condescended on, is entitled to reparation therefor.

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

The record was closed on 16th December 1913, and on 6th January 1914, after hearing counsel on the adjustment of issues, the Lord Ordinary continued the adjustment of issues till 13th January.

On 10th January 1914 the pursuer having moved that the defenders should be ordained to furnish her with the names and addresses of the driver and conductor of the car in question, the Lord Ordinary refused the motion "*in hoc statu.*"

On 13th January 1914, after a further hearing, the Lord Ordinary (Anderson) sustained the defenders' plea to the relevancy, and dismissed the action.*

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* "OPINION.—I have a good deal of sympathy with the pursuer in this case. She avers that as the result of what happened, three of her ribs on the right side were fractured, the right side of her head was severely bruised, and she sustained a severe shock to her nervous system; and has possibly also sustained internal injuries which will permanently affect her health. There is no doubt, if her story is true, that these injuries were received by her in consequence of her having been precipitated from a tramcar in North Bridge Street, Edinburgh. But I am afraid the case is just one of those in which the pursuer is in the position of not being able to prove in the appropriate way, by appropriate legal evidence, the fault which she thinks ought to be established against the defenders' servants.

"One sees in the newspapers now and then advertisements asking that witnesses who saw a certain accident should communicate with a certain solicitor, and there is no doubt that many cases, in which probably the injured party has a right to a legal remedy, do not come into the Law Courts, because evidence cannot be obtained to bring home fault to the wrongdoer. It seems to me that this case is just in that position; and if I am right in the judgment I am about to pronounce, the moral of the

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The pursuer reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 10th and 11th June 1914.

Argued for the reclaimer;—The ground on which the pursuer sought to make the defenders liable was fault on the part of their servants for which they were responsible, She was entitled to aver alternative, even if inconsistent, states of fact so long as each of these alternative statements set forth a relevant case.[1] This was just such a case as was figured by Lord President M'Neill[2] as being one in which alternative averments might properly be made. Both alternative statements here were relevant; and the pursuer could not, in the circumstances, be expected to be fully informed on the matters to which her averments related, and no reason was suggested why she should, at this stage, confine herself to one of them. In any case the Lord Ordinary should, at the stage which this case had reached, have granted the motion of the pursuer to be furnished with the names of the driver and conductor of the car.[3]

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matter is that an action should not be brought until a pursuer, in the first place, has made up his mind on what ground his action is to be put, and, in the second place, has satisfied himself that he is in possession of legal evidence by which he may reasonably expect to substantiate the kind of fault that he is going to put forward in his action.

"[His Lordship narrated the pursuer's averments as to the happening of the accident]—Now, undoubtedly, the circumstances there averred, if they are true, disclose fault against someone,—against one or other or both of the servants who were in charge of the tramway car. It is negligence to start a car violently from a stopping-place while people are in the act of alighting from that car; and if the pursuer had relevantly stated the fault occasioning the jerking of the car which she averred against one or other of the servants of the Company, or jointly against both, I think there is no doubt she would be entitled to an issue. But then what does she do when she comes to deal with the question of fault, when she comes to set forth the cause of the jerking of the car to which I have alluded?

"She begins with the conductor, and she says this:—'It is the duty of the conductor of a car to be on the rear platform of said car, or at least to be in such a position on said car when it is approaching a stopping-place that he can see whether there are any passengers who desire to alight. It is also his duty when approaching said stopping-place to keep a careful look-out to see whether there are any passengers on said car who desire to alight at said stopping-place, and to signal the driver to stop when there are such passengers. On the night in question the conductor of said car, as the car approached said stopping-place, was inside the car at the end next the driver making entries in an official book kept in a receptacle at said end of the car.' Now that is a distinct averment of fact. There are no preliminary words such as 'the pursuer believes and avers' that the conductor was in that position. That is a distinct averment of fact intimating to the defenders that at the trial evidence will be led to the effect that their conductor, instead of being, as he ought to have been at the stopping-place, on the rear platform of the car, was engaged in connection with his tickets in the interior of the car. Then she avers

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[1] Mackay's Manual, pp. 184, 185; Hope v. Hope's Trustees, (1898) 1 F. (H. L.) 1; Spring v. Martin's Trustees, 1910 S. C. 1087.

[2] Finnie v. Logie, (1859) 21 D. 825, at p. 829.

[3] Barrie v. Caledonian Railway Co., (1902) 5 F. 30; Henderson v. Patrick Thomson, Limited, 1911 S. C. 246, *per* Lord President Dunedin, at p. 249.

Argued for the respondents;—The pursuer's statements were irrelevant. Alternative grounds of action must be tested by taking the weaker alternative.[1] Here however neither alternative could stand, for the pursuer had made two inconsistent statements of fact either of which would, if proved, contradict the other. There was no instance in the decided cases in which such averments had been allowed to go to proof. No doubt a pursuer might set forth a certain state of the facts and then proceed to draw different, and it might be inconsistent, inferences of fact from the facts so stated, and it was to a record in this condition that the dictum of Lord President M'Neill in *Finnie* v. *Logie*[2] applied. But that was not the condition of this record. The pursuer's statements were definite statements of fact, not of inferences of fact, and being inconsistent and contradictory, were irrelevant, for they failed to give the defenders notice of the real case that they would have to meet.[1] With regard to the

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that she and her husband were seated near the rear end of the inside of the car, and when they proceeded to alight the conductor was so engrossed in making entries in his book that he negligently, and in breach of duty, failed to observe that the pursuer and her husband had left the inside of the car for the purpose of alighting. There again is a distinct intimation to the defenders that it will be proved at the trial by the pursuer as a matter of fact that the conductor was so engrossed inside the car making entries in his book that he negligently failed in his duty.

"The pursuer then goes on to say that the conductor 'made no attempt to ascertain by personal inspection whether there were any passengers on the rear platform desiring to alight, and gave no signal to the driver to stop at the stopping-place. The driver had slowed down the car and was preparing to bring the car gently to a stop, but when he received no signal to stop he instantly, and with a violent jerk, set the car in motion again, when the pursuer had been led to believe by the slowing down of the car that the car was about to stop. The pursuer was thus taken unawares, and the accident resulted. The said accident was accordingly caused by the conductor's neglect of duty.' Now there again is a distinct intimation to the defenders that the case which the pursuer is making against them is a case in which the fault complained of is that the conductor, in breach of his duty, failed to give the driver a signal to stop the car. Well, that is a good case, it is quite a good case on relevancy if the pursuer had stopped there; and, if the pursuer had made up her mind that that was the case which she was going to attempt to prove, and had stopped at that point, I should have had no difficulty in holding that she had stated a relevant case, and I should at once have given her an issue to enable her to go to a jury to substantiate that case.

"But she does not stop there. Having given the defenders notice, distinct notice, of the fault she is going to prove against them, she immediately proceeds to make another case of fault, equally specific, and equally distinct—a case of fault against the driver, and a case of fault against the driver which depended on action by the conductor, totally different from that which I have just alluded to, and absolutely inconsistent with it. She says:—'Alternatively the driver of said car was at fault. On the night in question the driver, as the car approached said stopping-place, released the gripper from the cable and slowed down the car in order to be in a position to bring his car to a stop at said stopping-place in as speedy a manner as possible, as it was the last journey for the night. When the car came close to said stopping-place there were no passengers

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[1] Hope v. Hope's Trustees, 1 F. (H. L.) 1, *per* Lord Shand, at p. 5.
[2] 21 D. 825.

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pursuer's motion, the Lord Ordinary had rightly refused it. The defenders were entitled to withhold these names, at any rate until the issues had been adjusted.

LORD PRESIDENT.—Had the pursuer in this case not thought it desirable to overlay her statement of facts with many words, I do not think any Court would have denied her the opportunity of laying her claim before a jury. The difficulty in the case, such as it is, has arisen from a very unusual cause—undue and excessive specification of fact in the record. The pursuer's case, when stripped of all unnecessary verbiage, is extremely clear and simple. She avers that she was travelling as a passenger on one of the defenders' cars and intended to alight at the point where the North Bridge intersects the High Street. She did alight there, but involuntarily. As they drew near the stopping-place, she says, the car gave a sudden, unexpected, and inexcusable jerk forward, and, in consequence, she was violently projected to the ground and sustained the injuries for which she seeks compensation in this action.

The immediate cause of her disastrous fall, she says, was that the driver of the car, at an inopportune moment, applied the gripper to the cable with the result that the car was violently jerked forward. He did that, she says, either because he received an order and disregarded it or because, having received no order, he of his own accord executed the operation. She is unable to say which of the two is the true explanation of the sudden and violent jerk which caused her to fall. It is customary, she says, as a car slows down in approaching a stopping-place, for the conductor to give an order to stop if there are passengers desiring to alight, that he failed to give the order in this instance, and accordingly that the driver, following a usual and quite proper practice, applied his gripper to the cable and jerked the car forward. If that averment is correct, then the

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at said stopping-place who desired to board the said car, and the driver in disregard of a signal from the conductor that passengers desired to alight, suddenly and without warning applied the gripper to the cable, and with a jerk set the car in motion at full speed, and caused the pursuer to be precipitated from the rear platform of said car on to the street.'

"Accordingly the defenders are faced with this situation that in one breath the pursuer says the conductor is in fault because he gave no signal; in the same breath she says, equally definitely and distinctly, that the conductor gave a signal, but that the driver was in fault because he paid no attention to that signal. Now the conclusion I have reached on that state of the pleadings is that it would be quite improper to allow a case of this sort to proceed where the pursuer has been unable to make up her mind as to the specific fault which caused her injury, and where obviously she has no opinion one way or another as to who was to blame. It would be in my judgment out of the question to allow such a case to go to a jury on the probability that the pursuer might, in the interval, obtain some evidence to substantiate one or other of the cases which she has put on record, but which the defenders have no means of ascertaining is to be the only case to be made against them at the trial. I am accordingly of opinion that this record does not fairly disclose to the defenders the case which is to be made against them; that the action is irrelevant; and that, accordingly, an issue cannot be granted."

fault is that of the conductor. But, alternatively, she says, if the conductor did give the order—and she, of course, sets out in her alternative statement that he did—the driver disregarded it, and in that state of the facts it is the driver's fault which caused her disaster.

The Lord Ordinary has apparently held that, because confessedly this pursuer cannot prove both alternatives, she ought to be denied the opportunity of proving either. It appears to me that that is a wholly untenable proposition. If one or other of the alternative limbs was irrelevant, then it is plain that the action would fall to be dismissed. But if, as is freely admitted by the defenders, either one or other of these statements of fact, if proved, would infer fault against the defenders, then it appears to me that the pursuer has stated a relevant case.

This is just one of those cases in which a pursuer may quite naturally and quite properly be wholly unable to say which of the two causes brought about her disaster; but, if either would involve the defenders in liability, then she is entitled to go to a jury and do her best to prove the one or the other. It appears to me that to this case the observations of Lord President M'Neill in the case of *Finnie* v. *Logie*,[1] are directly applicable, where he says: "In certain cases it may be quite right that there should be alternative statements. There may be matters as to which the pursuer cannot be expected to be fully informed, and as to which it may be reasonable that he should be allowed to state an averment alternatively, and if the alternative statement in each of its branches be a relevant statement and ground of action, and there appears to be a reason for not compelling him to limit himself to one of these at the time of bringing the action, then that is a relevant mode of stating a ground of action."

I observe at the close of his opinion the Lord Ordinary points out, for the first time I think in the course of his reasoning, that the action is irrelevant; but he offers no ground for so holding, because it is not suggested, in any part of his note, that either of the alternatives is irrelevant and would not, if proved, involve the defenders in liability. But his Lordship goes on to say that this record does not fairly disclose to the defenders the case which is to be made against them. I think it does very fairly disclose the case which the pursuer intends to make against them. But in order, apparently, that she might be able to state her case more distinctly and, it may be, to abandon on further investigation one or other of the two alternatives, she made a motion before the Lord Ordinary to have the defenders ordained to give her the names and addresses of the two officials on the ground of one or other of whose fault she raises this action. I think that was a request which, made at the time when it was made, ought to have been complied with, and that the Lord Ordinary ought, if the defenders refused the names and addresses of their two officials, to have granted the motion which was made by the pursuer. It seems to me that this is one of those cases figured by the Lord President (Dunedin) in the case of *Henderson* v. *Patrick Thomson, Limited*.[2] He said "Speaking generally, I should say that when the person is, from the circumstances, put forward

[1] 21 D. 825, at p. 829.

[2] 1911 S. C. 246, at pp. 249-50.

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as representing the person against whom the suit is raised in the matters whereon the question turns, such a demand will be legitimate." Now the pursuer has very distinctly averred that the fault for which the defenders are vicariously responsible on this occasion is that either of the conductor of the car or of the driver of the car. I think we are here in circumstances similar to those figured by Lord President Dunedin, and that the names and addresses of these two officials ought to have been given.

The pursuer asks, for what reason I know not, that we should recall the Lord Ordinary's interlocutor of 10th January 1914, and I think she is entitled to make that demand. I propose to your Lordships that we should recall the interlocutor of 10th January 1914 and that of 13th January 1914, and should remit to the Lord Ordinary to adjust the issue.

LORD JOHNSTON.—I entirely concur in the judgment which your Lordship proposes and on the grounds which your Lordship has stated. I would only add, very briefly, that I do not think the defenders can complain of the alternative mode of stating the pursuer's case, in the light of their own refusal to give or to facilitate the obtaining of the very information which might have reduced the pursuer's case to one distinct issue of fact. But when I read more carefully than I did yesterday the averment in condescendence 6, I do not think it bears the criticism which the learned counsel for the defenders made upon it. I think that it is an unquestionable statement of fact in the first alternative, of fact which the pursuer evidently believes to be true; and that the second alternative is carefully and with very considerable success so stated as to be not an averment of fact, but an inference of one fact from a series of other facts.

I agree with your Lordship that it might have been better if the pursuer's case had not been so categorically stated, but stated in more general terms. But if the facts are to be stated in full detail, I think that they have been stated in a manner which, having regard to the information to which the pursuer was restricted, is really quite good drafting. Accordingly I agree with your Lordship.

LORD SKERRINGTON.—I agree.

THE COURT recalled the interlocutors of the Lord Ordinary, dated 10th and 13th January respectively, and remitted to him to adjust issues.

GEORGE MESTON LEYS, Solicitor—MACPHERSON & MACKAY, S.S.C.—Agents.

MALCOLM M'MARTIN AND OTHERS, Complainers (Respondents).—*Anderson, K.C.—Dykes.*
ALEXANDER ROBERTSON, Respondent (Reclaimer).—*Wilson, K.C.—Wilton.*

No. 86.
June 11, 1914.
M'Martin v. Robertson.

Lease—Small holdings—Landholder—Exclusive possession of holding—Grazing rights of third party—Small Landholders (Scotland) Act, 1911 (1 *and* 2 *Geo. V. cap.* 49).

Certain yearly tenants of holdings, which comprised buildings, arable land, and a right of common grazing, applied to the Land Court for orders declaring them to be landholders within the meaning of the Small Landholders (Scotland) Act, 1911, and fixing fair rents for their holdings. The winter grazing, both of the arable lands and of the common pasturage, was let by the landlord to the tenant of a neighbouring farm, and this fact was set forth in the applications in question. The Land Court having pronounced orders declaring the applicants to be landholders and fixing fair rents, they thereafter sought to interdict the farm tenant from grazing his stock upon the subjects, on the ground that, in virtue of these orders, they were entitled to the exclusive possession of their holdings.

Held (*rev.* judgment of Lord Anderson) that the orders had no such effect, but applied only to the holdings as possessed at the time when the applications were made; and interdict *refused*.

1st DIVISION. Ld. Anderson.

MALCOLM M'MARTIN and three others, described as landholders, Cuiltrannoch, Lawers, Perthshire, presented a note of suspension and interdict in which they prayed the Court to interdict Alexander Robertson, tenant of the farm of Milton of Lawers, from grazing his stock (1) upon the lands known as the Cuiltrannoch Crofts, of which the complainers were in occupation as landholders registered in the books of the Land Court, and (2) upon the common grazing appertaining to the Cuiltrannoch Crofts.

Prior to 31st May 1913 the complainers had been tenants from year to year of parts of the Cuiltrannoch Crofts, of which the Marquess of Breadalbane was proprietor. The holding of each of the complainers consisted of a certain portion of arable land, with dwelling-house and other buildings, and a right to pasture a stated number of cows upon a common grazing, known as the "Cow Park." The respondent became tenant, at Whitsunday 1907, of the hotel and farm of Ben Lawers, belonging to the Marquess of Breadalbane, at a yearly rent of £160, the duration of the lease being ten years. By the third article of the lease the respondent was granted the right of wintering sheep from 15th November to 15th April in each year of the lease on the holdings in question.

The complainers, at various dates in March 1913, applied to the Land Court for orders declaring them to be landholders within the meaning of the Small Landholders (Scotland) Act, 1911, and fixing fair rents for their holdings. In each application the let of the winter grazing to the respondent was set forth.* On 31st May 1913 the

* In his application M'Martin set forth that his holding was held by him "from April 15th till November 15th," and he annexed the following statement:—

"STATEMENT OF FACTS.

"(If thought necessary.)

"I was asked by the landlord's factor to take a lease of the land I

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The respondent reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 11th June 1914.

LORD PRESIDENT.—This appears to me to be a singularly clear case. The complainers are crofters on the Breadalbane estate, and they made applications to the Land Court for the purpose of having it declared that they were landholders under the statute of 1911, and ought to have a fair rent fixed for their holdings. They set out that, in addition to their holdings, they had certain rights of grazing upon ground which extends to some 42 acres, and that the tenant of the Lawers Hotel had the right of winter grazing on their holdings and also on that ground. They did not

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Court in connection with the complainers' applications for small holdings. The question is—What rights has the Land Court conferred on the complainers? The decrees of that Court are ambiguous in this sense, that the respondent's rights are neither expressly reserved nor expressly abrogated. The decrees are therefore subject to construction. It was not suggested that it was incompetent for me to construe these decrees. On the contrary, I was asked to do so by both parties, who each founded on the decrees of the Land Court as substantiating their respective contentions. I am of opinion that I am entitled, and indeed bound, to interpret the judgments of the Land Court and to endeavour to ascertain their meaning.

"Each party, as I have stated, appealed to the applications to the Land Court and to the decrees following thereon; and each party further appealed to the provisions of the Act of 1911 as justifying the interpretation which they respectively put on the decrees of the Land Court. The appropriate method of considering the question seems to me to be first of all to examine the Act of 1911, to ascertain from its provisions the nature and extent of the right conferred upon landholders, and how the common law rights of landowners have been modified and limited; thereafter to ascertain, from a consideration of the terms of the applications and decrees, what rights have been granted to the complainers by the Land Court.

"Before dealing with these points, however, I think it right to dispose of another matter upon which the respondent laid stress. The respondent pointed out that no intimation of the proceedings before the Land Court had been made to him, that he had not been heard by that Court, and that his rights in the said lands and grazings had been taken from him, as his counsel put it, 'behind his back.' I did not understand the respondent's counsel as contending that this point afforded the respondent an answer to the demand for interdict, and if it cannot be held to have this effect, I have difficulty in holding that it has any bearing on the question I have to decide. If it be the case that the rights of the respondent have been abrogated by the decrees of the Land Court, he is not without remedy. At common law he is entitled, under the implied warrandice of the lease, to call upon the landlord to provide him with grazing land equivalent to that which he has lost, or to allow him an abatement of rent proportionate to the value of the rights of which he has been deprived. Further, under the Act of 1911, section 7 (8), he is entitled to obtain compensation from the Board of Agriculture for any damage or injury sustained by him in respect of being deprived of land held on lease. The respondent maintains that he was entitled to be heard in connection with the applications. This may be so, but it may also be that he was himself in fault in not attending the Land Court. That Court met in the locality where the holdings are situated, and it must have been known to the respondent that the Court was to deal with land and grazings in which he was interested. The respondent maintains

ask that his grazing rights should be impaired or that their grazing rights should be enlarged. The Land Court, having heard their applications, decreed that they were landholders in the sense of the statute, and fixed fair rents which, as we are told, were substantially smaller than the rents originally paid.

It is now contended that the effect of the declaration that they were landholders, and ought to have their rents reduced, was to deprive the tenant of the Lawers Hotel of his winter grazing. That, I think, is an accurate and precise statement of the contention of the complainers. As so stated, it bears its own contradiction upon its face. The tenant of the hotel was no party to the proceedings, for the extent of his grazing rights was not in question. The Lord Ordinary, I observe, concludes his note

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that it was the duty of the applicants to give him notice, and he refers, in substantiation of this contention, to the second page of the application, from which it appears that the applicant is requested to insert the name and postal address of any respondent other than the landlord. This does not seem to impose a duty upon the applicant of sending any notification to the respondent. The Act, section 24 (2), so far at least as common grazings are concerned, seems to impose the duty of giving intimation upon the Land Court. The complainers argued that the respondent was represented before the Land Court by the landlord's factor, who took part in the proceedings. I am not prepared to hold, however, that the factor attended the Court as the agent of the respondent. Assuming, however, that the respondent has been aggrieved and damnified by not having had the proceedings intimated to him, this gives rise to nothing more than a personal claim of damages against the person whose duty it was to give intimation. It cannot vest the respondent in a real right in the holdings which will compete with the statutory right of the complainers and be an answer to the demand for interdict. I am unable to hold, however, that the respondent has been damnified. He may yet make a claim against the Board of Agriculture, under section 7 (8) for any injury which he has sustained in respect of deprivation of his tenant rights.

"I now proceed to consider the main question which I have to decide, and, in the first place, direct my attention to the purpose and provisions of the Small Landholders (Scotland) Act, 1911 (1 and 2 Geo. V. cap. 49).

"It is common knowledge that the political motive of this Act was to endeavour to bring about the repopulation of depopulated rural Scotland. The statute, with this end in view, offers inducements to those who are desirous of earning a livelihood by cultivating the soil. The main inducements are that small holdings will be provided, with fixity of tenure, and at a fair rent. The Act applies to the whole of Scotland the principles of the Crofters Acts, 1886-1908, which were confined to certain counties of Scotland. The tenure set up by the Act is similar to that established by the Crofters Acts, the size of the holding and limit of rent being slightly extended by the Act of 1911.

"The landlord's freedom to contract is materially circumscribed by the provisions of the Act. There is limitation in this respect—(1) as to the subject of the lease, for a landowner may be compelled, if the Board of Agriculture so determine, to turn his land into small holdings; (2) in the matter of rent, which falls to be fixed, not by agreement of parties, but by the Land Court; and (3) in the matter of duration of the tenancy, which, in a question with the landlord, is perpetual, provided the conditions of the tenure are observed by the landholder. These conditions are not to be made the subject of agreement, but are prescribed by the Act. The landlord's right of interference with the landholder in connection

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by saying that "On the whole matter, I am of opinion that the complainers have the exclusive right to their respective holdings and pertinent common grazings, and are therefore entitled to decree of interdict against the respondent as craved." I am of opinion that the grazing rights remain exactly as they were before the applications, and by necessary consequence that the complainers are *not* entitled to the decree of interdict sought here.

I propose to your Lordships that we should recall the Lord Ordinary's interlocutor and refuse the application for interdict.

LORD JOHNSTON.—I concur with your Lordship. The point at which I think the Lord Ordinary has gone wrong is in not attending to what

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with his holding is also strictly defined by statute. Section 10 of the 1911 Act refers on this matter to section 1 of the Crofters Holdings (Scotland) Act, 1886, which sets forth in subsection 7 the occasions on which, and the purposes for which, a landlord shall have right to enter upon a holding. By section 12 of the 1911 Act the landlord is empowered to enter on a holding for the additional purpose, therein specified, of using for any estate purpose any springs of water rising on the holding.

"Although the tenure is perpetual in a question with the landlord, it is defeasible at any time in the option of the landholder, on his giving one year's notice to the landlord. If the landholder renounces the tenancy, or is removed by the landlord under the provisions of section 19 of the 1911 Act, or section 2 of the 1886 Act, he is to be entitled to compensation for permanent improvements suitable to the holding, which he or his predecessors of the same family have executed or paid for. The holding which the Act of 1911 deals with appears, from the terms of section 2, to be a holding held either (*a*) as a crofter holding, *i.e.*, in perpetuity, or (*b*) from year to year, or (*c*) on lease for a succession of years. The Land Court can only grant a holding of the character contemplated in the statute, and cannot attach any other conditions to the grant than the statute has prescribed (section 7). In other words, the statute seems to impose upon the Land Court the duty of granting to a prospective landholder the exclusive use of a small holding, from one year's end to another, and under the conditions of tenure prescribed by the Act. The presumption is that, in the present case, the Land Court has discharged its statutory duties in these respects. But the respondent says that the Land Court has done otherwise. He maintains—(1) that the holdings granted by the Land Court have in effect been granted for only seven months in each year; (2) that thus the landholder does not have the exclusive use of the holding; and (3) that conditions have been imposed on the landholder, burdening his tenure, which are not sanctioned by the statute.

"The respondent maintains that these points can be made good by reference to the applications and decrees and to certain sections of the 1911 Act. I therefore proceed now to examine the applications and decrees and the particular sections founded on by the parties—[His Lordship here referred to the terms of the applications and of the decrees of the Land Court].

"I.—*As to Holdings proper.* The respondent founds upon the terms of the applications, especially that of M'Martin, and of the statements of facts embodied in the applications. He contends that the applicants recognised the existence of the respondent's rights, were willing that these rights should be perpetuated, and, indeed, invited the Land Court to do so. The 'grievance' of the respondent's rights was referred to, not in

the holding, with which the Land Court were dealing and with which he had to deal, really was. The application was not an application for the fixing of a new holding or an increased holding, but merely for declaring an existing holding to be a landholding under the statute. The measure of such holding, therefore, was clearly the measure of the existing rights of the applicants, and it is difficult to understand how the Lord Ordinary persuades himself that the duty of the Land Court, having declared that existing holding to be for the future a landholding under the Act and having fixed a fair rental, was to do anything more.

I think that the complainers here (the applicants below) are entirely put out of Court by the terms of their own applications. They disclaim any question of altering the holdings, and they table distinctly that the

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order that the Land Court might annul the grievance, but that it might weigh with the Court on the question of rent. I am unable to take this view of the meaning of the applications. I think reference was made to the rights of the respondent because of their burdensome character, and as a reason for making the applicants landholders, and thus abrogating these rights. The applicants knew that they were the real occupiers of the land during the whole twelve months of each year, but M'Martin desired to emphasise the grievous character of the burden of the respondent's rights by the manner in which he described his holding, and the others do the same thing in a less emphatic fashion.

"The respondent points out that the rents were reduced by the Land Court, and argues that this necessarily implies the continuation of the existing burden. There might be substance in this argument had the existing rents been fair rents, but the existing rents were conventional rents, and I therefore am unable to draw the inference suggested by the respondent. The respondent referred specially to the following sections of the Act of 1911:—Section 14. This section deals with the adjustment of rights of parties interested by the Land Court. It does not cover the case of the respondent's interests if the effect of the decree of the Land Court is to annul these rights. Section 24. This section refers to regulation of common grazings, and will fall to be dealt with when that part of the case is reached. Section 25 (2). I am unable to see that this subsection has any bearing on the question. Section 26 (1). This section was quoted to show that a common grazing may be held in common by landholders and those who were not landholders, but it does not touch the *de quo queritur*, to wit, whether the respondent has now a share in the common grazings.

"The complainers made two pointed references to the Act of 1911. They referred to section 10 (1), which makes it imperative for the landholder to cultivate his holding, and enables him to cultivate it by way of horticulture, fruit growing, &c. How could the landholder cultivate in one of the latter methods and so avoid the statutory irritancies if the respondent is to have right to what is practically exclusive possession for five months in the year? The complainers also argued on sections 10 and 12 of the 1911 Act that the landlord's rights of interference with the holding are strictly defined by statute and are not to be extended beyond what the Acts allow. If the landlord may qualify the decrees of the Land Court in the manner suggested by continuing the burden which formerly existed, why should he not be equally entitled to impose additional burdens and so make the Act a dead letter? It is noticeable that the Legislature has thought it necessary in section 32 of the 1911 Act, when dealing with statutory small tenancies, to provide (subsection 6) that landlord and tenant may agree as to conditions of tenure, and (sub-

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rights which they held were subject to a certain right of grazing by somebody else. Now they maintain that this right of grazing is, by the action of the Land Court on their application, abrogated. It seems to me that their attitude here is not in good faith considering the terms in which they applied to the Land Court.

LORD SKERRINGTON.—I agree with your Lordships.

THE COURT recalled the Lord Ordinary's interlocutor and refused the note.

JAMES SCOTT, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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section 9) that the terms and conditions of the renewed tenancy shall be those of the determining tenancy. If the present case had been that of a small tenancy, the terms of that last subsection would have been directly applicable; but there are no similar provisions applicable to landholders.

"II.—*As to Common Grazings.* The respondent founded specially on section 24 (1) and (2) in connection with the matter of common grazings. I have already dealt with subsection (2), which is concerned with intimation to persons interested in the grazings. The first subsection has reference to the regulation by the Land Court of the rights of common grazing, and it seems to me that that Court may, at any time, prescribe regulations for the exercise of pasture rights of those who, in point of fact, hold the grazings in common. This subsection, however, does not seem to touch the question I have to decide, to wit, whether the respondent has now any interest in the common grazings. The complainers make two answers to the respondent's claim as to the common grazings which seem to me to be conclusive. They say (1) that the respondent's claim is destructive of the notion of common grazings. He asserts a right to pasture thereon an unlimited number of sheep between November and April. He thus puts forward a claim to exclusive possession of the grazings during that period. (2) The complainers show from the productions that the 42 acres of common grazings are divided into 11 parts or shares; that the applicants have received from the Land Court right to 6/11ths thereof; that the remaining 5/11ths are divided (record, p. 5) between David Kennedy, smith, and Duncan M'Lellan, landholder. There is thus no share of the common grazings left for the respondent.

"On the whole matter I am of opinion that the complainers have an exclusive right to their respective holdings and pertinent common grazings, and are therefore entitled to decree of interdict against the respondent as craved."

MISS JESSIE SCOTT, Complainer (Reclaimer).—*Macphail, K.C.*—*Dykes.*
DONALD DAVIDSON, Respondent (Respondent).—*M'Lennan, K.C.*—*Maclaren.*

No. 87.
June 12, 1914.
Scott v. Davidson.

Right in Security—Promissory-note—Promissory-note by several co-obligants—Subsequent disposition in security by one co-obligant—Sale of security subjects by creditor—Title of another co-obligant to challenge sale—Cautioner.

A, B, and C granted a promissory-note for £500 in favour of a firm of money-lenders for the accommodation of A. Five months afterwards A disponed a heritable property to the firm in security of this sum of £500, and also in security of a sum of £1000 contained in a promissory-note previously granted by himself and B. Neither of the notes having been paid the firm obtained decrees for these two sums, and subsequently assigned the decrees and also the disposition in security to X. Thereafter X sold the security subjects to a company.

C having been charged for payment of the £500 sought to suspend the charge, and maintained that, as a cautioner, she had a right to challenge the method in which the security subjects had been dealt with, and that, in any event, the debt had in effect been satisfied. She averred that the subjects which X had sold for £700 were worth £10,000; that X was himself the principal shareholder in the company to which they had been sold; and that he had thus obtained the equivalent of a sum of money far in excess of the amount due under the notes.

Held that, as C had failed to prove that she was in reality only a cautioner and entitled as such to the equities of a cautioner, and as the security had not been created for her behoof, she had no title to inquire into the question of how X had disposed of the security subjects, and suspension *refused*.

EXTRA DIVISION. Lord Hunter.

MISS JESSIE SCOTT, Nellfield Lodge, Braidwood, Lanarkshire, brought a note against Donald Davidson, 33 High Street, Grantown-on-Spey, for the suspension of a charge at his instance on a promissory-note for £500, dated 31st March 1910, granted by her and John Agnew and John Lawson, less the sum of £175, 2s. 6d. paid to account. The promissory-note was granted in connection with certain transactions with Howard & Cope, Limited, money-lenders.

The complainer averred on record, *inter alia*:—"At the time when the above-mentioned bill was granted Mr John Robertson, solicitor, Edinburgh, who is now acting for the respondent, acted as agent for the complainer and the said John Agnew (who is her brother-in-law) and John Lawson, and on their behalf carried through certain money transactions, by which a sum of £1500 was borrowed on bills as follows:—(1) Bill for £1000 granted by Mr Agnew and Mr Lawson, dated 22nd November 1909; and (2) promissory-note p. £500 granted by Mr Agnew and Mr Lawson and the complainer. The complainer signed said bill p. £500 at the request and for the accommodation of the said John Lawson; she did not receive any part of the said sum, and, as was well known to the said Howard & Cope, Limited, and the said John Robertson, she was merely a cautioner for the said sum; said sum of £1500 was employed for the benefit of the said John Lawson in connection with claims against him at the instance of the said Howard & Cope, Limited, who are money-lenders in London, and whose agents were Messrs Cornillon, Craig, & Thomas, W.S., Edinburgh. In

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consequence of the said bills not being met, an action for payment was raised in the Court of Session by the said Howard & Cope, Limited, . . . and was defended by the said John Robertson on behalf of Mr Agnew, Mr Lawson, and the complainer, but the defence was afterwards withdrawn, and decree was obtained on 6th December 1911."

The decree thus obtained was assigned (along with a disposition in security after mentioned) by Howard & Cope, Limited, to Charles Cristof Krall, and by him the decree was subsequently assigned to the respondent, Donald Davidson, for £100.

The complainer further averred:—"By disposition in security, dated 29th, and recorded 30th August 1910,* the said John Lawson, with consent of the said John Agnew, disponed in favour of the said Howard & Cope, Limited, the lands and estate of Nellfield in the county of Lanark (now belonging to the complainer) in security of the sums contained in said bill for £1000 and promissory-note for £500. By the foresaid assignation by Howard & Cope, Limited, in favour of Charles Cristof Krall, they conveyed to him all their right and interest in said Nellfield Estate under said disposition in security by John Lawson. According to the state of debt appended to the assignation by the said Charles Cristof Krall in favour of the respondent, the said Charles Cristof Krall sold a part of the lands of Nellfield in August 1913 for £700 sterling, and the said sum has been applied in liquidation of debts due by the said John Lawson

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* The disposition was in the following terms:—"I, John Lawson, . . . considering that I am indebted to Messrs Howard & Cope, Limited, in the sum of £1000 sterling as holders of a bill drawn by John Agnew, Ravenshall, Carluke, and accepted payable by me, the said John Lawson, and also in the sum of £500 sterling as holders of a bill or promissory-note granted by me, the said John Lawson, and by the said John Agnew and by Miss Jessie Scott, Ravenshall, Carluke, all jointly and severally, in favour of the said Messrs Howard & Cope, Limited, and considering that the date of payment of said bill and promissory-note is past, and that I have requested the said Howard & Cope, Limited, to grant me delay in enforcing payment of said sums of £1000 and £500, which they have agreed to do on condition of my granting the disposition in security underwritten, which I have agreed to do: Therefore I do hereby, with consent and concurrence of the said John Agnew, and I, the said John Agnew, for all right competent to me, do hereby dispone to and in favour of the said Howard & Cope, Limited—[Here followed a description of the subjects]—and that in real security to the said Howard & Cope, Limited, and their foresaids, of the said sums of £1000 sterling and £500 sterling, with interest thereon; . . . and we hereby grant power to the said Howard & Cope, Limited, and their foresaids (First) To sell the said subjects above disponed and assigned at any time or times in whole or in lots by public roup or private bargain, without any notice to us or our respective heirs, executors, or representatives, and without any advertisement, and at such price or prices as the said Howard & Cope, Limited, or their foresaids shall in their uncontrolled discretion think fit;—[Here followed further powers]—reserving power to me, the said John Lawson, or to my successors, to redeem said subjects while unsold on payment of said sums of £1000 and £500 and interest and expenses, and to demand an accounting should my said disponees sell said subjects, or any of them, or intromit with the rents, feu-duties, or other income arising therefrom: And we, the said John Lawson and John Agnew, consent to registration hereof for preservation."

and John Agnew other than the £500, for which alone the complainer is responsible as cautioner. All sums received by the said Howard & Cope or their assignees fall to be applied rateably towards the extinction of the complainer's liability under the said decree, and the said state is accordingly inaccurate. Further, the complainer has recently ascertained that the Nellfield Manure and Chemical Company, Limited, to which the said portion of Nellfield Estate (which extended to 18 acres or thereby, and contained valuable buildings and fixed machinery) was sold, was formed in pursuance of an agreement dated 12th June 1913, to which the parties were Pitt Becker, Charles Hupfield, the said Charles Cristof Krall, C. E. Heuschkell, and John Robertson, solicitor, Edinburgh (sometime agent for the complainer, and now agent for the respondent). Said company was registered on 30th July 1913 as a private company with a capital of £10,000 in shares of £1 each, of which only 102 shares were allotted for cash. In terms of a subsequent agreement dated 25th September 1913, to which the company and the five persons already mentioned were parties, 6227 shares were issued without payment, and of these 1000 shares were allotted to the said Charles Cristof Krall, 850 shares to Mrs Emily Krall (his wife), and 1000 shares to the said John Robertson. The remainder of the 6227 shares allotted were divided among (1) three persons in the employment of the said Charles Cristof Krall or of the company; and (2) the said Pitt Becker and the said Charles Hupfield. The said Pitt Becker and Charles Hupfield each advanced money to the said company, and each received from the company a bond and disposition in security over the said heritable subjects, the loans by them so secured amounting to £2000. The said agreement also bears that the price paid by the said company to the said Charles Cristof Krall was £500 and not £700 as set forth in the said state of debt and in the disposition of the subjects to the said company. The said alleged sale was not carried out by the said Charles Cristof Krall with a due regard to the interests of the complainer. The said Charles Cristof Krall was one of the promoters of, and had the predominating interest in, the said company, and the sale by him to the company did not in any way determine the value in the open market of the subjects sold. The said alleged price of £700 was wholly inadequate, and if a proper price had been obtained the whole liabilities of the said John Lawson and John Agnew under the said decree, including the £500 for which the complainer is now charged, would have been entirely extinguished. The true value of the subjects amounted to £10,000 or thereby, and thus greatly exceeded the amount due to the said Charles Cristof Krall by the said John Lawson, John Agnew, and the complainer under said decree, and on a just accounting the debt was entirely extinguished, and the alleged assignation to the respondent is wholly inept."

The complainer pleaded, *inter alia*;—(2) The complainer is entitled to have the note passed and the charge complained of suspended, in respect (*a*) that the respondent's cedents being bound to account to the complainer for the price of the heritable subjects sold, the same should be applied *pro rata* to meet the indebtedness of the complainer on the said promissory-note. (*b*) That, on a just accounting, no sum is due by the complainer to the respondent.

The respondent pleaded, *inter alia*, that the complainer's averments being irrelevant the note should be dismissed.

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On 23rd January 1914 the Lord Ordinary (Hunter) repelled this plea and allowed a proof, his interlocutor being affirmed on a reclaiming note by the Extra Division.

On 28th April 1914 the Lord Ordinary, after a proof, pronounced an interlocutor repelling the reasons of suspension.*

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* "OPINION.—In this action the complainer seeks to set aside a charge proceeding upon a decree obtained against her and others for payment of a sum due upon a promissory-note dated in March 1910. The other granters of the promissory-notes were a Mr Lawson and a Mr Agnew, the latter being a brother-in-law of the complainer. The promissory-note was granted in favour of Messrs Howard & Cope, and the charge proceeded at the instance of a Mr Davidson, as assignee of a Mr Krall, who, in turn, was the assignee of Messrs Howard & Cope. At the time when the complainer and the two gentlemen I have named gave to Messrs Howard & Cope a promissory-note for £500, Mr Lawson and Mr Agnew also granted a promissory-note for £1000. In security of these two promissory-notes for £1000 and £500 respectively Mr Lawson conveyed to Messrs Howard & Cope the estate of Nellfield, by disposition dated in August 1910. Subsequently to granting that conveyance, Mr Lawson, in June 1911, conveyed Nellfield Estate to Mr Agnew, who in turn gave a feu-charter of 18 acres of that estate to a company known as the Nellfield Estate Company. That company erected plant upon the estate, and went into liquidation. They attempted apparently to sell the heritable subjects, or rather the plant, but without success. There are other bonds upon the estate. To some extent these complicate the different questions raised before me, but I do not think they materially affect what, in my opinion, are very clearly the only material points that are raised in this action. Howard & Cope did not get payment of what was due to them by Messrs Lawson and Agnew, and they took decree against Messrs Lawson and Agnew for the £1000, and against Lawson, Agnew, and the complainer for the £500. The decree was not satisfied, and Messrs Howard & Cope assigned the decree, and, at the same time, assigned the disposition in security for sums due under the promissory-note to Mr Krall on 17th July 1913. After Mr Krall was thus in possession of the decrees and the security subjects, he exercised a right which had been conferred upon the holders of the security, namely, Howard & Cope, and disponed the subjects to another company—which, for brevity, I will call the Chemical Company—on 5th August 1913, the deed being registered on 6th August 1913. The price received by Mr Krall was £700. When Mr Krall had received that price for the subjects, he assigned the decrees to the present respondent for a sum of £100. The challenge now made by the complainer is this:—She says that the price which Mr Krall received from the Chemical Company, £700, was a totally inadequate price; that he should have received a much larger price; and that if an adequate price had been received the total indebtedness upon the bills would have been wiped out.

"I heard a discussion in the Procedure Roll in this case, and in the note appended to my interlocuor of 23rd January 1914, the reasons for my allowing a proof will be found. I may say this, that it appeared to me then that the vital point for the complainer was that she should establish, as she undertook to do, that she was merely a cautioner under the £500 bill. I considered that was a point upon which parole proof was competent, and I allowed it. Her other averment of consequence was to the effect that by the inadequate price that had been unjustifiably received by Mr Krall, she was continued liable under the bill; whereas had a sufficient price been received she would not have been under any liability. The averment which the complainer makes upon the question

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The complainer reclaimed, and the case was heard before the Extra Division (Lord Dundas, Lord Mackenzie, and Lord Cullen) on 10th, 11th, and 12th June 1914.

Argued for the reclaimer;—The complainer was not a principal debtor but merely a cautioner. As such she had a clear title to challenge the transactions in question in this case. Assuming, however, that she was not a cautioner but a co-obligant, the result was in the end the same. Admittedly the respondent Davidson was in no better position than his author Krall, and the case could therefore be taken on the footing that the questions raised were questions between Krall and the complainer. The disposition under which Krall obtained the subjects was virtually a disposition in trust, the purposes of the trust being the payment of the £1000 and the £500 debt. The complainer as a party interested in the payment of the latter debt was virtually a beneficiary under the

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of her being a cautioner is as follows—it is in condescendence 2:—'The complainer signed said bill p. £500 at the request and for the accommodation of the said John Lawson; she did not receive any part of the said sum, and as was well known to the said Howard & Cope, Limited, and the said John Robertson, she was merely a cautioner for the said sum.' As regards the latter part of this averment, it is to my mind not only clear that the complainer has failed to establish what she avers, but I think neither Howard & Cope nor Mr Robertson knew at the time when the complainer signed the promissory-note that she was merely a cautioner, and not a principal. With reference to the question as to whether she was a principal or a cautioner the matter stands thus. On the face of the bill, which is in complainer's own writing, she appears to be a principal. Against that there is merely her own testimony. Neither Mr Agnew nor Mr Lawson has been adduced as a witness in this case. I think that, however clear and above all possible challenge the testimony given by the party to a bill may be, it is more than doubtful whether a Judge could accept such evidence as sufficient. In the present case, without making any serious comment on Miss Scott's evidence, I am bound to say I could not accept it as in itself sufficient to justify me in relying upon it as accurate in detail. In my judgment the complainer has failed to establish that she was merely a cautioner and not a principal.

"The only question remaining is what is the effect of that failure. It, of course, makes it unnecessary for me to consider whether, on the assumption that the complainer was a cautioner and the price received adequate, there ought to have been a *pro rata* apportionment by the creditor between the £1000 indebtedness and the £500 indebtedness. The complainer argued that, although she had not established that she was a cautioner, she was still entitled to take up this position—that, as an insufficient price had been received for the security subjects, she had suffered, for if a fair adequate price had been got she would not have been liable at all, or to the extent she is sought to be made liable. I am bound to say I cannot accept that position as sound in law. I do not think that, on the footing that the complainer is not a cautioner, she can challenge in the present proceedings the price received for the subjects. Neither Mr Agnew nor Mr Lawson is a party to the present case. So far as I know, Mr Lawson, who was granter of the disposition, is satisfied with the price that was received, and I cannot tell, as in a question between the complainer and the co-obligants of the bond, what the state of indebtedness between them is. I think, therefore, that the complainer, having failed to establish that she was a cautioner, cannot succeed upon the ground that the price received was insufficient.

"But I may say, with reference to the latter part of the case, that I

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trust, and had accordingly a right to inquire into all the circumstances attending the sale of the security subjects by Krall: and these circumstances clearly showed that Krall had not applied the subjects as he should have done towards extinguishing the debt. The fact that the sale had been made to a company of which he was himself the leading shareholder might not *per se* be proof that the sale was not genuine, but it threw a heavy onus on the seller,[1] which in the present case the seller had been unable to discharge. If the subjects had really been sold for £700, then they had been sold for a ridiculously inadequate price, and the seller had committed a breach of the trust and had wasted the security subjects. The objection that he had done so was one which could be taken, not merely by a cautioner, but also by a party who was bound in the character of principal debtor,[2] the general rule of law being well established that a person holding security subjects, no matter in what capacity, must deal with them fairly and justly in the interests of all concerned.[3] The foregoing argument was based on the view that Krall had wasted the security subjects, but the matter could also be regarded from a still simpler, and probably a more appropriate, point of view. The charge in respect of the £500 debt could stand only if the debt was unpaid. If the debt was paid, no matter how or by whom, the complainer was free.[4] If £1500 had been handed over in cash to Krall by Lawson, the complainer would have been free, her debt having been paid, and it would have been no answer to say that Lawson was under no obligation to pay the debt, if he had in fact done so. But that was just what had happened here, except that, instead of getting payment in cash, Krall had got payment in kind, a circumstance that did not in any way affect the principle. He had obtained subjects which the complainer alleged were worth £10,000, and he had sold them for £700 to a company of which he was the principal shareholder, putting

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was not satisfied with the complainer's evidence as establishing clearly that Mr Krall, in effecting the sale which he did, sacrificed the property and took an inadequate price. No doubt, if the position is looked at from the point of view of what was got for the property as compared with what was spent on the property, the amount received was small; and I cannot help thinking that the witnesses who gave evidence for the complainer applied their minds to the question as to what was what I may describe as the intrinsic value of the subjects, rather than to the question, what was the market value on the footing that the subjects were put up for sale. I am not going into detail in connection with this matter. All I need say is that, looking to the troubled state of the title to the property and the want of success of the different enterprises carried on, I am not satisfied that the price actually paid to Mr Krall was other than what might fairly and reasonably be described as the fair value of the subjects. Therefore, on the whole matter, I am of opinion that the complainer has failed in her case, and I refuse the note."

[1] Farrar v. Farrars, Limited, (1889) 40 Ch. D. 395, *per* Lindley, L.J., at p. 410; Thomson v. Eastwood, (1877) 2 App. Cas. 215, *per* Cairns, L.C., at p. 236.

[2] Mackirdy v. Webster's Trustees, (1895) 22 R. 340, *per* Lord M'Laren, at p. 344; Bell's Prin. sec. 62.

[3] Beveridge v. Wilson, (1829) 7 S. 279; Stewart v. Brown, (1882) 10 R. 192; Hodson v. Deans, [1903] 2 Ch. 647; Menzies on Trustees, (2nd ed.), sec. 282.

[4] Bell's Prin. sec. 558.

into his pocket by this transaction a sum which, at the very lowest estimate, was equivalent to the whole debt of £1500. The simplest ground accordingly upon which the complainer founded her suspension was that the debt was no longer in existence, having been paid in full. In any event, the complainer was being asked to pay more than her share.

Argued for the respondent;—The Lord Ordinary was right in holding that the complainer was not a cautioner, and accordingly her whole case failed.[1] But, even had she succeeded in proving that she was a cautioner, she had failed to prove that Howard & Cope were aware of the fact; and proof of that was essential to her case, as a creditor was not bound to treat as a cautioner a person whom he did not know to be such. As a co-obligant the complainer had no right in the security. She granted her promissory-note in March 1910, and it was not until August 1910 that Lawson disponed the subjects in security. The complainer was not the granter of the security, and she did not even sign the promissory-note on the faith of the security being granted. The creditor in dealing with the security was in no true sense a trustee for her, she having in fact no right or interest in the security whatsoever. The creditor might at any time have handed back the security to Lawson, and the complainer would have had no title to object, which clearly showed that she could have no title to object on the ground merely that the security had been wasted. There was nothing to prevent Lawson ratifying the sale if he thought fit without the complainer's consent. Lawson was the only person concerned in the sale, and the cases cited by the complainer merely showed that, if Krall had sold the subjects disadvantageously, Lawson as owner of the subjects (or whoever was in right of Lawson as owner) might challenge the transaction as having been in violation of the radical right still retained in the subjects by the owner after satisfaction of the debt. In any event the only duty of a bondholder was to act *in bona fide*,[2] and it was not proved that Krall had not so acted. It was quite a misrepresentation of the facts to say that he himself had obtained the subjects. The subjects passed to the company, which was a separate *persona*, in exclusive ownership, and no objection to the transaction could be based on the fact that Krall was a shareholder in the company.[3] In any event it had not been proved that the price obtained was not the fair value of the subjects.

Lord Cullen.—When this case was formerly before us on the relevancy of the complainer's allegations contained in the closed record, the complainer's argument was based on an assumption of the truth of her averment that she was a cautioner for the bill debt in question, and that the fact of her being a cautioner was known to Howard & Cope, the creditors who took the bill. On this assumption, the truth of which the complainer offered to prove, she contended that she was entitled to the equities of a cautioner both in a question with Howard & Cope and

[1] Duncan, Fox, & Co. v. North and South Wales Bank, (1880) 6 App. Cas. 1, *per* Selborne, L.C., at p. 11; Newton v. Chorlton, (1853) 10 Hare, 646, *per* Wood, V.C., at p. 655.

[2] Kennedy v. De Trafford, [1897] A. C. 180, *per* Lord Herschell, at p. 185.

[3] Saloman v. Saloman & Co., [1897] A. C. 22.

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with their assignees, including Mr Krall, and that under one of these equities the holder of the bill debt was bound to communicate to her the security given for that debt by Lawson in return for full payment exacted from her; that this obligation could not be implemented in respect that Krall, the author of the respondent, had relinquished without consideration almost the whole value of the security, having sold to the Nellfield Manure and Chemical Company, Limited, for £700 subjects that were worth £10,000. Affirming the Lord Ordinary's interlocutor, which was then under review, we allowed a proof.

On the evidence adduced the Lord Ordinary holds that the complainer has failed to prove that she was a cautioner. I entirely agree with the Lord Ordinary for the reasons which he has stated. The Lord Ordinary's view, indeed, has hardly been questioned, and no attempt was made to prove that Howard & Cope knew that the complainer was, as she alleges, a cautioner, a matter as essential to her case as the fact of her being a cautioner.

But the complainer, on the footing that she falls to be regarded as a co-obligant for the debt who was not a cautioner, still insists on her right to suspension of the charge. She says in the first instance that she is not bound to pay the debt in so far as it has already been paid *aliunde*. The respondent concedes this to the extent and effect of bringing into account the £700 of money received by Krall under the sale made by him to the Nellfield Manure and Chemical Company, Limited. The mode in which the £700 is brought into account as between this particular bill debt and another bill debt is not questioned by the complainer on the assumption that she is not to be treated as a cautioner; but her case is (first) that Krall sold for £700 what was worth a great deal more; (second) that the buyers were the Nellfield Company, Limited; (third) that this Company was promoted by Krall for the purpose of making the purchase; and (fourth) that Krall became the principal shareholder of the company. On the footing of these alleged facts the complainer contends that Krall was benefited by the transaction beyond the price of £700 which he received, and that he is bound to bring into account with her such excess of benefit over the £700.

Now, I think it is clear that Krall did not sell to himself, although that view permeated Mr Macphail's argument to a considerable extent. He sold to a limited company, which is a separate *persona*. He did not through the sale become, as the complainer suggested, part owner of the property. The property passed in exclusive ownership to the company which bought it. What Krall derived in benefit, if the price was inadequate, was not a part of the property but a share holding in a company which he had allowed to buy too cheaply. If Krall did sell the security subjects in question at an inadequate price he may have to answer for that to Lawson, who gave him the security. The complainer did not give him security and it was not created for her benefit. Indeed, it has been pointed out by Mr M'Lennan that whereas the bill which she signed was dated in March 1910, the security was not created by Lawson until August 1910, and there is not any evidence nor any allegation directed to showing that, when the security was created in August 1910,

Miss Scott was any party to its creation or knew of its being created, or that it was intended in any way to be a security for her behoof. Krall, the creditor, I think, might have handed back the security to Lawson at any time without the complainer's consent and without her having any right to object or without any effect upon her indebtedness under the bill.

Again, I think the sale by Krall to the Nellfield Manure and Chemical Company, Limited, for £700 might be ratified by Lawson or by his trustee without the complainer's consent. If that is so, I am quite unable to follow the argument by which it is sought to be made out that the complainer, in addition to having brought into account the price which Krall actually received, is entitled to call Krall to account for the way in which he dealt with the property in connection with the sale, and for not having procured a large enough price, if it be the case that the price of £700 was less than the value of the property. That seems to me to be a matter for the owner of the subjects who granted the security.

It was mentioned by Mr Macphail that Miss Scott is now said to be the owner of the subjects. There is no information as to when she became owner or what precisely she owns, the only reference to the matter being a remark in a parenthesis at the bottom of page 7 of the record, where the estate of Nellfield is referred to and the words "(now belonging to the complainer)" are added. Whether she was the owner of Nellfield at the time when Krall sold to the Manure and Chemical Company there is nothing to show. It is not said that she was in any way the assignee of Lawson to his reversionary rights under the disposition granted to Howard & Cope, and I confess I am unable to gather from the brief statement of the parenthesis which I have read that Miss Scott has *qua* owner any right to insist in the suspension. I think, therefore, her case must be considered upon the grounds of suspension which were very clearly submitted to us by Mr Dykes in his opening speech, and these I have stated and dealt with.

I am of opinion that the Lord Ordinary's judgment is right and that we should affirm it.

Lord Mackenzie.—I am of the same opinion, and upon the same ground. I do not think it necessary to express any opinion upon the merits of the case—that is to say, whether the price at which Mr Krall sold was or was not an adequate price, because, in my opinion, the present complainer has no title to raise that question.

She brings this suspension of a charge upon a decree obtained against her ordaining her and John Agnew and John Lawson to make payment jointly and severally of the sum of £500. It is as a debtor that she seeks to have the charge suspended, and no question is raised in the present proceedings at her instance arising out of any right of property which she may now have in the subjects which are in question.

It appears parenthetically as an averment on record that she is the owner of Nellfield and there is a reference in the proof to this; but I wish to emphasise the point that no question is raised as between the owner of the security subjects and the respondent in the present case, and that nothing that we may say in giving judgment in the present case can affect

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any right that the owner of the property has, and may hereafter seek to vindicate by an action in the appropriate form, to set aside the transaction by which Krall has come in place of Howard & Cope and realised the security subjects, as being in violation of the duty that he owed to the owner of the subjects. That there is such a duty is made clear by cases to which we were referred, and does not admit of dispute.

But, dealing with the question as raised in the present proceedings, the first point is that the complainer has entirely failed to prove what in my opinion is the necessary foundation of her case, viz., that she is in the position of a cautioner. There is no sufficient evidence to that effect, the only testimony being that of the complainer herself, and it is the more remarkable that she should be the only witness upon this point because it appears that she granted this promissory-note in order to oblige her brother-in-law, Mr Agnew, and Mr Agnew is not a witness in the case. Moreover, even if she established that she was a cautioner it would not have availed unless she brought home to Messrs Howard & Cope that they knew she was a cautioner. In regard to that the proof is entirely silent.

But it is said that, even if there is no evidence upon those—which seem to me to be vital—points, yet as co-obligant she is entitled to a certain equity in regard to the security over Nellfield. Now, it is important to observe in this connection that she granted this promissory-note for £500 along with Messrs Lawson and Agnew to Howard & Cope on the 31st March 1910. There had been on 22nd November 1909 a prior bill for £1000 by John Agnew which came into Howard & Cope's hands. Miss Scott was no party to that bill. It was not until 29th August 1910 that Lawson with Agnew's consent disponed the Nellfield subjects to Howard & Cope in security not only of the £500 for which Miss Scott was bound but also in security of the £1000 for which Agnew was bound. There is no warrant for saying that the promissory-note was granted by Miss Scott on the faith of any security being granted, and in my opinion it is a fallacy to say that in dealing with that security the creditor was in any true sense a trustee for Miss Scott. She had no *jus quæsitum* in the security at all. She was not in the position of an owner, who when a creditor realises a heritable security has the right to see that as large a sum is realised as possible, a right which is possessed by a postponed bondholder in analogous circumstances.

But in the present case there was nothing to prevent Mr Lawson, the owner of the property, from transacting with Messrs Howard & Cope the day after he granted the disposition of the security on 29th August 1910, and bargaining on any terms he pleased as regards the security subjects. He could, so far as Miss Scott was concerned, have loaded that security with any amount of debt so as to make it rank preferably to her £500. He could have done that because Miss Scott had no interest in the security and would have had no right to prevent his so dealing with it. He might have accepted a re-conveyance or he might have consented to a sale at any price he pleased.

I think all those considerations are sufficient to indicate that, when Miss Scott fails to establish that she is a cautioner, she also fails to show she

has any equities as in a question with the holder of the subjects. That being my opinion it follows that she has no title to raise the question which has been very fully argued. June 12, 1914. Scott v. Davidson.

LORD DUNDAS concurred.

THE COURT adhered.

JAMES SCOTT, S.S.C.—JOHN ROBERTSON, Solicitor—Agents.

No. 88.

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Verney v. Verney.

HARRY LLOYD LLOYD VERNEY, Pursuer (Reclaimer).—*Clyde, K.C.*—*W. H. Stevenson.*
GERALD H. G. LLOYD VERNEY AND OTHERS, Defenders (Respondents).—*W. Mitchell.*

Entail—Validity—Defect in the cardinal prohibitions—Powers conferred on heir of entail—Power to appoint among children—Power to sell.

Under a deed of entail an estate was destined to A, "whom failing, to such son or daughter of the said A as he shall by writing under his hand appoint, and failing such appointment" to substitutes. The deed also reserved to each heir of entail "full power by himself or herself alone to sell and dispone the whole or any part" of the lands "subject always to the provisions and declarations after mentioned," and to grant the necessary deeds, "declaring that in case of a sale being effected the price . . . shall as soon as possible be re-invested in the purchase of land either in Scotland or in England or Wales, which land, if in Scotland, shall be entailed by a valid deed of strict entail . . . and, if in England or Wales, by a valid settlement" on the same series of heirs, and as far as might be subject to the same or similar restrictions as were contained in the deed of entail, "and until so applied the said price shall be consigned in bank or invested in name of a trustee or trustees upon trust for the purpose of being laid out and applied as aforesaid; and it shall be competent for the institute or heir of entail in possession for the time being to name a trustee or trustees for that purpose." It was further provided in the deed that the purchaser should have no concern with the application of the price, but should "be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices . . . are to be consigned or invested as aforesaid."

A having brought an action of declarator that the entail was invalid, and that he held the estate free from the conditions contained in the deed, on the ground that the entail was defective in two of the cardinal prohibitions, seeing that under the power of appointment he could alter the order of succession, and that he had also full power to sell the estate,—

Held (*diss.* Lord Salvesen) that the powers contained in the deed did not make the entail defective in the cardinal prohibitions, and consequently that the deed constituted a valid entail.

2D DIVISION. Lord Skerrington.

ON 24th December 1912 Harry Lloyd Lloyd Verney, of Carriden, in the county of Linlithgow, brought an action against his three sons, who were in pupillarity, against himself as their curator and administrator-in-law, and against his sister, Mrs Mary L. Lloyd Verney or Fanshawe, and her husband. The conclusion of the action was for declarator that a disposition and deed of entail of the estate of Carriden, dated 28th December 1891, and

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recorded in the Register of Entails 7th, and in the Register of Sasines and Books of Council and Session 15th, January 1892, "is and shall be deemed and taken to be invalid and ineffectual as regards all the prohibitory, irritant, and resolutive clauses therein written or referred to, in terms of the provisions of the 43rd section of the Act 11 and 12 Victoria, chapter 36, and that, notwithstanding of the foresaid clauses and of any fettering clauses contained or referred to in the said disposition and deed of entail, the pursuer is entitled to hold and holds the said lands and others before described free from the conditions and provisions and clauses prohibitory, irritant, and resolutive contained in the said disposition and deed of entail, and that he has full power to sell, alienate, and dispone the said lands and others, in whole or in part, in any way he may think proper, and to contract debt thereupon, and to dispone the same gratuitously, and to alter the order and course of succession thereto at pleasure, and to grant and execute all deeds necessary for these purposes, and generally to deal with the same as unlimited fiar thereof, and that no action of forfeiture shall be competent at the instance of any heir substitute under the destination contained in the said disposition and deed of entail against the pursuer by reason of the contravention of any or all of the prohibitions and conditions therein contained."

The disposition and deed of entail was executed by the pursuer's elder brother, James Hope Lloyd Verney, and by his father, George Hope Lloyd Verney, for their respective rights as proprietors of the subjects disponed. On the death of the institute (the pursuer's father) his brother, James Hope Lloyd Verney, succeeded to the estate and possessed it, but without making up a title. On his death without issue the pursuer succeeded, and made up a title by decree of the Sheriff of Chancery under section 10 of the Conveyancing (Scotland) Act, 1874, which was duly recorded in the Register of Sasines on 10th April 1911. The destination in the disposition and deed of entail was in the following terms (quoted in cond. 2):—"To and in favour of me, the said George Hope Lloyd Verney, whom failing to me, the said James Hope Lloyd Verney, whom failing to such son or daughter of me, the said James Hope Lloyd Verney, as I shall by writing under my hand appoint, and failing such appointment to the heirs-male of my body, whom failing the heirs-female of my body, whom failing Harry Lloyd Lloyd Verney, second son of me, the said George Hope Lloyd Verney, whom failing, to such son or daughter of the said Harry Lloyd Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment to the heirs-male of his body, whom failing the heirs-female of his body, whom failing Edward Vortigern Lloyd Verney, third son of me, the said George Hope Lloyd Verney, whom failing, to such son or daughter of the said Edward Vortigern Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment, to the heirs-male of his body, whom failing to the heirs-female of his body, whom failing Mary Levison Lloyd Verney, surviving daughter of me, the said George Hope Lloyd Verney, and the heirs-male of her body, whom failing the heirs-female of her body, whom all failing to the nearest heirs and assignees whomsoever of me, the said James Hope Lloyd Verney, the eldest heir-female throughout the whole course of succession succeeding always without division and excluding heirs-portioners."

The disposition and deed of entail also provided as follows (quoted in cond. 3):—"Reserving always to me, the said George Hope Lloyd Verney, with the written consent of the said James Hope Lloyd Verney, if living, and to each heir of entail subsequent to me, the said George Hope Lloyd Verney, full power by himself or herself alone to sell and dispone the whole or any part or parts of the said lands, subjects, and others without the consent of any subsequent heir called under the destination before written and without the necessity of obtaining the authority of the Court, but subject always to the provisions and declarations aftermentioned, and that either by public roup or private bargain, and at such time or times and for such price or prices as I, the said George Hope Lloyd Verney, with consent foresaid, or as I, the said James Hope Lloyd Verney, or the heirs of entail succeeding to me, shall think fit, and for that effect to grant, subscribe, and deliver all necessary articles of roup, minutes of sale, dispositions, and other deeds and writings, but providing always and declaring that in case of a sale being effected the price realised, subject to deduction only of the expenses of the sale and of the re-investing of the price as aftermentioned, and of any debts affecting or capable of being made to affect the fee of the said lands, subjects, and others at the time of such sale, shall as soon as possible be re-invested in the purchase of land either in Scotland or in England or Wales, which land, if in Scotland, shall be entailed by a valid deed of strict entail containing an express clause authorising registration in the Register of Tailzies, and if in England or Wales, by a valid settlement containing all such provisions as counsel shall advise on the same series of heirs and as far as may be in the same or similar terms and subject to the same or similar prohibitions, conditions, restrictions, and others as are contained in the deed of entail under which the lands, subjects, and others or the portion or portions thereof so sold were holden previous to such sale, and until so applied the said price shall be consigned in bank or invested in name of a trustee or trustees upon trust for the purpose of being laid out and applied as aforesaid: And it shall be competent for the institute or heir of entail in possession for the time being to name a trustee or trustees for that purpose—[then followed a reservation of power to borrow on the security of the lands for permanent improvements]: And it is hereby declared that purchasers from and parties lending to me, the said George Hope Lloyd Verney, or any heir of entail succeeding to me, under the respective powers of selling and borrowing before expressed and reserved, shall have no concern with and shall not be bound or entitled to inquire into the application or non-application of the price or prices of any lands sold or sums borrowed by me or such heir of entail, but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid."

After setting forth the facts as stated above and referring to the terms of the disposition and deed of entail, the pursuer averred:—(Cond. 4) "In terms of the said destination power is conferred upon the pursuer, as substitute heir therein called, to exercise by writing under his hand a power of appointment of the whole lands and others conveyed by the said disposition and deed of entail in favour of any son or daughter of the pursuer. The pursuer has

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not exercised said power of appointment, but it is open to him to do so at any time. The effect of the said power is to entitle the pursuer to alter the order of succession prescribed in the said disposition and deed of entail and thus render nugatory the conditions and restrictions therein contained or imposed by the Entail Acts against altering the order of succession prescribed in the said disposition and deed of entail. A similar power of appointment involving an alteration of the said order of succession was under the said disposition and deed of entail conferred on the pursuer's predecessor, the said James Hope Lloyd Verney, and is also conferred on the substitute heir called *nominatim* after the pursuer, viz., the said Edward Vortigern Lloyd Verney (who died unmarried and without issue). The destination under the said disposition and deed of entail is therefore not a proper and valid tailzied destination, no definite and fixed order of tailzied succession having been prescribed by the granters of the deed. The pursuer is further entitled in virtue of the provision quoted in the third article hereof, at his own hand and without any consent, to sell and dispone the whole or any part of the entailed estate. The said disposition and deed of entail is therefore, so far as it bears to have the effect of a deed of entail and to impose the restrictions and conditions therein contained or enacted under the Entail Acts, invalid and not binding upon the pursuer, and he is entitled to deal with and dispose of the estate in all respects as a fee-simple proprietor and free from any entail fetters, prohibitions, conditions, restrictions, and irritant and resolutive clauses imposed by or contained or implied in the said disposition and deed of entail or the Entail Acts, and to have it so found and declared under the present proceedings."

The pursuer also averred that his sister, the defender Mrs Fanshawe (designed in the destination above quoted as Mary Levison Lloyd Verney), was the surviving named substitute of entail under the destination in the disposition and deed of entail called to succeed to the lands after the pursuer.

Defences were lodged on behalf of the pursuer's children, and a curator *ad litem* was appointed to them. Mrs Fanshawe did not defend the action.

The pursuer pleaded;—The disposition and deed of entail mentioned in the summons not being a valid deed of entail according to the law of Scotland, and particularly the statute 1685, cap. 22, on the grounds condescended on and otherwise, and being, in virtue of the provisions of the Act 11 and 12 Victoria, cap. 36, invalid and ineffectual as regards all the prohibitions therein contained, the pursuer is entitled to decree as concluded for.

The compearing defenders pleaded, *inter alia*;—(2) The said disposition and deed of entail being both valid in law and binding upon the pursuer in all its provisions, decree of declarator ought to be refused, and the defenders assoilzied.

On 19th February 1913 the Lord Ordinary (Skerrington) pronounced an interlocutor sustaining the second plea in law for the compearing defenders and assoilzieing them from the conclusions of the summons.*

* "OPINION.—[After stating the facts]—The pursuer asks for declarator that the disposition and deed of entail is 'invalid and ineffectual as regards

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The pursuer reclaimed, and the case was heard before the Second Division on 14th, 19th, 20th, and 21st May 1914.

Argued for the reclaimer;—The Lord Ordinary's interlocutor should be reversed. A deed of entail was not valid unless it effectually imposed the three cardinal prohibitions against altering the destination, alienating, or burdening the estate. Prior to the Rutherfurd Act,[1] if an entail was invalid *quoad* one of the prohibitions, it might be defeated by the heir doing any act not validly prohibited, but that statute altered the law to the effect that, if the heir was in a position to avail himself of a defect in one of the prohibitions, he should be free from all the prohibitions without the necessity of any circuitous proceedings.[2] In the present case the pursuer could, under the entail, assuming it were valid, make an appointment in favour of one of his children, and propel the fee to him[3]: the child would then take in fee-simple, for the further destination was to take

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all the prohibitory, irritant, and resolutive clauses therein written or referred to, in terms of the provisions of the 43rd section of the Act 11 and 12 Victoria, chapter 36,' and that he holds the estate in fee-simple. The deed contains an express clause authorising registration in the Register of Tailzies and referring to section 39 of the said Act, and also to section 14 of the Act 31 and 32 Vict. cap. 101, which makes it unnecessary to insert the three cardinal prohibitions and irritant and resolutive clauses. It follows that the fetters have been well and effectually imposed, unless it can be shown as regards one or other of the cardinal prohibitions that such relaxations have been sanctioned as make the prohibition nugatory. The opinion of the Lord President Inglis in *Malcolm* v. *Kirk*, (1873) 11 Macph. 722, is exceedingly instructive as to the construction of section 43 of the Act of 1848. He negatives the view that a partial relaxation of any one of the prohibitions would make all the prohibitions invalid, and he states that only 'a total invalidity of one of the prohibitions' would lead to that result (p. 730). In the case which he was considering, the entail was held valid although a power had been conferred on the heirs of entail to grant provisions to younger children to the extent of two years' rent, and to sell portions of the estate sufficient to pay the debts thus contracted. He referred in his opinion to the case of *Howden* v. *Porterfield*, (1834) 12 S. 734, *aff.* 1 Sh. & M'L. 739, where an entail was assumed to be valid although the heirs had not only a power to contract debt for the purpose of paying younger children's provisions but also a power to contract further debt which must never exceed 6000 merks. He pointed out that the permitted debt had been held to be in the same position as an entailer's debt, and that a landowner, though deeply in debt, may execute an entail which will be valid under the Act 1685. I assume, however, that a permission to incur debt to an unlimited amount, or to an amount which exceeded the value of the estate, would be held to annul the prohibition against contracting debt, and would according to section 43 of the Act of 1848 make all the prohibitions invalid.

"The first ground upon which the entail is attacked is the fact that the destination (which is fully quoted in condescendence 2), after calling the pursuer, proceeds, 'whom failing to such son or daughter of the said Harry Lloyd Lloyd Verney as he shall by writing under his hand appoint, and failing such appointment to the heirs-male of his body, whom failing

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[1] 11 and 12 Vict. cap. 36, sec. 43.

[2] Rogerson v. Rogerson, (1872) 10 Macph. 698, *per* Lord President Inglis, at p. 702, and Lord Deas, at p. 703; Malcolm v. Kirk, (1873) 11 Macph. 722.

[3] Duff on Entails, p. 53.

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place only "failing appointment," and he could then re-convey the estate to the pursuer on such terms as might have been arranged between them. A defeasible entail did not bind the heir in possession after the power to determine it had emerged; and accordingly the pursuer was free from the fetters. But, further, the deed of entail was invalid by reason of (1) the power of appointment, and (2) the power of sale, conferred on the heirs of entail. (1) Under the reserved power of appointment the heir was master of the destination. He could appoint the estate to any one of his children, who would then take in fee-simple. If the heir made an appointment the destination was evacuated: if he refrained from doing so the destination stood. He could thus alter the succession or not, as he chose. There was a vital distinction between the prohibitions against alienating or burdening the estate, on the one hand, and the prohibition against altering the succession on the other. The former prohibitions were

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the heirs-female of his body, whom failing' to the pursuer's brother Edward (who afterwards died without issue) and the heirs of his body, whom failing to Mrs Fanshawe and the heirs of her body, whom all failing to the nearest heirs and assignees of the entailer, James Hope Lloyd Verney, the eldest heir-female excluding always heirs-portioners. The pursuer avers that he has not exercised this power of appointment, but he maintains that it authorises him to render nugatory the prohibition against altering the order of succession. I am disposed to agree with the pursuer's counsel that if the power of appointment were exercised and afterwards took effect by the pursuer's death, the appointee would hold the estate in fee-simple as being the last member of the destination. The whole of the subsequent destination is, in my view, governed by the words 'and failing such appointment.' I cannot find any destination in favour of the heirs of the body of the appointee, whom failing his brothers and sisters in their order. It is inconceivable that the ulterior destinations were intended to carry the estate after the death of the appointee to his uncle and aunt and their descendants to the exclusion of his own descendants and the descendants of the pursuer. Assuming, however, that the succession of an appointee would end the entail, I do not see how the appointment can be described as an alteration of the order of succession when the order in question is directed to come into effect only on the failure of such an appointment. So far as I am aware, there is no rule of conveyancing and no principle of the law of strict entails which would prevent an entailer from conferring upon a future heir of entail a power to make an appointment in favour of one of the children of such heir, with the result that on the succession of such appointee the entail would come to an end. The case of *Martin* v. *Kelso*, (1853) 15 D. 950, *aff.* 2 Macq. 556, affords an example of a power to alter the order of succession by postponing or excluding female heirs, and this power was assumed to be consistent with a strict entail. There are plenty of examples where an entailer reserved power to alter the order of succession, but the case of *Martin* was the only one which was cited in which such a power had been conferred upon the heirs of entail. But the case is *a fortiori* of the present one, because the power there in question did, when exercised, bring about an alteration of the order of succession directed by the entailer. I am unable to hold that the entail of Carriden is invalid upon the ground that the prohibition to alter the order of succession has been nullified by the power of appointment conferred upon the pursuer.

"The same legal principle applies to the contention that the wide power of sale quoted in condescendence 3 nullifies the prohibition against alienation, but the application of the principle is in this case more difficult. The power to sell the estate as a whole and to re-invest the price in the

designed to secure the preservation of the estate; and, for the purpose of preserving the estate, there were occasions when it might be necessary to sell a portion of the lands or to raise money on the security of the estate. Hence a relaxation of these prohibitions had been admitted, but only to the extent of allowing alienation or the contraction of debt so far, and so far only, as was consistent with reasonable administration of the estate.[1] If the prohibition against the alteration of the line of succession stood in the same position as the other prohibitions and the same rule applied, then, as the powers here were excessive, the deed of entail was bad. But, in point of fact, no relaxation whatsoever was admitted in the case of the prohibition against alteration of the succession. That prohibition was distinct in its origin from the other prohibitions. Prior to 1685 the superior's consent had to be obtained to the original destination, and it could not be altered afterwards without

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purchase of land either in Scotland or in England or Wales, which land is to be entailed or settled, as the case may be, on the same series of heirs, is quite unprecedented. To sell an estate and transfer the family seat to another country goes far beyond the province of estate management. On the other hand, in the case of a family which, like the pursuer's, has a close connection with Wales, the vesting of such a power in the person of its head for the time being may be as useful and beneficial as the vesting in the head of a purely Scottish family of what Mr Bell (section 1733) describes as 'a power to excamb or to sell and re-invest for the purpose of concentrating the estate.' The case of *Breadalbane*, (1830) 8 S. 490, shows that a power of excambion conferred by an entailer was not regarded as anything unusual. In the case of *Baird* v. *Baird*, (1844) 6 D. 643, *aff.* 6 Bell's App. 7, the heirs of entail had power not only to excamb, but also 'to sell off and dispone such parts and portions' of the entailed lands as they should think fit, but excepting the manor houses, with their parks and enclosures, upon condition that previous to the sale they should purchase other lands in the same counties of equal value and that the lands so acquired should be entailed on the same heirs and in the same terms as those in lieu of which they were acquired. This power was held not to be inconsistent with a strict entail under the Act 1685, cap. 22. This judgment was affirmed on appeal. It is clear that both in the Court of Session and in the House of Lords the power to sell was regarded as an administrative power similar to the power to feu which had been held in the *Roxburghe* case not to justify the alienation of the whole estate by means of sixteen feu-dispositions all of the same date—*Roxburghe* v. *Ker*, 17th June 1813, F. C., *aff.* 2 Dow, 149, 5 Pat. App. 609. But there are *dicta* in *Baird's* case which go considerably beyond the case actually decided. The Lord Justice-Clerk (Hope) said (6 D. 653) that he was not aware that a power to sell the whole estate would be illegal if it were made a condition that before the sale another estate of equal value should be purchased and effectually entailed. Lord Fullerton (p. 658) expressed a clear opinion in favour of the legality of such a power, and Lord Jeffrey said that in his opinion such a power would not form a ground for the interim impeachment of the existing entail. Lord Fullerton referred to the *Ascog* case, and said that 'nobody seemed to have any doubt that

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[1] Catton v. Mackenzie, (1872) 10 Macph. (H. L.) 12, *per* Lord Westbury, at p. 24, and Hatherley, L.C., at p. 19; Malcolm v. Kirk, 11 Macph. 722; Howden v. Porterfield, (1834) 12 S. 734, *per* Lord Mackenzie, at p. 738, *affd.* 1 S. & M'L. 739; Roxburghe v. Ker, Jan. 12, 1808, F. C., 2 Dow, 149, *per* Eldon, L.C., at p. 226, 5 Pat. 609; Earl of Breadalbane, (1830) 8 S. 490.

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his consent; and the superior would never grant an investiture unless the line of succession was marked out.[1] So in entails the underlying principle was that the line of heirs was fixed, and was fixed by the entailer. It was essential that the heirs who were successively to take should be named or be ascertainable by reference to the direction in the deed of entail[2]; and, although the entailer might validly reserve a power of nominating heirs,[3] the granting of such a power to subsequent heirs was incompatible with the nature of an entail. It was also inconsistent with the whole scheme of the Entail Acts, *e.g.*, if the pursuer proposed to disentail, how could the expectancies of the three next heirs be valued? There was no authority to support the Lord Ordinary's decision. *Martin* v. *Kelso*[4] was distinguishable as, in the first place, the validity of the entail was not, and could not be, challenged by the parties, and secondly the power in that case was merely to pass over certain of

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where it' (a direction to re-invest) 'is expressly given it was a perfectly good direction.' In the *Ascog* case the House of Lords reversed the Court of Session and refused to imply a duty to re-invest from the fact that alienation was ineffectually prohibited—*Stewart* v. *Fullarton*, (1827) 5 S. 418, N. E. 396, *rev.* 4 W. & S. 196. In *Baird's* case (6 Bell's App., p. 26) the Lord Chancellor (Cottenham) said, 'Here the entail is to cease, that is to say, the power of selling is to come into operation upon the happening of a future event; and it is not disputed that the entail of the estate may be made so to determine.' The *dicta* in *Baird's* case must, of course, be interpreted with reference to the fact that the deed of entail provided automatic machinery for securing the interests of the future heirs of entail by making it a condition that lands of equal value should previously to the sale be purchased and entailed. It was argued in the House of Lords (6 Bell's App., p. 21) that lands so bought and put under a new entail would be open to adjudication by the creditors of the new entailer, but the argument does not seem to have made any impression, and was, I think, unsound. I have come to the conclusion that the judgment in the case of *Baird* would have been the same even if the power of sale had extended to the whole estate, including the mansion-houses, and even if the exercise of the power of sale had been made conditional on the creation of a trust for re-investment of the price. A trustee may prove dishonest and trust investments may prove valueless; but the law does not require an absolute guarantee that the interests of the postponed heirs of entail shall be conserved. All that it demands, according to my understanding, is that the relaxation of the prohibition against alienation shall not be so considerable as to destroy and eat up the prohibition. For example, if a deed of entail conferred power upon the heirs to sell the estate and imposed upon them a mere personal obligation to re-invest the price, it would not be an entail under the Act of 1685 any more than would be a deed which relied merely upon the personal obligation of the heir in possession for the enforcement of the three cardinal prohibitions. The purpose of that Act was to confer upon the heirs of entail a security of a different and higher character than a mere personal obligation on the part of the heir in possession. In principle, however, I see no difference between a power which, if executed, involves the creation of a trust for re-investment and a power which is limited and conditioned as in the

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[1] M'Laren on Wills, (3rd ed.) vol. i., sec. 892.

[2] MacGillivray v. Souter, (1862) 24 D. 759; Farquhar v. Farquhar, (1838) 1 D. 121.

[3] Kenny v. Taylor, (1875) 2 R. 636; Blair, (1877) 4 R. 308.

[4] (1853) 15 D. 950, 2 Macq. 556.

the heirs in favour of other heirs who were called in the entail and would take under its fetters. In *Wedderburn* v. *Halket*[1] the deed was not a strict entail, and moreover the decision was unsound and had never been followed. (2) The heir of entail was empowered to sell the whole estate, and as this power exceeded the powers incidental to the rational administration of the estate, it nullified the entail.[2] Nor did the provisions as to the re-investment of the price or the appointment of a trustee save the entail. The heir selling the estate was not expressly bound to re-invest the price in land, and an obligation of this nature could not be implied.[3] The heir would sign the disposition or other required deeds and he would receive the price. The re-investment of the price was not a condition of the sale; it was only to be made "as soon as possible." Nor did the deed require as a condition of the sale that a trustee should be appointed. If the sale and the purchase of other lands

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case of *Baird*. An entail is, in my opinion, entitled to the benefit of the Act 1685, provided that it substantially limits the power to alienate of the heir in possession, and at the same time confers upon the succeeding heirs of entail something more than a mere personal obligation by the heir in possession to re-invest the price in the event of a sale.

"The next question is whether the power of sale conferred upon the heirs of entail in the present case requires the creation of a trust for re-investment as a condition of its valid and effectual exercise or whether it may be effectually exercised so as to confer a good title on a purchaser while leaving the seller under a mere personal obligation to create a trust for re-investment. The clause as printed in condescendence 3 must be read along with a clause which is not printed, and which is to the effect that purchasers are not to be bound or entitled to inquire into the application or non-application of the price, 'but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid.' Though the seller is placed under no obligation to appoint a trustee in whose name the price is to be consigned or invested, he cannot avoid doing so if he is to exercise the power in the manner pointed out by the deed. Further, if the purchaser chooses to pay the price to the seller rather than to a trustee for the heirs of entail, he will get a bad discharge for the price, and also, as I think, a bad title, because he has deviated from the course prescribed by the entailer. Accordingly, if the power of sale is exercised in strict accordance with the directions of the entailer, the price of the lands sold must come into the hands of a trustee for the heirs of entail. It is not material to consider whether such a trustee could without committing a breach of trust direct that the money should be consigned in an English bank or invested in English securities, and thus make it difficult or impossible for the Scottish Court to enforce the due execution of the trust for re-investment. If we assume that such was the intention of the entailer, it was a perfectly lawful one,

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[1] (1762) M. 15,416, (1770) 2 Pat. 231.

[2] Catton v. Mackenzie, 10 Macph. (H. L.) 12, *per* Lord Westbury, at p. 24, and Hatherley, L.C., at p. 19; Malcolm v. Kirk, 11 Macph. 722; Howden v. Porterfield, 12 S. 734, *per* Lord Mackenzie, at p. 738, *affd.* 1 S. & M'L. 739; Roxburghe v. Ker, Jan. 12, 1808, F. C., 2 Dow, 149, *per* Eldon, L.C., at p. 226, 5 Pat. 609; Earl of Breadalbane, 8 S. 490.

[3] Stewart v. Fullarton, (1830) 4 W. & S. 196, *per* Lord Wynford, at p. 237; Bruce v. Bruce, (1830) 4 W. & S. 240; Duke of Queensberry's Executors v. Marquis of Queensberry, (1830) 4 W. & S. 254; Montgomerie v. Eglinton, (1843) 2 Bell's App. 149.

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were simultaneous, a trustee would not be appointed. And, in any case, the trustee was a mere stakeholder, no duties were laid on him, the purchaser was not bound to pay the price to him, and, if he did, there was nothing to prevent the trustee from handing it to the seller. If the money were not re-invested the only action which would lie would be a personal action, and not the declarator which was the statutory remedy for breach of an entail and which was provided by every perfect entail.[1] In this respect the present case was in marked contrast to *Baird* v. *Baird*,[2] as also in the circumstance that in that case the heir selling could never get the price into his hands. Finally, the provision that the price of the estate might be invested in land in England was fatal to the entail. It was immaterial whether there was or was not in England a species of title equivalent to our entails, for the Act of 1685 applied only to lands in Scotland; but in point of fact there was no equivalent form of title in England.[3]

Argued for the respondents;—The pursuer was not entitled to the declarator sought. He was not in a position to propel the fee[4] and re-acquire in fee-simple, as his children were not *sui juris*, and the questions which might arise in that event did not arise in the present case. There was no stereotyped form of a deed of entail, and any conditions which were not contrary to the Act of 1685 might be inserted in the deed.[5] Where, under a deed of entail, the only destination beyond the heir in possession was to heirs whatsoever, the entail was at an end and the heir held in fee-simple[6]; but it had never been suggested, although this was the necessary result under the reclaimer's argument, that the preceding heir (the penultimate heir in the destination) also held in fee-simple by reason of the fact that (as the pursuer here could) he could propel to one who would take in fee-simple. (1) The power of appointment allowed to the heirs was in no way destructive of the entail. The exercise of the power could not effect an alteration of the order of succession. It was expressly sanctioned by the deed of entail, and the destination had been settled by the entailer subject to this power. The appointee would take in conformity with, and as heir under, the deed of entail. In *Wedderburn* v. *Halket*[7] an heir was held entitled,

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and it does not in any way derogate from the validity of the trust. Nor is it in my view at all material that the valid execution of the power to sell the whole estate will not only bring the existing entail to an end, but may result in the purchase of an estate in England or Wales which cannot of course be settled in a manner identical in its effects with a Scottish entail.

"For the foregoing reasons I sustain the defenders' second plea in law, and assoilzie them from the conclusions of the summons."

[1] Earl of Breadalbane v. Jamieson, (1877) 4 R. 667, *per* Lord President Inglis, at p. 670.

[2] (1844) 6 D. 643, *per* Lord Justice-Clerk Hope, at p. 653, and Lord Fullerton, at p. 658, 6 Bell's App. 7, *per* Cottenham, L.C., at p. 25.

[3] Lord Advocate v. Stewart, (1902) 4 F. (H. L.) 11.

[4] As to the effect of the propulsion of a fee, Lord Advocate v. Earl of Buchan, 1907 S. C. 849, 1909 S. C. (H. L.) 8, was cited.

[5] Gray v. Gray's Trustees, (1878) 5 R. 820.

[6] Moubray's Trustees v. Moubray, (1895) 22 R. 801; Sandford on Entails, (2nd ed.) pp. 547, 548.

[7] (1770) 2 Pat. 231; Bell's Prin. (10th ed.) sec. 1733.

without infringing the entail, to alter the succession by excluding the heir-male who was an idiot. *Martin* v. *Kelso*[1] was also an authority which directly supported the respondents' case. There was nothing in the respondents' contention that was inconsistent with the Entail Acts, for the consents which had to be obtained or valued for the purpose of disentailing any lands were those of the nearest heirs at the time, notwithstanding the possibility that nearer heirs might subsequently emerge (*e.g.*, by the birth of a son to the heir in possession). If the test were whether the power was such as was consistent with rational administration of the estate, that test was clearly satisfied here. (2) The power of sale also was not such as to nullify the entail. It was not a naked power of sale, but was equivalent rather to excambion. It was exerciseable only under the condition that the price should be re-invested in land; there was a distinct trust as to the re-investment and the entailing of the purchased land; and the purchaser of the estate would not obtain a valid title unless he obtained a discharge for the price from the trustees.[2] It was not essential that the whole machinery of a trust should be set out in the deed, and if it appeared in the deed that a trust was intended the Court would aid the execution of the trust.[3] In *Fleeming* v. *Howden*[4] Lord Westbury observed: "An obligation to do an act with respect to property creates a trust," and that observation was approved in *Munn* v. *Pratt*.[5] [LORD SALVESEN.—Lord Westbury's observation was modified by the House of Lords in *Bank of Scotland* v. *Liquidators of Hutchison, Main, & Company, Limited*.[6]] It was immaterial that the lands purchased after the sale of the estate might be situated in England. In that case it would be the duty of the trustees to settle the lands according to English law in the manner most nearly approximating to a Scottish entail.[7]

At advising on 16th June 1914,—

LORD DUNDAS.—I think the interlocutor reclaimed against is right; and I agree not only with the Lord Ordinary's conclusion, but also with his reasoned opinion. But, as the reclaimer's arguments were elaborate, and were said to include matters not submitted in the Outer House, it is proper that I should state my own views upon the various points discussed.

The pursuer asks for declarator that the deed of entail, under which he is at present heir in possession of the estates, is invalid and ineffectual as a strict entail, and that he is entitled to hold the lands free from the fetters of the deed, and to deal with them as fee-simple proprietor. He

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[1] 15 D. 950, 2 Macq. 556.

[2] Baird v. Baird, 6 D. 643, 6 Bell's App. 7; Hay's Trustees v. Hay's Trustees, (1895) 3 S. L. T. 86.

[3] Sandys v. Bain's Trustees, (1897) 25 R. 261, *per* Lord Kinnear, at p. 267.

[4] (1868) 6 Macph. (H. L.) 113, at p. 121.

[5] (1898) 25 R. 461, *per* Lord Kinnear, at p. 473.

[6] *Supra* (H. L.), p. 1, [1914] A. C. 311.

[7] Studd v. Cook, (1883) 10 R. (H. L.) 53; Earl of Zetland v. Lord Advocate, (1878) 5 R. (H. L.) 51.

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challenges the validity of the entail upon two distinct and separate grounds, which I shall deal with in their order.

In the first place, the pursuer maintains that the destination which is fully quoted in cond. 2 is inconsistent with and destructive of the prohibition against altering the order of succession. He says that the power given to several of the successive heirs, including himself, to appoint as his successor any one of his own children amounts to a power to alter the order of succession; that the appointee would not be a substitute heir of the entail investiture, but a stranger to the destination; and that he himself would accordingly, in the event of his appointing one of his children, be the last heir substitute in the entailed destination, and is therefore now entitled to declare the entail at an end. I think these arguments are quite unsound. They appear to me to proceed upon a misconception as to what does, and what does not, amount to an alteration of the order of succession. In the case of a fee-simple destination to A and the heirs-male of his body, whom failing to B, &c., &c., the destination will subsist until it is altered. But each successive heir in possession can alter it, if he pleases. He may convey the lands to X, who would take them as his disponee, and not as heir of provision under the original investiture. That would be a proper alteration of the order of succession. But, if the original destination were to A, whom failing, to any person whom he may nominate and appoint by writing under his hand and, failing such appointment, then to the heirs-male of the body of A, whom failing, to B, &c., &c., then A might, if he pleased, nominate and appoint X, without disponing the lands to him at all; and X would take them, not as A's disponee, but as heir of provision under the original investiture. In the latter case, X is a proper substitute; in the former he is not. In the first case, the order of succession has been altered; in the second, it has not. The case of a strict entail under the Act of 1685 is precisely similar. That Act enabled the lieges to tailzie their lands, "and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit," and to affect the tailzies with irritant and resolutive clauses which should be effectual against purchasers and creditors, as well as against the heirs themselves. But the question, who is a proper substitute or heir of provision, and who is not, is just the same in the case of a strict entail as it is in that of a simple destination. All this is elementary; but it is necessary to state it, looking to the argument of the reclaimer's counsel. I do not think it is doubtful that, if the pursuer should execute an appointment in favour of one of his sons, that son would take as a proper substitute under the existing investiture, and the appointment would not constitute or involve an alteration of the order of succession inconsistent with, or destructive of, the prohibition against such alteration.

It does not appear to me that authority is required for the propositions I have stated; but I may refer to the important case (not cited to us) of *Stewart's Trustees* v. *Porterfield*.[1] The case was one where an entailer had reserved to himself two powers; one, to nominate heirs

[1] (1826) 2 W. & S. 369, (1831) 5 W. & S. 515, 1 Ross' Leading Cases (Land Rights), 569.

by a writing under his hand, who should come in at a certain point of the destination; the other, to alter the succession, subject to certain limitations. With the actual dispute and its decision we are in no way here concerned. But it seems clear from the opinions delivered not only that the appointees under the hand of the entailer took as substitutes under the original investiture, but also that the case would have been the same if the power of nomination had been one not reserved by the entailer himself, but conferred by him on a subsequent heir in possession. Lord Justice-Clerk Boyle considered the case to be "precisely the same in principle with those where we have sustained a power to nominate heirs, vested in a third party. There, all that is necessary is a writing by the person who has the power of nominating heirs. If so, then *a fortiori* such power may be exercised by the granter, who has reserved it to himself." His Lordship added, "the original deed is the title to the estate."[1] In the course of that case, a remit was made by the House of Lords to the Scots judges; and an opinion (amongst others) was returned by six of them, including the Lord President and Lord Corehouse, who pointed out that the instrument of nomination was merely the evidence, and not the source of the nominee's right, the source being the deed of entail itself. They said that "in further illustration, and as a decisive proof of this point, reference may be made to grants of honours before the Union, which in this respect were exactly upon the same footing as lands, except that a grant of honours necessarily flowed from the Crown, and could not be extended, varied, or modified by a subject. But in Scotland, it was usual to obtain grants of honour not only to the grantee and his heirs-male and of tailzie, referring to the particular entail then made, but also to the heirs of tailzie whom he might thereafter appoint . . ."[2] The learned judges pointed out that, as the Crown is the sole fountain of honour, it is plain that any nominee so taking owed his title to the original Crown grant, and not to the deed of nomination by the subject. These authorities make it clear that the appointment of an heir, in virtue of a power reserved or conferred by the deed of entail, is a fulfilment, not a contravention, of the order of succession prescribed by the entailer himself. Again, *Martin* v. *Kelso*,[3] referred to by the Lord Ordinary, affords an example of a case where the Court accepted an entail as perfectly valid, though it contained powers to substitute heirs to exclude altogether certain persons from the succession. It is true, as Mr Clyde pointed out, that neither of the parties to that case did (or could) challenge the validity of the entail upon which both had to rely; but, if there had been any ground for such a challenge, I can hardly suppose that all the eminent judges who took part in the decision would have overlooked it. I may add that there are indications in the "System of Stiles" by that highly reputable authority, Dallas of St Martins, that powers of nomination might validly be conferred by an entailer upon third parties of a latitude far greater than anything to be found in the deed under consideration.[4]

[1] 2 W. & S., at p. 377.
[2] 5 W. & S., at p. 519, 1 Ross' Leading Cases, at p. 580.
[3] 15 D. 950, *affd.* 2 Macq. 556.
[4] Dallas' Styles, pp. 559, 560.

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I have dealt at perhaps unnecessary length with this part of the case, owing to the insistence of the reclaimer's argument; but I confess that I have no doubt that the deed contains nothing inconsistent with, or destructive of, the prohibition against altering the order of succession; and that, if the pursuer should appoint one of his sons, the appointee would take as a substitute heir under the entail investiture. I am disposed (like the Lord Ordinary) to think that such appointee would, on the pursuer's death, hold the estate in fee-simple, as being the last member of the destination. But that assumption would plainly afford no ground for a declarator that the pursuer himself is now free from the fetters, and entitled to deal with the estate as proprietor thereof in fee-simple.

Before leaving this part of the case, I must notice,—but only to dismiss it,—a further argument which was pressed upon us mainly by the junior counsel for the reclaimer. It was contended that the pursuer might make a deed of appointment in favour of one of his sons; might then propel the fee in favour of that son; and thereafter, by arrangement with him, have the estate reconveyed to himself in fee-simple; and that, all this being within the pursuer's power and competency, the Court should now, without insisting upon the performance of unnecessary and circuitous steps, grant the declarator of freedom which the pursuer asks. The mere statement of this argument involves, to my mind, its rejection. The simple and conclusive answer to it seems to me to be that, assuming the pursuer's power to propel the fee to an appointed son, the Court has no guarantee that the appointee would reconvey the estate to his father; on the contrary, the reconveyance would necessarily depend upon the volition of a third party, and of one who (as the pursuer's sons are all in pupillarity) could not grant an effectual disposition. The Court is, in effect, asked, not to dispense with mere needless circuity of procedure, but to presuppose, and give its sanction *ab ante* to, some sort of arrangement which could not, as matters now stand, be legally carried into effect, and which there is no reason to suppose that the son, even if *sui juris*, would make. For these reasons I am of opinion, with the Lord Ordinary, that the pursuer's first ground of challenge fails entirely.

The pursuer's second line of attack upon the deed of entail is quite distinct from the first. It is argued that the deed contains such a relaxation of the prohibition against sale as to render that prohibition nugatory. I am satisfied that the Lord Ordinary has rightly negatived this argument, and upon the right grounds. The case of *Baird*,[1] to which his Lordship refers, seems to me to go a long way towards this result. The actual decision in that case,—a most authoritative one, pronounced unanimously by the whole Court and affirmed by the House of Lords,—established that a power to any heir of entail in possession to sell certain parts of the estate, on condition that, before the sale, he should purchase other lands of equal value, the title to which should have been taken (to the satisfaction of any purchaser of the originally entailed lands) to the heirs in the entail, under the same fetters and conditions as were contained in the original deed of entail, did not nullify the entail,

[1] 6 D. 643, *affd.* 6 Bell App. 7.

either as being destructive of the fetters or as making the entail inconsistent with the statute of 1685. But weighty dicta by distinguished judges went a good deal further than the actual decision; and I agree with the Lord Ordinary in thinking that "the judgment in the case of *Baird*[1] would have been the same even if the power of sale had extended to the whole estate, including the mansion-houses, and even if the exercise of the power of sale had been made conditional on the creation of a trust for reinvestment of the price." The correctness of the first of these hypotheses is not, I think, open to dispute; and the soundness of the second seems to me to follow from a just appreciation of the case of *Baird*.[1] I think that case establishes that, where a deed of entail contains a prohibition against sale, duly fenced with irritant and resolutive clauses, and also a qualified permission to sell, it is obviously immaterial that the conditions attached to the permission are not so fenced, so long as they are lawful conditions, capable of enforcement; that the qualifying conditions of the permission must be strictly and faithfully observed by anyone who seeks to avail himself of the power to sell—else he is outside of, and can take no benefit from, the power; that the permission may be validly clogged with the condition of a trust for the protection of the substitute heirs; and that, in considering whether the reserved power is, or is not, inconsistent with the prohibition, it is (I quote the words of Lord Justice-Clerk Hope in *Baird's* case [2]) "fixed that you must not construe the deed in such a case as to introduce, by the construction adopted, inconsistency between the different parts of the deed; that the rule of construction is to interpret the one clause in subserviency to the other; and not to admit an interpretation of the reserved power which is, either in construction or in exercise, to defeat the general prohibition." If these considerations are attended to, I think it will be found that, in the present deed, the qualified permission to sell under certain conditions is not so repugnant to the general prohibition against sale as to warrant us in declaring that the entail is invalid, and that the pursuer is in the position of fee-simple owner of the estate.

The pursuer contends that he could, in accordance with the conditions of the deed, sell the lands, and appropriate the price without risk of successful challenge by any heir-substitute. I do not think he could do so. But, in considering his argument, it is necessary to attend closely to the terms of the deed. It is true that power is thereby conferred on the heir in possession "by himself alone," and without consent of any substitute heir, to sell the estate, and to grant a disposition to the purchaser; but he can only do so "subject to the provisions and conditions" of the deed. If he sells otherwise than in strict conformity to the provisions and conditions, he does not effectually sell. In the words of the Lord Justice-Clerk in *Baird's* case,[3] "the heir may exercise the reserved power or not, as he chooses. The entail remains in the meantime complete. He cannot sell, except in virtue of the reserved power. If he attempts to sell in virtue of the reserved faculty, he must act within the clause

[1] 6 D. 643, *affd.* 6 Bell App. 7. [2] 6 D., at p. 650.
[3] 6 D., at p. 651, *sub fin.*

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reserving the power. The clause says that, in order to be entitled to exercise (the) power, certain things must first be done. If these are not done, the heir does not bring himself within the permission. They are as much part of the power reserved as any other part of the clause. The faculty is only to sell, after performing certain other things. If these are not done, the permission does not attach, and no sale can be within the exercise of the reserved power." Now it is expressly provided by the deed of entail that "the price realised . . . shall as soon as possible be re-invested in the purchase of land" to be entailed or settled in manner therein prescribed, "and, until so applied, the price shall be consigned in bank or invested in name of a trustee or trustees"—(I think that consignation, as well as investment, must plainly be in the trustee's name)—"upon trust for the purpose of being laid out and applied as aforesaid." It is true, but I think immaterial, that the selling heir is not expressly *directed* to appoint a trustee or trustees; it does not matter who makes the appointment; but, in order to remove doubt, the deed says "it shall be competent" for him to do so. I have quoted the conditions upon which alone the entailer gives permission to sell. Any sale not made in conformity with these conditions would be outside the special power, and therefore struck at by the general prohibition against sale, and the irritant and resolutive clauses expressed or implied in the deed of entail. I apprehend that any purchaser would, for his own sake, have to see that the disposition granted to him was one which the seller had power to grant—in other words, he would have to see that the conditions were satisfied upon which alone the seller had power to sell. The course contemplated by the deed is that "until so applied, the said price shall be consigned in bank or invested in the name of a trustee or trustees," and it is specially provided in a later clause, for the protection of a purchaser, that he (the purchaser) "shall have no concern with, and shall not be bound to inquire into, the application or non-application of the price . . . but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices are to be consigned or invested as aforesaid." If the course contemplated by the deed is followed, it is plain that the price must pass not into the hands of the pursuer, but into those of a trustee or trustees.

It was, however, ingeniously suggested by the pursuer's counsel that it might not be necessary to follow this course; that the appointment of a trustee is not prescribed as an essential condition of sale, and might not be at all necessary; that, simultaneously with the sale of the estate, the pursuer might arrange for the purchase and entail or settlement of another estate, at the same (or not smaller) price; and that the two transactions might be settled together, the price paid by the purchaser of the now entailed estate, in exchange for the disposition in his favour, being handed direct to the seller of the new lands, in exchange for his disposition and entail of these. It is not, to my mind, clear that the appointment of a trustee or trustees, whether strictly necessary or not, is not made by the deed one of the conditions upon which alone the faculty to sell may be lawfully exercised. But, assuming that this is not so, and that, in the way suggested, any necessity for having a trustee to hold the

price, pending the purchase of a new estate, could be obviated, I do not think the pursuer's case would be materially advanced. If he exchanges his disposition for a valid entail or settlement of other lands, these would still not be his property absolutely and in fee-simple. But the pursuer (as I understood the argument) put his case still higher, and maintained that there is nothing in the deed of entail to prevent him from selling at his own hand, and giving a good title to the purchaser, and appropriating the price to himself, without purchasing or settling other lands at all. I do not think he could do this; because the purchaser, in the absence of any trustee to give him a good discharge for the price, would, for his own protection, have to see that the price was applied in the purchase of other lands, and that these were validly settled as prescribed by the deed—in other words, that the condition was duly satisfied upon which alone the heir of entail was permitted to sell. The pursuer refers to the clause I have already quoted, declaring that the purchaser shall have no concern with the application of the price, but shall be discharged by the receipt of the trustee in whose name it is to be consigned. But that clause will not avail a purchaser who has not chosen to obtain the receipt of a trustee for the price,—a step which I conceive that any prudent law-agent would, as matter of course, insist upon,—and the whole transaction of sale would, in my judgment, be struck down by the prohibition against selling, coupled with the irritant and resolutive clauses contained (or by statute implied) in the deed of entail. An action for that purpose would, I apprehend, prevail, if brought by any substitute heir of tailzie, in respect of the contravention by the selling heir of one of the cardinal prohibitions of the entail. The Lord Ordinary, therefore, seems to me to be quite right in holding that, in order to the effectual exercise of the faculty to sell, the price must be committed to the hands of a trustee,—unless, perhaps, in the case, which probably was not suggested to his notice, of a simultaneous purchase and settlement of new lands. In neither case, so far as I can see, could the selling heir get the price into his own hands. The machinery of the permissive clause appears to me to have no flaw in it upon this head.

But the pursuer further maintained that, in any view, the entail was invalid,—the prohibition against sale being rendered nugatory by the fact that the deed authorises re-investment of the price in the purchase of lands in England or Wales, which are to be settled as therein directed, but which manifestly could not be entailed under the Scots Act of 1685. It was said that the Lord Ordinary had missed this point. I am satisfied that he did not do so; he alludes to the matter at the end of his opinion, and, if his reasoning be otherwise correct, he had no occasion whatever to deal with it specially *ad longum*. The final answer to this point seems to me to be that with which I have already dealt very fully, viz., that the selling heir can only sell subject to the provisions and conditions prescribed; and that, if he adheres to these, he cannot, so far as appears, put himself in the position of absolute and uncontrolled owner of the lands directed to be purchased and settled. The pursuer's argument upon this head seems to amount to this, that, inasmuch as lands in England or Wales cannot be entailed according to Scots law, therefore the Court is to disregard altogether the

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condition prescribed in the deed as to investment and settlement. I cannot accept this argument. That condition is an integral part and portion of the power to sell. If it had been possible for the pursuer to satisfy us that such a settlement as is prescribed by the deed must in effect leave him in the position of absolute and uncontrolled ownership of the lands to be purchased and settled, the case would have been different But he has not attempted this. I am not surprised that he has not even made an averment to this effect; and it seems to me to be out of the question to ask the Court to make any such assumption.

For these reasons, which I think are substantially the same as the Lord Ordinary has expressed much more concisely, it appears to me that the second ground of the pursuer's attack upon the entail must fail, as well as the first; and that we ought to adhere to the interlocutor reclaimed against.

LORD SALVESEN.—The leading conclusion in this action is for a declarator that a deed of entail under which the pursuer is the present heir in possession of the lands of Carriden and others is invalid, and that, notwithstanding the fettering clauses referred to therein, the pursuer is entitled to hold the said lands in fee-simple. The deed of entail in question was the joint deed of James Hope Lloyd Verney, who was owner of the lands of Carriden therein described, and George Hope Lloyd Verney, who was owner of certain other lands apparently adjoining and particularly described under the head *secundo*. All the lands which were the subject of the deed of entail are situated in the county of Linlithgow, and the object of the deed of entail seems to have been to consolidate the lands into one estate and to make the granter George Hope Lloyd Verney the institute, and on his death James Hope Lloyd Verney the first substitute heir.

The first peculiarity of the deed on which the pursuer relies is that power was given to James Hope Lloyd Verney to appoint his successor from amongst any members of his own family. Failing his doing so, which actually happened, the estate was to go to the pursuer, in whom similar powers of appointment were vested, and it was only on his failure to execute any deed of appointment that the estate was to pass to the heirs-male of his body. The first ground of attack on the deed of entail as a valid and effectual one is that the power of appointment now admittedly vested in the pursuer enables him to alter the order of succession, and so to render nugatory the restriction against altering the order of succession which is imposed by the Entail Acts, and especially section 39 of the Rutherfurd Act. Under this section it is unnecessary in a deed executed after the Act and authorising registration in the Register of Tailzies to insert in the deed of entail the three cardinal prohibitions and relative irritant and resolutive clauses, the clause of registration having the same operation and effect as the most formal irritant and resolutive clauses duly applied to other prohibitions contained in such tailzie, except only such as by its terms may be specially excepted.

In approaching this question two considerations require to be kept steadily in view. The first is thus expressed by Lord President Inglis in

Rogerson v. *Rogerson*[1]:—"Under the previous law when an entail was invalid as regards one of the prohibitions the entail might be defeated by the heirs doing any act not validly prohibited. Thus if there were no valid prohibition against contracting debt the heir might hold the estate in fee-simple by incurring debt to a confidential person who, having attached it by adjudication, reconveyed it to him free from any fetters. And so where the defect was in the prohibition against sale. But in all cases it was necessary to hit the blot so to speak—that is to say, that the heir should avail himself of the particular defect which existed in the entail by doing the thing which was not effectually prohibited. That led to a great deal of uncertainty in titles, and it was thought very justly that this was an undesirable state of the law. Hence it was enacted by the statute of 1848 that where the heir could in any way get free from the fetters of the entail, he should be liberated from them altogether, and without any circuitous proceedings." The second is laid down by the same high authority in the case of the *Earl of Breadalbane* v. *Jamieson*,[2] in the following terms:—"Now, it seems to me that as between an heir of entail in possession and the next heir about to succeed him, there can be no obligation and no liability except that which arises out of the fetters of the entail. The heir in possession is free except in so far as fettered. The fetters are the sole protection of the heir who is next to succeed. If, therefore, the fetters cannot protect the heir next to succeed against that which his predecessor has done, it seems to me to follow of necessity that the heir next to succeed can have no ground of complaint and no claim of any kind in respect of that which has been done. It was said no doubt in argument that when a man pulls down the mansion-house, being the heir of entail in possession, he comes under an implied obligation to rebuild it, and that if that obligation is not fulfilled during his own lifetime, his representatives must fulfil it as coming in his place. Now I am humbly of opinion that as between an heir of entail in possession and the heir next to succeed there can be no implied obligation. A deed of entail is not to be interpreted in such a way as to extract from it any obligations by implication. It is *strictissimi juris*. If you cannot find the obligation expressed upon the face of the deed of entail it is worth nothing in entail law." It is unnecessary to amplify or expound the propositions in law which have been thus clearly enunciated in the two passages I have quoted. All that we need consider is their application to the deed now under consideration.

I understood it to be conceded, and at all events it appears to be plain enough, that if the pursuer had been given an unrestricted power of appointment he would be entitled to the declarator which he seeks. The power however is not unrestricted, but can only be exercised in favour of one of the members of his own family whether male or female; but, such as it is, it gives him the undoubted right to make a new destination, by which in his option the entail can be brought to an end, at all events in the person of the appointee, or, if he prefers, transmitted to the other members of his family in succession, without necessarily providing for the

[1] 10 Macph. 698, at p. 702.

[2] 4 R. 667, at p. 671.

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heirs of the body of any of the substitutes so called. In my opinion such a power of altering the succession, limited though it may be, is quite inconsistent with the notion of a strict entail. Lord M'Laren in his well-known work on Wills and Successions (par. 892), in dealing with this subject says: "It may be asserted as a general proposition that the only kind of destination capable of supporting an entail is one to a series of persons named with or without substitutions to heirs of a determinate class—that is to say, to persons standing in a known order of relationship different from the legal order of succession but constituting a recognisable group of heirs." I do not think that a destination to a series of persons named, to each of whom is given the power of choosing the heirs who shall next succeed him, even though such heirs are to be selected from the members of his own family, satisfies the definition of a proper tailzied destination. The heirs who would thus be called to the succession would be the heirs chosen, not by the entailer, but by each substitute heir who succeeded to the estate; and this would involve an alteration on the original order of succession.

The industry of counsel enabled them to refer us to two cases only in any way germane to the matter with which I am now dealing. The first is the old case of *Wedderburn*.[1] There the Court of Session held that it was a contravention of the deed of entail for the heir in possession, whose eldest son was an idiot, to alter the order of succession by settling the estate upon his second son and the subsequent heirs called to the succession. This decision was reversed on appeal to the House of Lords—the report being contained in 2 Pat. 231. There is no report of the opinions of the noble and learned Lords, but the ground of their decision may be gathered from the argument of the appellant which was that the exclusion of an idiot might be implied from the presumed intention of the entailer. If so, it was on no other footing than exists when an entailer provides that in the case of the substitute heirs being females and thus heirs-portioners at common law the entailed estate should pass to the eldest. The decision has never been regarded as settling any general question, and it is significant that it is omitted in the Scots Revised Reports of decisions in the House of Lords. I question whether it has ever been acted on, there being no infrequent cases of the eldest son, even when of insane mind, taking an entailed estate in Scotland just as he takes the title.

The other case which appears to have more bearing is that of *Martin* v. *Kelso*.[2] There a deed of strict entail contained a clause empowering the heir in possession "so often as the heirs apparent or presumptive are females to settle the estate upon a younger daughter in preference to an elder daughter or to pass by such daughters altogether and settle the estate upon the presumptive heir-male." It was held that this power to alter the succession could be exercised in favour not only of a younger daughter personally but of the heir whatsoever of her body. This case also reached the House of Lords where it was affirmed. It may be noted, however, that neither of the parties to the case did or could have maintained the invalidity of the deed of entail as both were claiming under it,

[1] M. 15,416.

[2] 15 D. 950, *affd.* 2 Macq. 556.

and the decision therefore involves a mere construction of the particular clauses contained in the deed then under consideration. The power of appointment was moreover a conditional power and was evidently intended to prevent the entail coming to an end by several persons succeeding jointly to the estate. It therefore does not afford any aid in determining the effect of a power of appointment conferred upon each successive heir in possession irrespective of whether he had a son; nor was there in that case a power given to the heir in possession to bring the entail to an end in the person of the appointee. The decision therefore leaves the general question absolutely open, and leaves us free to decide it on principle.

There is a further consideration which in my opinion goes to strengthen the view that the power of appointment here is in effect a power to alter the order of succession, and so invalidates the entail. It is this; that, assuming that we should find the deed of entail to be valid and refuse the declarator, the pursuer has it in his power to become the fee-simple proprietor of the estate by a circuitous method. It was held in *Martin* v. *Kelso*[1] that a deed *inter vivos* was not an improper form of executing the power. The present pursuer is therefore in the position of being able to negotiate with the members of his family the terms upon which the appointee he selects and to whom he can propel the fee should reconvey the estate to him in fee-simple. If the pursuer's children were all in majority this could easily be arranged in view of the pursuer's absolute right to appoint any one of them to take the estate in succession to himself; and it makes no difference in principle, nor can it affect the validity of the deed, that at present they are all minors and would require the consent of a curator to validate such a transaction. Even a curator who desired nothing but the interests of his ward might find it to that ward's advantage, for a pecuniary consideration of relatively small amount or a promise of succeeding to a larger share of his father's estate than he would otherwise be entitled to, to enter into such an arrangement. But all this appears to me to be irrelevant. The validity of a deed of entail does not depend on external facts but on its own terms; and I hold that a power of appointment, such as is conferred here, does in effect render nugatory the prohibition against altering the order of succession. I am therefore of opinion, differing from the Lord Ordinary, that the entail of Carriden is invalid on this ground.

I reach the same result on a consideration of another clause of this very remarkable deed by which power is conferred upon the heir in possession "by himself or herself alone, to sell and dispone the whole or any part or parts of the said lands, subjects, and others without the consent of any subsequent heir called under the destination before written and without the necessity of obtaining the authority of the Court." It is true that this power of sale is qualified by a direction that the price realised shall be reinvested in the purchase of land either in Scotland or England or Wales; which land if in Scotland shall be entailed by valid deed of strict entail, and if in England or Wales by a valid

[1] 15 D. 950, *affd.* 2 Macq. 556.

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settlement containing all such provisions as counsel shall advise on the same series of heirs and subject to the same or similar prohibitions as are contained in the deed of entail. But unless the effect of this and subsequent clauses be to prevent the heir in possession from giving a valid title to a purchaser it appears to me simply to impose a personal obligation. The only clause that might be construed as limiting the right of the heir in possession validly to dispone the estates to a third party is one to the effect that the purchaser shall have no concern with the application of the purchase price, "but shall be fully exonered and discharged by the receipts of the trustee or trustees in whose name the said price or prices and sum or sums to be borrowed are to be consigned or invested as aforesaid." I cannot read this last clause as if it were expressed negatively, namely, that the purchaser should not be exonered and discharged except by the receipt of the trustee. That may have been what was intended; but a deed of entail falls to be strictly construed, and the clause on which so much stress has been laid is merely an addendum to a clause that is a superfluity. No purchaser of land has ever any concern with the application of the purchase price. All that he is concerned with is that it should be paid to the seller from whom he acquires right. Even if it were otherwise it would be a simple matter for the pursuer to name a trustee (for the deed expressly empowers him and him alone to make the nomination), and such trustee could without any breach of trust grant a receipt to the purchaser which would give him an unquestionable title. I see nothing to prevent such a trustee thereafter resigning his office if a question should arise between him and the pursuer as to the binding character of the direction to consign in bank and subsequently re-invest; and the deed contains no machinery for the appointment of another trustee. But, even if it were otherwise, the right of the succeeding heirs of entail could in the option of the trustee be converted into a claim for breach of trust, which is something entirely foreign to the remedies by which the interests of such persons are protected under a strict deed of entail, as explained in the passage I have quoted from the Lord President's opinion in the *Earl of Breadalbane*.[1] The remedy certainly would not be one of interdict against him or against the pursuer; nor could there be a declarator of contravention of the entail directed against the pursuer. The truth is that the law which we are in the habit of applying to trusts has no place where one is dealing with the very special law applicable to entails. A prohibition to sell is not valid unless it is fenced with irritant and resolutive clauses. On the analogy of trust law a person who takes an estate subject to such a prohibition and contravenes it would be liable to a personal claim at the instance of those whose rights were thereby defeated; but no such personal claim is competent against an heir of entail, because he holds a fee of the land subject only to the fetters, and perhaps also because it cannot be known until his death who would have taken the estate in succession to him if the prohibition contained in the entail had not been contravened. For the same reason an entail of a moveable subject however strictly expressed gives

[1] 4 R., at p. 671.

no right to the succeeding heirs of entail as against the heir in possession who sells it and pockets the price. This was decided by Lord Shand in *Kinnear* v. *Kinnear*,[1] in a decision which has never been questioned. Lord Shand said,—"Having in view the nature of the property and the fact that a right of fee is given to the disponee and his successors it appears to me to follow that the right must be absolute, and that it is incompetent to limit or control the fee so as to prevent the fiar and succeeding heirs in all time from disposing of the property as they see fit . . . The two determining elements against the valid entail of moveables are the direct fee given and the nature of the subjects." The same considerations in my opinion apply where by the terms of the deed of entail the heir in possession is empowered to sell the lands and receive the price into his own hands either directly—as I hold he could do here—or indirectly through the medium of a trustee nominated by himself.

It remains to consider whether any of the decisions necessarily lead to a different result. Great reliance was placed on the case of *Baird*,[2] where power was given to the heirs under a deed of entail to excamb or sell such parts and portions as they should think fit on condition that the lands acquired by excambion or purchase should be entailed on the same heirs and in the same terms as those in lieu of which they were acquired. It was held that this power was not inconsistent with a strict entail as it could only be exercised upon complying with the conditions under which it was given. The entailer however in that case had provided that the limited power to sell or excamb should not be exercised until other lands had first been acquired and entailed to the full value of those which it was proposed to excamb or sell. The succeeding heirs of entail were therefore absolutely protected against any diminution of the value of the estate; for no purchaser could acquire a valid title to the lands sold unless the heir had complied with the condition upon which alone he was entitled to sell. The same observations apply to the power of sale given to the heir in possession in the case of *Hay's Executors*,[3] for it was a condition of the exercise of the power of sale that the consent of certain trustees should first be had and obtained and that the price should be paid to these trustees and not to the heir of entail. The opinion of Lord Low is only narrated; but it contains the following sentences which afford the key note to his decision:—"The prohibition . . . so far as the heirs themselves are concerned is absolute. They cannot at their own hand sell a single acre of land. They can only sell it when they have obtained the consent of the trustees—a consent which the trustees are not bound to give and may never give. There is therefore not that repugnancy between the prohibition and the power of sale for which the pursuers contend. There is room for both the prohibition and the power; and the prohibition will be effectual until the condition upon which alone the power can be exercised can be fulfilled." I see no ground for questioning either this decision or that in *Baird's Trustees*,[2] the latter of which is of course binding; but they do not appear to me to have any application to the powers conferred by the deed of entail here in question.

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[1] (1877) 4 R. 705, at p. 708. [2] 6 D. 643. [3] 3 S. L. T., p. 86.

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There is a further point which is peculiar to the present case, namely, that the heir in possession may sell the whole lands and invest the price in an English or Welsh estate. We are not familiar with the conditions on which heritable property can be settled in England or Wales on a series of heirs; but it is obvious that, to any lands outside of Scotland, the Entail Acts can have no application. It is in my judgment quite repugnant to a Scotch deed of entail that it may, at the pleasure of the heir in possession, be converted into a settlement of a landed estate in a foreign country; and it is not surprising that such a power seems never before to have been introduced into such a deed. Therefore on this separate ground also I am in favour of granting the declarator which the pursuer seeks.

Lord Guthrie.—I think the Lord Ordinary has come to a right conclusion in holding that the pursuer is not entitled to have the entail in question declared invalid, and that he is not entitled to declarator that he holds the estate contained in the disposition and deed of entail in fee-simple. The pursuer's case is that he can do something which will nullify one, or in another view two, of the three cardinal prohibitions indispensable to a valid Scots entail, without thereby incurring an irritancy. These two prohibitions are (first) the prohibition to alter the order of succession, and (second) the prohibition to alienate.

I. Is the pursuer in a position now to alter the order of succession contained in the deed of entail? It is said that he can do so if he, in terms, exercises a power conferred upon him by the entailer, that is to say, the power of appointment contained in the disposition and deed of entail. But to say that the exercise of a power conferred by the entailer is to alter the order of succession fixed by the entailer seems to me to be, on the face of it, a self-contradictory statement. The pursuer's position is more accurately put in the fourth article of the condescendence, where it is alleged "the destination under the said disposition and deed of entail is therefore not a proper and valid tailzied destination, no definite and fixed order of tailzied succession having been prescribed by the granters of the deed." But, whichever way it is put, I think with the Lord Ordinary that this case is *a fortiori* of the case of *Martin* v. *Kelso*.[1] I do not, any more than the Lord Ordinary, think it necessary to consider whether a power of appointment, not limited to the selection of one of a class one of whom would otherwise succeed, would not be inconsistent with a strict entail, in respect that such a power would be irreconcilable with the fundamental idea of a tailzied succession.

In addition, even if, contrary to the view above expressed, the true question is one of the pursuer's power to alter the order of succession, he is not, in any event, now in a position to do so, because the act, which would, it is said (erroneously as I think), amount to an alteration of the order of succession, can only take effect at his death. A method was indeed suggested under which, by a conceivable but improbable arrangement with the appointee, the pursuer might acquire the estate in fee-

[1] 15 D. 950, *aff.* 2 Macq. 556.

simple. But this could not be done by the pursuer at his own hand, nor could it be done in the ordinary course of business with the co-operation of another, as in the case of borrowing money. It was admitted that in no case has a possible contravention been held fatal to the validity of a deed of entail, except where the contravention could be carried through by the heir of entail at his own hand, or with only such outside assistance as could be obtained as matter of course.

II. It is said that the pursuer can alienate the estate without incurring forfeiture, first, because he may sell the estate and may then defeat the obligation in the deed to re-invest the proceeds in land to be entailed, and, second, because, even if he carries out formally the provisions as to re-investment in land, he may re-invest in land so as to be the fee-simple proprietor of the land so bought.

First, the competency of provisions in a deed of entail authorising an heir of entail to appoint trustees, who shall be entitled, at his request, to sell the entailed estate, and who shall be bound to re-invest the proceeds in land to be entailed, seems to follow from the reasoning, if not from the decision, in the case of *Baird*.[1] But in this case it is said that there is no effectual machinery to prevent the heir of entail avoiding the appointment of the trustees contemplated in the deed, and, with the assistance of a purchaser, obtaining the proceeds of a sale into his own hands, in which case he could not be compelled to invest the proceeds in land or to put the lands, if purchased, under the fetters of an entail. Apart from any other objections to this argument it is open to the answer already made, namely, that it cannot be done at the heir's own hand, or with such co-operation as he would be able in the ordinary course of business to obtain. But I agree with Lord Dundas in thinking that, if the suggested transaction were arranged between an heir and a purchaser, the heir would incur a forfeiture, and a substitute would be entitled, by a declarator of contravention, if not to nullify the sale to the purchaser, at least, by himself or through trustees, to obtain from the purchaser or the heir the proceeds of the sale for investment in land to be entailed.

Second, it is said that, even if the heir carries out the provisions as to re-investment in land, he may re-invest in land so that he shall be the fee-simple proprietor of the land so bought. This question does not, like those above dealt with, involve any operation which the heir cannot fully perform at his own hand and in terms of the deed. It is, of course, common ground that land in England or Wales cannot be put under the fetters of a Scots entail in terms of the Scots Act of 1685; it is pointed out that the deed itself assumes that land in England or Wales cannot be effectually subjected to the identical prohibitions fenced with the identical irritancies competent under the law of Scotland; and it is asserted at the bar by the pursuer that, however the deed contemplated in the disposition and deed of entail may be conceived, the disponee, or at all events his heirs born after his death, will be fee-simple proprietors. The record contains no averment as to what, if any, fetters and irritancies are competent under the English law of entail, and both parties declined,

[1] 6 D. 643, *aff.* 6 Bell's App. 7.

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when the point was brought before them by the Court, to add averments on this matter. In these circumstances, I cannot assume that land purchased in England cannot be effectually entailed on the pursuer and the series of heirs mentioned in the deed of entail in question, or at all events cannot be so settled on the pursuer as to prevent him from being the fee-simple proprietor of that land. If so, it seems to me that, whatever may be his rights in the event of his purchasing land in England and settling it in terms of the clause in the deed of 1891, it is impossible under this record to give him the declarator he seeks in this action.

LORD JUSTICE-CLERK.—There can be no doubt that this case presents difficulty, which is emphasised by the fact that there is a difference of opinion on the bench. My view is in accordance with that of the majority of your Lordships, concurring as I have come to do with the views expressed by the Lord Ordinary; and the very full opinion of Lord Dundas, which I have studied, also meets with my entire concurrence. I am therefore in favour of adhering to the Lord Ordinary's judgment.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—T. J. G. HUNTER, W.S.—Agents.

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Scottish Insurance Commissioners v. M'Naughton.

THE SCOTTISH INSURANCE COMMISSIONERS, Petitioners.—*Sol-Gen. Morison.—T. G. Robertson.*
JOHN LOVE M'NAUGHTON (Secretary of the Scottish Fisheries Association, &c.), Respondent.—*Horne, K.C.—Hamilton—Lippe.*
THE PORT OF HULL TRAWL FISHERMEN'S PROTECTIVE SOCIETY, Respondents.—*J. Smith Clark.*

Insurance—National Insurance—Employment—Contract of service—Share Fishermen—Payment by share of profits—National Insurance Act, 1911 (1 *and* 2 *Geo. V. cap.* 55), *sec.* 1 (1) *and* (2), *First Schedule, Part I.* (*a*) *and* (*b*) *and Part II.* (*k*).

Held that (*a*) share fishermen remunerated by shares in the profits of fishing vessels, and under an obligation, sanctioned by custom, to share any losses incurred, but having no proprietary interest in the vessels, nets, or gear, and (*b*) net share fishermen, similary situated except that they received in addition to such shares of profits a further share thereof in respect of their ownership of the nets used on board the vessels, were not employed persons within the meaning of the National Insurance Act, 1911.

Held, further (in terms of a minute of admissions), that trawl share fishermen, who were paid wages or shares, as the case might be, even when the voyage resulted in a loss, were employed persons within the meaning of the Act.

1ST DIVISION. ON 2nd July 1913 The Scottish Insurance Commissioners, established under the National Insurance Act, 1911, presented a petition, in accordance with the provisions of section 66 thereof, for the purpose of submitting certain questions for decision by the Court.

The petition, after quoting the sections of the Act affecting the

questions,* proceeded as follows:—"Questions have arisen as to whether the classes of employment of (*a*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing-vessel registered in Scotland, and who have no proprietary or other interest in such vessel or in the nets or other gear thereof (hereinafter referred to as 'ordinary share fishermen'), and (*b*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing-vessel registered in Scotland, and who receive a further share of said profits in respect of their ownership or part ownership of the nets of such vessel, but have no proprietary or other interest in the vessel itself (hereinafter referred to as 'net share fishermen'), are classes of employment within the meaning of Part I. of the said Act. The petitioners think fit instead of themselves deciding the said questions to submit the same for decision to your Lordships in terms of section 66 (1), proviso (iii.) of the said Act."

Answers were lodged for (1) John Love M'Naughton, secretary of the Moray Firth Fisheries Association and of the Scottish Fisheries Association; and (2) the Port of Hull Trawl Fishermen's Protective Society.

The answers for the latter respondents, which were the subject of a joint minute of admissions lodged for them and the petitioners, set forth, *inter alia*, as follows:—"These respondents, as representing from 70 to 80 per cent of the trawl fishermen of Scotland, respectfully submit that the prayer of the petition, in so far as it relates to trawl fishermen, should be answered in the affirmative, in respect that (1) their employment is employment within the

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* The National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), enacts:—

Sec. 1. "(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act shall be . . . insured in manner provided in this part of this Act. . . . (2) The persons employed within the meaning of this part of this Act . . . shall include all persons . . . who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that schedule."

Part I. (*a*) and (*b*) of the said First Schedule is in the following terms:—

"(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person . . .

"(*b*) Employment under such a contract as aforesaid as master or a member of the crew of any ship registered in the United Kingdom . . ."

Part II. of the said First Schedule contains *inter alia* the following provisions:—

"*Exceptions.*

. . . . . .

"(*k*) Employment as a member of the crew of a fishing vessel where the members of such crew are remunerated by shares in the profits or the gross earnings of the working of such vessel in accordance with any custom or practice prevailing at any port if a special order is made for the purpose by the Insurance Commissioners, and the particular custom or practice prevailing at the port is one to which the order applies."

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meaning of Part I. of the said Act; and in any event (2) the petitioners have never made a special order in terms of Part II. (k) of the First Schedule of the said Act for the purpose of excepting and excluding trawl fishermen from participation in the benefits of the said Act."

The joint minute contained, *inter alia*, the following statements:—

"That share trawl fishermen are remunerated in accordance with the terms of the award by the Aberdeen Conciliation Board set forth in the said answers.

"That the only fishermen working on trawlers who are remunerated wholly by shares are the skippers and mates (otherwise first fishermen) of the trawlers; that they receive shares as set forth in the said award of the net balance of the value of the fish after deduction of the items therein mentioned; and that it sometimes happens that a loss occurs to the owner upon a particular voyage or fishing (the net balance of the proceeds of the fish being insufficient to pay the shares of the skipper and mate and the fixed wages of the rest of the crew), and yet not only are wages paid to the whole members of the crew other than the skipper and mate, but also the foresaid shares are paid to the skipper and mate.

"That since the coming into operation of the National Insurance Act, 1911, the owners of trawl fishing boats registered in Scotland, as employers and the share trawl fishermen engaged thereon as employed contributors, have almost without exception regularly paid, and continue to pay, contributions for insurance under the said Act."

The averments of the petitioners and of the respondent John Love M'Naughton were the subject of a proof led before Lord Mackenzie on 3rd March 1914.

The facts established at the proof are set forth in the following passage from his Lordship's opinion:—

"According to the system under which steam drifters, steam liners, and sailing boats are worked it is unusual that there should be any agreement in writing, and though we were referred to certain forms of agreement the state of the evidence is such that, in my opinion, we are not called upon to deal with these as requiring any special treatment. It is usual for one or more of the owners to be on board, but that is not necessarily the case. The "land owners," *i.e.*, those who own shares in the boat but do not go to sea, take no part in making up the crew of the boat. The skipper, who is appointed by the owners, is himself, in general, one of the joint owners. When so appointed he attends to the management of the boat while in port, and to the making up of the crew for the fishing to which the boat is going at the time. The bulk of the evidence shows that it is the practice for the skipper to approach his crew, rather than for the crew to select their skipper. The skipper when so appointed by the owners has of course for the purpose of discipline and navigation complete control including a power of dismissal. When a member of the crew is dismissed during a fishing the settlement to date is matter of arrangement. The owners of the boat may provide the nets or they may be provided by members of the crew, in which case the risk of loss of any net is with its owner. On liners the crew provide their lines. Fishermen change from one category to another, being on one voy-

age share fishermen or half dealsmen, as they are called, on another voyage net men. I attach no importance to the evidence to the effect that occasionally discussions take place between the skipper and the crew as to where the boat should proceed to for the purpose of fishing, nor to the evidence to the effect that a man who may turn ill nominates another in his place. Each of these points is equally consistent with partnership or with service. The fact that arles are no longer paid, as used to be the case when fixed wages were paid to the hired man, does indicate a certain change in the system. Formerly, ordinary share fishermen were remunerated by fixed wages, with sometimes a poundage.

"The contribution of the owners of the boat is the use of the boat. The net owners and the owners of the lines contribute respectively their nets and their lines, and the crew, *i.e.*, skipper, net owners or line owners as the case may be, and the hired men, contribute their labour. The catch is realised by a fish salesman. Before a division is made the general practice (which, however, varies according to the custom of particular ports) is that all the expenses, including coal, oil, commission, harbour and other dues, food, &c., are deducted from the gross takings, and the balance is divided into three equal parts, one for the boat, one for the nets, and one for the crew. No charge is made for interest on capital. The practice varies in regard to charging the insurance of the boat; in some cases it is put against the general expenses, in others against the boat. In the case of motor boats a share is given to the motor owner. The engineer, stoker, and cook are paid by fixed wages, though sometimes the cook may have a share. It is the invariable practice that the crew's share is divided equally, no difference being made between the skipper, the net men (or the line men), and the hired men. The fishing crew usually consists of six. This method of dealing with the proceeds appears to me to establish that what is shared is not gross returns but profits. The weight of the evidence is also to the effect that the custom is universal that if there is a deficiency at the end of a voyage every member of the crew whether net share man or ordinary share man, has to pay his share of the loss. There is no distinction between ordinary share fishermen and net share fishermen in this respect. This custom goes further than an honourable understanding; it indicates that there is a legal liability."

The case was heard before the First Division (without Lord Johnston) on 2nd, 3rd, and 4th June 1914.

Argued for the petitioners;—Where fishermen worked on vessels of which they were not the owners it was to be presumed that they were not joint adventurers, but were employed by the owners[1]; and that presumption was confirmed where, as here, the skippers were engaged by the owners from trip to trip, and the crews were engaged by the skippers, who had complete control of the vessel and the crew, including power of dismissal. That presumption was not displaced by the mere fact that the fishermen were remunerated by a share of the profits. Fishermen so remunerated were clearly regarded by the Legislature as employed persons, otherwise no provision would have been necessary in the Workmen's Compensation

[1] Hibbs v. Ross, (1866) L. R., 1 Q. B. 534, Blackburn, J., at p. 542.

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Act, 1906, to exclude them from the benefits of that Act[1]; nor would the provisions of the Merchant Shipping Act, 1894, applicable to a contract of service have been required.[2] Remuneration by a share of profits—which was an obvious device to insure hearty work and care of gear—did not of itself establish that the relationship was partnership or joint adventure and not service. That depended on the intention of the parties and the whole circumstances of the case.[3] The facts established here did not support the view that this was partnership or joint adventure. The important element of joint property was absent. Even with regard to the "net men" it was not a case of joint property. These men were in the same position as workmen taking their tools to work. If tools were broken or lost that was the workman's loss, and if a net was lost the loss fell upon its individual owner; just as the premiums of insurance on the vessels were a charge upon the owners alone. The same considerations applied *a fortiori* to the lines. Nor was joint adventure established by the fact that, if there was a loss upon a voyage, the fishermen in certain cases made good their share of the loss out of the profits of subsequent voyages. That liability (if it could be so called) was founded upon a point of honour only, and not upon any legally enforceable obligation. In any event, it merely covered working expenses, as for coal, oil, &c., incurred in going to the fishing ground. Loss, however, was exceptional, and instances of payment of losses by fishermen were so rare that they ought to be left out of consideration in determining whether the fishermen were employed persons. The case of *M'Gee* v. *Anderson*[4] was special, and did not affect the present question.

Counsel for the respondents the Port of Hull Trawl Fishermen's Protective Society moved the Court to find, in view of the facts disclosed in the joint minute, that share trawl fishermen were employed persons within the meaning of the National Insurance Act.

Argued for the respondent John Love M'Naughton;—Share fishermen could not be regarded as employed on a contract of service, because they did not work for an ascertained hire payable by an ascertained employer.[5] The existence of such a contract could not be reconciled with such facts as the liability to share losses; the right to nominate a substitute in case of sickness; and the circumstance that net men risked their nets, just as the owners or part owners of the vessel (who at sea had to obey the skippers) risked their vessel. The whole conditions under which vessels such as those in question were worked disclosed a joint adventure, in

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[1] 6 Edw. VII. cap. 58, sec. 7 (2); Smith v. Horloch, (1913) 6 Butterworth's W. C. C. 638, Cozens-Hardy, M.R., at p. 642.

[2] 57 and 58 Vict. cap. 60, secs. 388 and 389.

[3] Eaglesham & Co. v. Grant, (1875) 2 R. 960, Lord Justice-Clerk Moncreiff, at p. 967; Bell's Com., (7th ed.) ii. 499; Clark v. G. R. & W. Jamieson, 1909 S. C. 132, Lord M'Laren, at pp. 137-8; Wilkinson v. Fraser, (1802) 4 Esp. 182; Mair v. Glennie, (1815) 4 M. & S. 240, Lord Ellenborough, C.J., at p. 243; Perrot v. Bryant, (1836) 2 Y. & C. (Ex.) 61; Lindley on Partnership, (8th ed.) 26 and 49; Walker v. Hirsch, (1884) 27 Ch. D. 460; Sutton & Co. v. Gray, [1894] 1 Q. B. 285.

[4] (1895) 22 R. 274.

[5] Ersk. III. iii. 14; Bell's Prin., sec. 146; Fraser, Master and Servant, (2nd ed.) 3.

which owners, skippers, and fishermen were jointly engaged, and the fish salesman was an agent for all concerned. Those who worked under such conditions as were disclosed here could not be regarded as workmen employed under a contract of service.[1] Joint ownership of stock was not an essential feature of joint adventure; it sufficed if several persons laboured together for gain to be divided between them.[2] The case of *Clark* v. *G. R. & W. Jamieson*[3] was distinguishable, because in that case remuneration was by a share of gross earnings, not of profits. The requirements of the National Insurance Act itself precluded share fishermen from being regarded as employed persons, because the provisions of the Act as to stamping were inapplicable to the case of a voyage upon which there was a loss.

At advising on 16th June 1914,—

LORD MACKENZIE.—The duty of the Court in these proceedings is to decide whether any of the fishermen whose cases are under consideration are employed under any contract of service within the meaning of Part I. of the First Schedule to the National Insurance Act, 1911. Put shortly, that Act provides that all persons over a certain age, under any contract of service, are to be insured, but there is an exception in Part II. of the First Schedule, subsection (*k*), in these terms:—"Employment as a member of the crew of a fishing vessel where the members of such crew are remunerated by shares in the profits or the gross earnings of the working of such vessel in accordance with any custom or practice prevailing at any port if a special order is made for the purpose by the Insurance Commissioners, and the particular custom or practice prevailing at the port is one to which the order applies." No such order has been made by the Insurance Commissioners. They have availed themselves of the power conferred by section 66 (1) of the Act, which provides that they may, if they think fit, instead of themselves deciding whether any class of employment is or will be employment within the meaning of the Act, submit the question for decision to the Court of Session. They have done so by this petition, which puts the question for the determination of the Court as follows:—"Whether the classes of employment of (*a*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who have no proprietary or other interest in such vessel or in the nets or other gear thereof, and (*b*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who receive a further share of said profits in respect of their ownership or part ownership of the nets of such vessel, but have no proprietary or other interest in the vessel itself, or either of the said classes of employment, are employments within the

[1] Lindley on Partnership, (8th ed.) 48; M'Gee v. Anderson, 22 R. 274, Lord Trayner, at p. 277; Workmen's Compensation Act, 1906, sec. 13; Boon v. Quance, (1909) 102 L. T. 443; Hughes v. Postlethwaite, (1910) 4 Butterworth's W. C. C. 105; Gill v. Aberdeen Steam Trawling and Fishing Co., Limited, 1908 S. C. 328.

[2] Lindley on Partnership, (8th ed.) 52.

[3] 1909 S. C. 132.

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meaning of Part I. of the National Insurance Act, 1911." I should point out that there is in the prayer no distinction drawn between profits and gross earnings. It is assumed that what is divided is profit, a point which requires to be considered and decided.

A large body of evidence has been led in the case with regard to the nature and conditions of the contracts under which the different classes of boats are worked, including steam trawlers, steam drifters, steam liners, and sailing boats. As regards the position of part owners of all classes of boats though members of the crew, no question arises. It is admitted that they are outside the Act. Steam trawlers are usually owned by companies. There is no dispute as to the position of share trawl fishermen, and this is dealt with in the joint minute of admissions lodged for the petitioners and for the respondents the Port of Hull Trawl Fishermen's Protective Society, and, in accordance with the admissions of these parties, there will be a finding that share trawl fishermen are employed persons within the meaning of the Act. Since the coming into operation of the Act, the owners of the boats as employers, and the trawl fishermen as employed contributors, have, almost without exception, regularly paid and continue to pay their contributions for insurance under the Act. It is only necessary to point out that the joint minute states that, if a particular voyage results in loss, wages are yet paid to the whole members of the crew, other than the skipper and mate, and shares of the net balance of the value of the fish, after certain deductions, to the skipper and mate.

[His Lordship then set forth the facts established at the proof with regard to steam drifters, steam liners, and sailing boats, in the passage quoted *supra*, pp. 828-9, and proceeded]—All this appears to me to differentiate the case from one of a contract of service and to place it in the category of joint adventure. No doubt instances of deficit at the end of a voyage are not common. They appear to arise mainly in the case of the winter herring fishing. When a loss is incurred the amount may be paid at once, or what is more common in practice the fisherman who is liable suffers a deduction from what is earned by him on a succeeding voyage. This is so in the case of liners as well as drifters. Instances are given in the case where liability for such loss was enforced by action in the case of the crews of drifters. An attempt was made on behalf of the petitioners to show that in each case the amount of the loss was less than the amount of the food bill, or in any event not more than the amount of the food bill plus the expense of the transport of the fishermen to and from the fishing ground. In my opinion this contention of the petitioners is not well founded. It is established that the liability of all the crew is for a share of the general loss. Even if it only resulted in the individual fisherman having to bear the cost of his own provisions, and his share of the running expenses, this would none the less be a contribution on his part to the stock embarked in the joint adventure. He gives the use of this along with his labour, just in the same way as the owner gives the use of his share of the boat, as the net shareman gives the use of his nets, and as the owner of the lines gives the use of his lines. I am unable to regard either nets

or lines as mere tools; they are stock, the use of which is given to the joint concern. I do not consider it necessary to go into the details of the decrees which have been obtained against crews for their shares of loss. The terms of these go far to corroborate what one of the witnesses says—that he has got the whole cost in many cases from part of the crew when others had not paid anything to him. Nor do I think it necessary to go into the details of the accounts which have been produced relating to the "Marys," "The Silver Thyme," "Cinceria," and "Lufra," of which the unprinted account relating to the "Lufra" is probably the most striking. I may incidentally call attention to the fact how inconsistent the position of the crew of the "Lufra" is with the idea of the provisions of the Insurance Act. The "Lufra" made a loss on the winter fishing, December 1911–January 1912. This loss was carried to debit of the crew and was in no case paid up before October 1912, and in one case not until December 1912. So far from being in receipt of wages during the intervening months the earnings of the crew were represented by a minus quantity. Yet if they were to be held to be insured persons under the Act they ought during these months to be paying contributions. Their case is the same as that of an agricultural labourer asked on account of the failure of the crop to forego his wages, and also to contribute to the loss thereby occasioned to his employer; or that of a miner asked to contribute to the oncost charges of the pit, because coal was not selling at a profit. The liability for loss is to my mind the determining factor in the case. These fishermen who are liable for a share of loss are not under a contract of service. An agreement to share profits and losses, as is pointed out in Lindley on Partnership, p. 48, in the sense of making good the losses if any are sustained may be said to be the type of a partnership contract. As already indicated it is profits and not gross returns which are shared by these fishermen. The case is different in this respect from that of *Clark* v. *Jamieson*,[1] where Lord M'Laren emphasised the distinction drawn in the Partnership Act, 1890, between profits and gross earnings. As was pointed out what was divided in that case was not a share of the profits, for that would have implied deductions for expenses of management, repairs, stores, and perhaps bad debts, but was a share of the gross earnings. A share of the gross returns is under the statute not even *prima facie* evidence of the existence of a partnership. No doubt it does not follow that each of several persons who share profits and losses has all the ordinary rights and is under all the ordinary liabilities of a partner in a question with his copartners. This is made clear in the case of *Walker* v. *Hirsch*.[2] In the present case the liability of the joint adventurers for, *e.g.*, furnishings, will depend on what the article furnished is, and on whose credit it was supplied. Members of the crew as such will not be liable for barking the nets—the nets being the property of the net owners. Nor again would the crew be liable for expenses in connection with the maintenance or repair of the boat, incurred on the orders of the boat owners. These consequences which follow from the separate ownerships of the stock do not the less make the adventure a joint one.

[1] 1909 S. C. 132.

[2] 27 Ch. D. 460.

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Nor does the fact that the crew as such, and the net men, have no share in the management of the boat, or the financial arrangements connected therewith, place them in the position of mere servants. It is readily intelligible that the owners will not entrust the management of a valuable vessel—in the case of steam-drifters running from £2500 to £3500—to anyone in whom they have not absolute confidence. Upon the whole matter, I am of opinion that the petitioners have failed to make good their contention on the general question.

In consequence of the way the prayer of the petition is framed I think it would be better that our determination should take the shape of findings. I therefore propose that we should find (1) that the classes of fishermen, in regard to whom evidence has been led, are, with the exception of share trawl fishermen, not employed persons within the meaning of Part I. of the National Insurance Act, 1911; and (2) in terms of the joint minute of admissions for the Scottish Insurance Commissioners and for the Port of Hull Trawl Fishermen's Protective Society, No. 13 of process, that share trawl fishermen are employed persons within the meaning of Part I. of the said Act.

LORD SKERRINGTON concurred.

LORD PRESIDENT.—I agree in the opinion which Lord Mackenzie has delivered. The evidence has satisfied me (1) that there is a right on the part of all the members of the crew to participate in the profits in the proper sense of the term at the close of a fishing venture; and (2) that there is an obligation sanctioned by invariable custom—although only by custom not an honourable obligation merely—to bear losses which are incurred in the course of the venture. These considerations appear to me—as they appear to your Lordships—to be decisive in favour of the view that the fishermen with whom we are concerned here are joint adventurers and not employed persons. We shall, therefore, pronounce findings as Lord Mackenzie has proposed.

THE COURT pronounced an interlocutor in the following terms:—"Find and declare (1) that the classes of fishermen in regard to whom evidence has been led are (with the exception of share trawl fishermen) not employed persons within the meaning of Part I. of the National Insurance Act, 1911, and (2) in terms of the joint minute of admissions for the Scottish Insurance Commissioners and for the Port of Hull Trawl Fishermen's Protective Society, No. 13 of process, that share trawl fishermen are employed persons within the meaning of Part I. of the said Act."

JAMES WATT, W.S.—GARDEN & STEEL, S.S.C.—HENDERSON & MACKENZIE S.S.C.—Agents.

No. 90.

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THE LORD PROVOST, MAGISTRATES, AND COUNCILLORS OF THE CITY OF GLASGOW, Pursuers (Respondents).—*Cooper, K.C.—M. P. Fraser.*
THE GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, Defenders (Appellants).—*Constable, K.C.—J. G. Jameson.*

Glasgow Corporation v. General Accident Fire and Life Assurance Corporation, Limited.

Process—Appeal—Competency—Final judgment—Process of competition—Sheriff Courts (Scotland) Act, 1907 (7 *Edw. VII. cap.* 51), *secs.* 3 (*h*), *and* 28 (1), *as amended by Sheriff Courts (Scotland) Act*, 1913 (2 *and* 3 *Geo. V. cap.* 28)—*Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

In determining the question whether an interlocutor pronounced in the Sheriff Court is a "final judgment," and as such appealable to the Court of Session under section 28 of the Sheriff Courts (Scotland) Act, 1907, as amended by the Sheriff Courts (Scotland) Act, 1913, regard must be had not only to section 3 (*h*) of the Act of 1907, which contains a definition of final judgment, but also to the terms of section 53 of the Court of Session Act, 1868, and accordingly that the words of the latter section "or of the competition between the parties in a process of competition" must be read into the definition contained in the Act of 1907.

In an action in the Sheriff Court, which raised the question of the rights of the parties to the action in a subject belonging to a principal debtor and arrested in the hands of a third party, the Sheriff, on appeal, pronounced an interlocutor finding that the security on which one of the claimants based his claim was invalid, repelling his pleas, finding no expenses due to or by him, and remitting the cause back to the Sheriff-substitute. The interlocutor did not dispose of the conclusions of the action.

Held that the unsuccessful claimant was entitled to appeal to the Court of Session, seeing that the interlocutor, so far as it concerned him, was a final judgment, in respect that it finally disposed of his claim in the competition between the parties.

EXTRA DIVISION. Sheriff of Perth.

THE LORD PROVOST, MAGISTRATES, AND COUNCILLORS OF THE CITY OF GLASGOW brought an action in the Sheriff Court at Perth against (1) Masterson & Williamson, Perth, described as arrestees, and (2) James MacLeish, Perth, described as principal debtor, in which they craved the Court to ordain the defenders Masterson & Williamson to deliver to them certain articles belonging to MacLeish which they (the pursuers) had arrested, on 17th April 1912, in the hands of Masterson & Williamson, in execution of a decree obtained by them in the Sheriff Court at Perth on 26th March 1912 against MacLeish for £100; or otherwise to grant warrant for the sale of the articles and the payment of the proceeds to the pursuers in so far as required to satisfy the decree.

Defences were lodged by Masterson & Williamson, who pleaded, *inter alia*, that they were only bound to make the articles furthcoming on payment of their charges and their expenses in the action.

The General Accident Fire and Life Assurance Corporation, Limited, Perth, compeared by minute, and were sisted as defenders to the action. They pleaded that the articles in question had been delivered to them on 16th December 1911, *i.e.*, prior to the laying on of the arrestments, in security of a sum of £150 advanced by them to MacLeish, and that the arrestments accordingly attached nothing.

The Sheriff-substitute (Sym) having refused to grant the warrant craved, the pursuers appealed to the Sheriff.

On 20th June 1913 the Sheriff (Johnston) pronounced the fol-

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lowing interlocutor:—"The Sheriff sustains the appeal: Recalls the Sheriff-substitute's interlocutor of 17th December 1912: Finds that the articles referred to in the initial writ were delivered in security of prior debt to the minuters, the General Accident Corporation, Limited, within sixty days of the notour bankruptcy of the debtor, and that the security is invalid: Repels the pleas in law for the said General Accident Corporation, Limited: Finds no expenses due to or by the said Corporation, and remits the cause to the Sheriff-substitute."

The General Accident Fire and Life Assurance Corporation, Limited, appealed to the Court of Session.

The case was heard before the Extra Division (Lord Dundas, Lord Mackenzie, and Lord Cullen) on 16th June 1914, when the pursuers objected to the competency of the appeal,* and argued;—The appeal was incompetent, the Sheriff's interlocutor of 20th June 1913 being one which was not open to appeal. The question depended upon sections 3 and 28 of the Sheriff Courts (Scotland) Act, 1907, as amended by the Sheriff Courts (Scotland) Act, 1913. Leave to appeal had not been granted by the Sheriff, and as admittedly the interlocutor did not fall under the classes of interlocutors described in (*a*), (*b*), or (*c*) of section 28, an appeal without such leave was only competent if the interlocutor was a "final judgment." A "final judgment" was defined in section 3 (*h*) as one which disposed of the subject-matter of the cause. The interlocutor in question here did not do so, but merely had the incidental effect of repelling the pleas of one of the claimants. It made no order as to what was to be done with the articles which were the subject of dispute. The appellants founded on section 53 of the Court of Session Act, 1868, and said that this interlocutor was one disposing "of the competition between the parties in a process of competition." Even if it were legitimate to read section 53 of the Act of 1868 into the Act of 1907 as amended by the Act of 1913 (which was doubtful seeing that in these later Acts no reference was made to the Act of 1868) still the competition between the parties had not been disposed of and there was no formal judgment pronounced in the cause.[1] The competition had at the most only been disposed of *quoad* the appellants. If the appellants were desirous of appealing they ought to have obtained the leave of the Sheriff, in which case they would have fallen under (*d*) of section 28. The undernoted cases were also referred to.[2]

Argued for the appellants the General Accident Fire and Life Assurance Corporation, Limited;—The appeal was competent in respect that the Sheriff's interlocutor was a "final judgment" as defined by section 3 (*h*) of the Act of 1907 read in the light of section 53 of the Act of 1868. The latter section must be taken into consideration as its language was clear and explicit and had not been affected or repealed by subsequent legislation. The action here was a "process of competition," and the Sheriff's interlocutor disposed of the whole subject-matter and merits of the competition so

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* The sections of the Acts under consideration are quoted in the opinion of Lord Dundas.

[1] Governors of Strichen Endowments v. Diverall, (1891) 19 R. 79.

[2] Shirra v. Robertson, (1873) 11 Macph. 660; Hillhouse v. Walker, (1891) 19 R. 47.

far as the appellants were concerned, and put them out of Court.[1] They had no further interest in the proceedings in the Sheriff Court as their whole defences had been repelled.[2]

At advising on 17th June 1914,—

LORD DUNDAS.—An objection is taken to the competency of this appeal. The action was brought by the Lord Provost and Magistrates of Glasgow against (1) the firm of Masterson & Williamson, as arrestees, and (2) a certain James MacLeish, as principal debtor. The appellants, the General Accident Fire and Life Assurance Corporation, Limited, compeared by minute, and were sisted as defenders. The real competition, or at all events the serious competition in the case, is between them and the pursuers. In the interlocutor appealed against, the Sheriff "sustains the appeal; recalls the Sheriff-substitute's interlocutor of 17th December 1912; finds that the articles referred to in the initial writ were delivered in security of prior debt to the minuters, the General Accident Corporation, Limited, within sixty days of the notour bankruptcy of the debtor, and that the security is invalid; repels the pleas in law for the said General Accident Corporation, Limited; finds no expenses due to or by the said Corporation, and remits the cause to the Sheriff-substitute."

The question is, whether that interlocutor is open to appeal. That depends upon various statutory provisions, the first being section 28 of the Sheriff Courts (Scotland) Act, 1907, as it now stands amended by the recent Sheriff Courts (Scotland) Act, 1913. There one finds that:—"Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment either of a Sheriff or of a Sheriff-substitute if the interlocutor appealed against is a final judgment, or is an interlocutor" of one or other of four classes which are specified, and which admittedly do not cover the interlocutor with which we are dealing. The question, therefore, so far is, Does this interlocutor fall within the words "final judgment"? "Final judgment" is defined in section 3, subsection (*h*), of the Act of 1907, which is not altered by the Act of 1913:—"'Final judgment' means an interlocutor which, by itself, or taken along with previous interlocutors, disposes of the subject-matter of the cause, notwithstanding that judgment may not have been pronounced on every question raised and that expenses found due may not have been modified, taxed, or decerned for." We must further have regard to section 53 of the Court of Session Act of 1868, which has not been in any way touched or repealed by recent legislation, and which, although in terms applicable to Court of Session procedure, is by the concluding words * made

[1] Duke of Roxburghe, (1875) 2 R. 715; Governors of Strichen Endowments v. Diverall, 19 R. 79, Lord M'Laren, at p. 80.

[2] Malcolm v. M'Intyre, (1877) 5 R. 22; M'Ewan v. Sharp, (1899) 1 F. 393; Turner's Trustees v. Steel, (1900) 2 F. 363.

* The words referred to are as follows:—"And for the purpose of determining the competency of appeals to the Court of Session, this provision shall be applicable to the causes in the sheriff and other inferior courts, the name of the sheriff or other inferior judge or court being read instead of the words 'the Lord Ordinary,' and the name of the sheriff court or other inferior court being read instead of the words 'Outer House.'"

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applicable also to appeals from the inferior Courts. Section 53 says:—"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause"; and then it goes on to deal with the matter of expenses.

Now, these being the relevant sections, the question is whether the interlocutor before us is an appealable interlocutor? I think it is. It is quite true that the learned Sheriff does not pronounce an operative decree in terms of either of the alternative craves of the petition. But his interlocutor does deal with the validity or invalidity of the appellants' security; it holds it to be invalid; and it repels all their pleas. Further, the interlocutor deals with the matter of expenses as between the appellants and the pursuers. They have, so far as I see, no further interest or place in the litigation. It is true that there is a remit of the case back to the Sheriff-substitute; but in spite of that, for all I know, there may be no further procedure in the case. At all events, the appellants are out of the case in the Court below; and it seems to me that if they cannot appeal now they will never be able to do so. The competition in which they are concerned has been, in my judgment, finally disposed of in the Court below. I am for repelling the objection, and proceeding to hear the case on the merits.

Lord Mackenzie.—I am of the same opinion. The ground upon which I consider that the appeal is competent is that there was a proper competition in which the appellants were one of the parties, and that by the interlocutor under appeal the whole of their pleas and contentions are finally disposed of. No subsequent interlocutor can affect their rights in any way; they are finally put out of the case. Now, unless we are to consider the term "final judgment" in the Sheriff Courts Act in a narrower sense than when one is dealing with an interlocutor of the Court of Session, then it is a final judgment, because it finally disposes of the claim of one of the parties in the competition. I think we are entitled to have regard to the terms of section 53 of the Court of Session Act of 1868, in order to enable us to put a proper construction upon the term "final judgment" in section 3, subsection (*h*), of the Sheriff Courts Act.

Lord Cullen.—I entirely concur.

The Court repelled the objection to the competency of the appeal.

Campbell & Smith, S.S.C.—Bonar, Hunter, & Johnstone, W.S.—Agents.

No. 91.

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M'Gown v. Henderson.

ANDREW M'GOWN AND ANOTHER, Pursuers (Reclaimers).—*Constable, K.C.—T. G. Robertson.*
JOHN RALSTON HENDERSON, Defender (Respondent).—*Moncrieff, K.C.—D. P. Fleming.*

Partnership—Rights and liabilities of members—Dissolution—Expired contract of copartnery continued as partnership-at-will—Application of pre-emption clause in original contract to partnership-at-will—Partnership Act, 1890 (53 and 54 Vict. cap. 39), sec. 27 (1).

A contract of copartnery in a wine and spirit business between three parties, entered into for five years, contained a clause providing that "in the event of the copartnery not being renewed at the expiry thereof the licence shall then be valued by a neutral party mutually appointed, and the first party as holder of the licence shall in his option be entitled to pay out the second and third parties the amount due to them respectively," or that otherwise the licence should be sold in open market, and the proceeds divided among the parties. After the expiry of the term created by the contract the partnership was carried on for several years as a partnership-at-will until dissolved by a notice from the first party.

Held that the clause conferring the right of pre-emption was carried forward into the partnership-at-will, and that at its termination the first party was entitled to exercise the right.

EXTRA DIVISION. Lord Hunter.

ON 23rd December 1913 Andrew M'Gown and Dugald Cameron brought an action against John Ralston Henderson, in which they, *inter alia*, craved declarator that the partnership of the pursuers and defender in the business of wine and spirit merchants carried on in the premises known as the Elderslie Bar, Yoker, under the firm name of John R. Henderson, was terminated at 24th September 1913, and that the pursuers were entitled to have the business wound up and the whole assets thereof realised and the debts paid and the surplus divided among the parties according to their respective rights and interests.

From the averments of parties on record it appeared that on 8th September 1905 a minute of agreement and copartnery was entered into between the parties—to which Henderson was the first party, and M'Gown and Cameron the second and third parties—for carrying on the business of wine and spirit merchants at the Elderslie Bar, Yoker, the licence for which was held by Henderson. The agreement contained, *inter alia*, the following clauses:—"(*Third*) The business to be carried on in the said premises shall be that of a wine and spirit merchant, and the copartnership shall subsist for five years as from and after the 15th day of May 1905 notwithstanding the date hereof. . . . (*Eighth*) In the event of the copartnery not being renewed at the expiry thereof, the licence shall then be valued by a neutral party mutually appointed, and the first party as holder of the licence shall in his option be entitled to pay out the second and third parties the amount due to them respectively, or otherwise the licence shall be sold in the open market to the highest bidder, and the price so obtained, when received, divided among the parties in accordance with their rights and interests therein."

The copartnership constituted by the agreement continued throughout the five years therein mentioned, and thereafter it sub-

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sisted as a partnership-at-will until 24th September 1913, when it was dissolved by notice from Henderson, who intimated that he was prepared to have the termination of the contract carried out in terms of the eighth clause of the agreement, and claimed a right to exercise the option of pre-emption thereby conferred upon him. M'Gown and Cameron maintained that the clause in question was inapplicable to the partnership-at-will, and that they were entitled to have the business wound up and the whole assets, including the licence, realised and divided among the partners.

The pursuers pleaded, *inter alia*;—(1) In respect the partnership among the parties has been dissolved as condescended on, and the defender declines to recognise the pursuers' right to have the business wound up and the assets thereof divided among the parties, decree of declarator should be granted as craved.

The defender pleaded, *inter alia*;—(2) In respect that the eighth clause of the contract of copartnery is applicable to the dissolution which took place at 24th September 1913, the defender should be assoilzied from the conclusions of the summons.

On 18th February 1914 the Lord Ordinary (Hunter) assoilzied the defender from the conclusions of the summons.*

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* "OPINION.—The question between the parties in this case may be described as being whether or not the defender is right in his contention that he is entitled to the option indicated in clause 8 of the contract of copartnery. If he is right, then I apprehend he is entitled to absolvitor here; on the other hand, if he is wrong, the pursuers would be entitled to get the declarator which they ask.

"By section 27 (1) of the Partnership Act of 1890 it is provided that 'where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership-at-will.'

"The contention of the pursuers is that such a provision as is contained in clause 8 of the contract of copartnership is inconsistent with the provisions of a partnership-at-will. As was contended by Mr Watson, they maintain that on a sound construction of article 8 the only event contemplated is the actual termination of the contract on the expiry of the five years, and that upon that event having occurred the right to the option ceased altogether.

"The pursuers relied mainly on two decisions, one an early decision of *Clark* v. *Leach* in 1862, 32 Beaven, at p. 14, the other—which is probably the most important and instructive case upon this branch of law that is to be found—the case of *Neilson* v. *The Mossend Iron Co.*, 13 R. (H. L.), p. 50. Only the latter of these two cases need be looked at. I think when looked at it is clear that it does not support the contention of the pursuers. In that case there was a contract of copartnery entered into for a definite period of time, and after the expiration of the term the partnership had been carried on as before without a new contract. There was a provision in the original contract that if three months before the termination of the contract the whole partners of the company should not have agreed to continue to carry on the business thereof, any one or more of them who might be desirous of retiring should be entitled to do so, and should immediately on the completion of the balance-sheet aftermentioned be paid out, by the partner or partners electing to continue the business, his or their share and interest in the concern, as the same should be ascertained by a balance of the company's books as at the termination of the contract. The House

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The pursuers reclaimed, and the case was heard before the Extra Division (Lord Dundas, Lord Mackenzie, and Lord Cullen) on 15th June 1914.

Argued for the reclaimers;—The reclaimers did not dispute that in many instances the provisions of a partnership contract, the period of which had expired, might be carried forward into a subsequent partnership-at-will. Whether there was this carrying forward in any particular case depended entirely upon the terms of the contract under consideration. The terms of clause 8 of the present contract clearly showed that that clause was not carried forward into the partnership-at-will. The opening words of the clause excluded the possibility, as they clearly meant that the clause was only to come into effect "in the event of the copartnery not being renewed at the expiry thereof." The copartnery had in fact been renewed, and the clause therefore never could come into

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of Lords, reversing the decision of the First Division, held that the provision was not applicable to the partnership-at-will which had existed subsequently to the date of the expiry of the contract period of partnership. The ground of judgment, I think, mainly was that it was inconsistent with the nature of a contract of partnership-at-will that such a provision should be given effect to, because it is clear that it was impossible to give the notice which alone gave the right to the payment on the terms specified three months before the termination of a contract-at-will. Such a contract, of course, is terminable at will. In the course of his judgment Lord Watson, at p. 54, said this,—'It is not, in my opinion, inconsistent with the nature of a partnership-at-will that a member should agree upon its dissolution at any time to receive payment of his share and interest in the shape of a sum of money, to be fixed with reference to a particular balance-sheet, without having resort to a legal winding-up, and to leave the other members to carry on the business.' I find in his work on Partnership, Lord Lindley, at p. 473, (8th ed.) says in general terms,—'A clause giving a right of pre-emption is not in itself inconsistent with the incidents of a partnership-at-will, and is therefore as a general rule operative after the termination of the partnership originally contemplated.'

"I think clause 8, reading its language fairly and not unnecessarily critically, is practically a clause giving a right of pre-emption at the expiry of the contract. Upon a fair consideration of the instructive judgments of Lord Watson and Lord Selborne in the case of *Neilson* I do not think that anything contrary to that view is to be found. I agree with what Mr Justice Stirling said in the case of *Daw* v. *Herring*, [1892] 1 Ch. 284, at p. 288, as regards Lord Watson's judgment. That case was not taken before the Court of Appeal in England, but it was decided a considerable number of years ago, and the probability is that if it was thought to be wrongly decided the opinion of a higher Court would have been taken. It is not binding upon me, but as I agree with the decision I do not think I can do better than simply quote the passage from Mr Justice Stirling, who says: 'It appears to me that the judgment of Lord Watson is founded on two propositions. The first is a general one, and may be stated precisely in his own words: "All the stipulations and conditions of the original contract remain in force in so far as these are not inconsistent with any implied term of the new contract." The second special one is this: the provisions made by the original contract for the winding-up of the partnership affairs on the termination of the original partnership remain in force, unless the special character of the stipulations is such that they cannot reasonably be applied to a contract determinable at will. The question is not, as I read Lord Watson's observations on the passage quoted from the judgment of Lord Shand,

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effect. It was a case where time was of the essence of the condition, and the Lord Ordinary had erred in reading the clause as applying generally to the dissolution of the partnership. The provision was a special provision analogous to the provisions which had been held inapplicable to the partnerships-at-will in *Neilson* v. *Mossend Iron Company, &c.*,[1] and *Clark* v. *Leach*.[2] In *Daw* v. *Herring*[3] and in *Cox* v. *Willoughby*[4] there was no condition corresponding to "in the event of the copartnery not being renewed," and the option to purchase in the former case depended upon very special circumstances.

Argued for the respondent;—The rights of parties depended primarily upon section 27 of the Partnership Act, 1890,[5] which provided that, where a partnership for a fixed term was continued after the term expired, a continuance upon the old terms was to be presumed so far as consistent with the incidents of a partnership-at-will. There was nothing inconsistent with such a partnership in the clause in question, it being just as apposite and appropriate to the termination of the partnership-at-will as to the termination of the original copartnery. The case was exactly like *Daw* v. *Herring*,[3] and also in a lesser degree like *Brooks* v. *Brooks*[6] and *Cox* v. *Willoughby*,[4] which decisions should be followed. *Neilson* v. *Mossend Iron Company*[1] was distinguishable, because there the provision for giving three months' notice prior to the termination of the contract was quite inconsistent with a partnership-at-will, and only consistent with a partnership having a definite period of determination.

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whether the language of the original contract with reference to the termination of the partnership originally constituted is strictly appropriate to the termination of a partnership-at-will, but whether the provisions as to the consequences of the termination of the original partnership are in their essence applicable or inapplicable to a partnership-at-will.'

"Now, I think, using the language of Mr Justice Stirling, that one cannot reasonably contend that this provision in connection with the valuation of a licensed business is not a provision as to the consequences of the termination which in its essence is applicable to a partnership-at-will. In the case of *Daw* v. *Herring* the original contract had provided that notice to terminate might be given 'within three months after the expiration or determination of the partnership by effluxion of time,' and that in that event an option to purchase the share of the other partner was given. Mr Justice Stirling held, giving effect to the views I have indicated, that that clause was applicable to the period after the expiry of the contract term; and a similar decision, I think, was reached in the more recent case of *Brooks*, which is reported in 85 Law Times, 453. Both the decision in *Daw* v. *Herring* and in the case of *Brooks* appear to be in accordance with the views that the Court took in the case of *Cox* v. *Willoughby*, (1880) 13 Ch. Div. 863, and the case of *Essex* v. *Essex*, (1855) 20 Beavan, 442. Taking the view, therefore, which I take as to the construction to be put upon clause 8 of the contract of copartnership, and as to the effect to be given to the provisions of section 27 (1) of the Partnership Act of 1890, I think the defender here falls to be assoilzied from the conclusions of the action."

[1] (1886) 13 R. (H. L.) 50.
[2] (1863) 1 De G., J., & S. 409.
[3] [1892] 1 Ch. 284.
[4] (1880) 13 Ch. D. 863.
[5] 53 and 54 Vict. cap. 39. Sec. 27 (1) is quoted in the second paragraph of the Lord Ordinary's opinion.
[6] (1901) 85 L. T. 453.

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LORD DUNDAS.—The question in this case is certainly a short one, and does not lend itself to any elaboration of statement. The decision depends, as in each case of this sort it must depend, upon the construction to be put on the language of the particular instrument under consideration.

The pursuers maintain—I quote from a passage in the Lord Ordinary's opinion, which I think it was admitted correctly describes their argument —"that on a sound construction of article 8 the only event contemplated is the actual termination of the contract on the expiry of the five years, and that upon that event having occurred the right to the option ceased altogether." That view appears to me to be unsound; and I am, for my part, entirely satisfied with the way in which the Lord Ordinary has dealt with the matter, and with the grounds upon which he has based his judgment. I find it unnecessary to say more about the case than this: that I think the interlocutor is right; that the Lord Ordinary has proceeded upon the right grounds; and that neither Mr Constable nor his learned junior, who I suppose have said all that could reasonably be said in support of their case, has stated anything that should, in my opinion, lead to a contrary conclusion. I accordingly am for adhering to the interlocutor.

LORD MACKENZIE.—I am of the same opinion. I have listened attentively to the argument of Mr Constable, and also to that of Mr Robertson, and I am quite unable for my part to see any ground for differing from the conclusion at which the Lord Ordinary has arrived. Of course, as Lord Selborne points out in the case of *Neilson* v. *Mossend Iron Company*,[1] the first thing to be done is to construe the clause in question; and, considering the 8th article of this contract of copartnery, I am unable to find anything in it to exclude the idea that the right of pre-emption was to be carried forward. I think the present case is like the case of *Daw* v. *Herring*,[2] but I do not think the case is like the case of *Neilson*.[1]

LORD CULLEN.—I concur. The reclaimers do not dispute the soundness of the rule stated in the passage quoted by the Lord Ordinary from Lord Lindley's work on Partnership[3]: "A clause giving a right of pre-emption is not in itself inconsistent with the incidents of a partnership-at-will, and is therefore, as a general rule, operative after the termination of the partnership originally contemplated."

It is true that, in any particular case, the right of pre-emption may be so specially conditioned as to be capable of exercise only at the expiration of the original contract, or it may be created in such terms as to show that the bargain of parties was that it should apply solely at the period of the expiry of the contract so as to exclude it from being carried into a partnership-at-will; but if the parties by the original contract do no more than simply agree that, on a winding-up of the affairs of the partnership taking place at its expiry, the partner shall have the right of pre-emption

[1] 13 R. (H. L.) 50. [2] [1892] 1 Ch. 284. [3] 8th ed., p. 473.

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as an alternative to open sale, I can see nothing to prevent the right being carried forward. As article 8 of the present contract seems to me to import no more than this, I am of opinion that the Lord Ordinary has come to a right conclusion on the matter, and that his judgment should be affirmed.

THE COURT adhered.

GARDINER & MACFIE, S.S.C.—BRUCE & STODDART, S.S.C.—Agents.

No. 92.

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JOHN BARBOUR AND ANOTHER, Appellants.—*Constable, K.C.—Keith.* ANDREW KENNETH M'DOUALL, Respondent.—*Johnston, K.C.—C. H. Brown.*

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Lease—Outgoing—Compensation for improvements—Drainage improvements—Statutory notice of intention to execute improvements—Agreement to dispense with notice—Proof of agreement—Agricultural Holdings (Scotland) Act, 1908 (8 *Edw. VII. cap.* 64), *sec.* 3 (1) *and* (4).

The Agricultural Holdings (Scotland) Act, 1908, sec. 3 (1), enacts that a tenant shall not be entitled to compensation in respect of drainage improvements executed by him, unless he has, before beginning to execute these improvements, "given to the landlord notice in writing of his intention so to do." Sec. 3 (4) further enacts that "the landlord and the tenant may by the lease or otherwise agree to dispense with any notice under this section."

In a claim by tenants of a holding for compensation under the Act in respect of drainage improvements it appeared that no notice in compliance with sec. 3 (1) of the Act had been given by the tenants to the landlord, but the tenants maintained that there had been an agreement under sec. 3 (4) to dispense with notice. It was proved that, before the improvements were executed, the tenants had interviews with the landlord's factor, at which, although the question of compensation or notice was never specifically raised, the factor was informed of the nature of the proposed work; and that the tiles were supplied to the tenants under orders given by the landlord's factor and were paid for by the landlord, while the cartage and the laying of the drains were done by the tenants at their own expense, and that this was the custom on the estate.

Held that in these circumstances an agreement to dispense with the notice required by sec. 3 (1) of the Act could not be inferred.

Opinion reserved as to whether such an agreement must be proved by writing.

Lease—Outgoing—Compensation for unreasonable disturbance—Reasonable opportunity to landlord of making valuation of tenant's stock and implements—Compensation for "loss or expense directly attributable to" tenant's quitting his holding—Agricultural Holdings (Scotland) Act, 1908 (8 *Edw. VII. cap.* 64), *sec.* 10.

Sec. 10 of the Agricultural Holdings (Scotland) Act, 1908, which deals with compensation for unreasonable disturbance, enacts that, in the circumstances therein specified, the tenant shall, upon quitting his holding, "be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connection with the holding; provided that no compensation under this section shall be payable—(*a*) unless the tenant has given to the landlord a reasonable opportunity of making

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a valuation of such goods, implements, produce, and stock as aforesaid. . . ."

Where the tenants of a holding gave notice to their landlord on 24th May 1912 that they intended to claim compensation under this section, and thereafter, without further notice or intimation to the landlord, proceeded on 13th February 1913 to sell their stock and implements by public roup,—

Held that the tenants had given to the landlord a reasonable opportunity of making a valuation in terms of the Act, there being no obligation on a tenant, on his own initiative, to make an offer to the landlord of such an opportunity.

Observed that, where there was a displenishing sale, what the tenant would be entitled to as compensation under the section would include not merely the expense of the sale but also the loss through deterioration of the stock upon a sale.

2D DIVISION. Sheriff of Dumfries and Galloway.

THIS was an appeal on a case stated by the arbiter at the request of Andrew K. M'Douall, proprietor of the estate of Logan, Wigtownshire, in an arbitration under the Agricultural Holdings (Scotland) Act, 1908, between him and John and Robert Barbour, formerly tenants of the holding of Balgowan on that estate. The subjects of the arbitration were certain claims under Parts II. and III. of the First Schedule, and section 10 of that Act,* made by the tenants

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* The Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), enacts:—

Sec. 3. "(1) Compensation under this Act shall not be payable in respect of any improvement comprised in Part II. of the First Schedule hereto, unless the tenant of the holding has not more than three nor less than two months before beginning to execute the improvement given to the landlord notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and the tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed."

"(4) The landlord and the tenant may by the lease or otherwise agree to dispense with any notice under this section, and any such agreement may provide for anything for which an agreement after notice under this section may provide, and in such case shall be of the same validity and effect as such last-mentioned agreement."

Sec. 10. "Where (*a*) the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit . . . the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding, which the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock on or used in connection with the holding: Provided that no compensation under this section shall be payable—(*a*) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce, and stock as aforesaid; (*b*) unless the tenant has, within two months after he has received notice to quit . . . given to the landlord notice in writing of his intention to claim compensation under this section."

First Schedule, Part II. "Improvement in respect of which notice to landlord is required. . . .

"(17) Drainage."

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on the determination of their tenancy of the holding at Whitsunday 1913.

The stated case set forth:—

"The following facts were admitted or proved:—

"The deceased Robert Barbour (father of the claimants) entered into the occupancy of the farm of Balgowan at Whitsunday 1887 on a nineteen years' lease, but no formal lease was ever executed. From the date of his death, about three years later, the farm was carried on by his testamentary trustees until Martinmas 1900, when the claimants were accepted as tenants, and continued as such until Whitsunday 1906. From that date the farm was held by them by tacit relocation until Whitsunday 1913, at which date their tenancy was brought to an end by notice to quit given by the respondent on 29th April 1912.

"The claim included a claim in respect of improvements made by the tenants by drainage. It was admitted that the claimants did not on any of the occasions on which such improvements were executed give notice in writing to the landlord, in compliance with the requirements of section 3 (subsection 1) of the Act. It was, however, admitted, or proved to the arbiter's satisfaction, that on each of these occasions when drainage improvements were executed the claimants had interviews with the former factor, Mr D. A. M'Clew, at which the nature of the work proposed was brought fully under his notice. Orders for the tiles necessary for carrying out the work, to the Tirally Brick and Tile Works, were given by the said factor to the claimants, and the tiles so supplied were charged against and paid for by the estate. No additional rent or interest was charged against the claimants in respect of such drainage; the cartage and laying of the drains were done by the claimants at their own expense; and that this was and is the custom on the estate. It was further admitted that at none of these meetings was the subject of compensation mentioned or the question of written notice specifically raised.

"It was proved that the tenancy of the said John Barbour and Robert Barbour of said holding was terminated by notice to quit given by the landlord without good and sufficient cause, and for reasons inconsistent with good estate management. Notice of intention to claim for loss under section 10 was given by the claimants to respondent's factor on 24th May 1912, and the claimants did not dispose of any of their effects until 13th February 1913, on which date the main part of their dairy stock was sold at the farm by public auction; the remainder of the stock, together with the implements and utensils of husbandry, being sold by public auction at the farm on 17th May 1913. These two sales were duly advertised by posters displayed in the district and also by advertisement in the various local newspapers for some considerable time before the sales actually took place. It was admitted by the factor that he saw the advertisements, but that he took no steps to have a valuation made. The claimants gave the following written notice on 26th April 1913 to the respondent:—'Balgowan, Ardwell, Stranraer, 26th April 1913.—To Andrew Kenneth M'Douall, Esq., of Logan, *per* Henry Michie, Esq., Logan Estate Office, Ardwell, Stranraer.—Dear Sir,—In terms of section 10 of the Agricultural Holdings (Scotland) Act, 1908, we hereby give you notice that you can now have an opportunity of inspecting the goods,

implements, and stock on the farm of Balgowan.—Yours faithfully, ROBERT BARBOUR; JOHN BARBOUR.'

"It was proved that the sale of the dairy stock was a good sale, so far as public displenishing sales go, and that at least fair values were obtained for the various animals, so far as such sales go. It was, however, proved to the arbiter's satisfaction that during the tenancy the claimants had built up by selection and breeding a good milking herd, the value of which as a herd to the tenants was greater than the *cumulo* value of the component units sold at a displenishing public sale to individual purchasers.

"It was further found proved that the implements and dairy utensils were sold at break-up prices, and did not realise anything approaching their value. It was also proved that the tenants did not receive at the public sale the full values of the horses and brood mares sold."

The case also stated that on 5th November 1913 the arbiter issued proposed findings in which he, *inter alia*, proposed to find "(1) That on the claim for drainage improvements from the facts and circumstances proved as above, there existed by implication such an agreement to dispense with formal written notice as is contemplated in and provided for by subsection 4 of section 3 of the said Act. I, therefore, proposed to award compensation to the claimants in respect of drainage improvements executed by them, and in assessing the amount of the compensation, having taken into account the benefit derived by the tenant from the landlord's expenditure on tiles, in accordance with the provisions of section 1 (2) of said Act. (2) That a reasonable opportunity was given by the tenants to the landlord of making a valuation of the whole goods, implements, produce, and stock in respect of which a claim is made under section 10 of the Act. (3) That the claimants sustained loss or expense directly attributable to their quitting the holding, unavoidably incurred by them in connection with the sale of their stock, implements, and dairy utensils, that from the evidence led, and my own knowledge, I assess the loss sustained on these sales as follows:—Dairy stock, £100; Horses and brood mares, £30; Implements, £65."

The questions of law stated by the arbiter were as follows:—"(1) On the facts found by me to be admitted or proved, am I entitled to hold that there was an agreement to dispense with written notice to execute drainage in terms of section 3 (4) of the Agricultural Holdings (Scotland) Act, 1908, and to award compensation in respect of such improvements? (2) In respect of the terms of the notice, dated 26th April 1913, given by the claimants to the respondent, are the claimants barred from founding on any other alleged previous circumstances to supersede a similar notice prior to the sale of 13th February? (3) On the facts found by me to be admitted or proved, am I entitled to find that a reasonable opportunity was given to the landlord by the tenants of making a valuation prior to the sale of 13th February 1913, in terms of section 10, *proviso* (a). (4) On the facts found by me to be admitted or proved, am I entitled to find that the sums proposed to be awarded as loss in connection with the sales of dairy stock and implements are loss or expense unavoidably incurred by the tenants upon or in connection with said sales, and directly attributable to their quitting the holding?"

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On 4th February 1914 the Sheriff-substitute (Watson) pronounced an interlocutor answering the first and second questions in the negative and the third and fourth in the affirmative and remitting the case to the arbiter.

The claimants, Robert and John Barbour, appealed to the Court of Session, and the case was heard before the Second Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Guthrie) on 19th June 1914.

Argued for the appellants;—(1) From the facts of the case it appeared that the parties had agreed to dispense with the notice required by sec. 3 of the Agricultural Holdings (Scotland) Act, 1908. The provisions of the Act showed that such an agreement need not be in writing,[1] for—while writing was prescribed in secs. 2, 3 (1), 4, and 6 (3)—sec. 3 (4) did not mention writing. It would be meaningless to require that such agreements to dispense with notice should be in writing, for it would be as easy to give written notice as to enter into a written agreement to dispense with it. But, if writing were required, it need not be formal,[2] and the requirement would be satisfied by the orders for tiles given by the respondent, which obviously must have been written orders. (2 and 3) The Sheriff-substitute's decision on the second and third questions was clearly right. It was a question of facts and circumstances in each case whether the landlord had had reasonable opportunity of making a valuation; and in this case he had ample opportunity. The statute did not require the tenant to notify the landlord as to the valuation which he was entitled to make. (4) There was also no ground revealed in the case for disturbing the Sheriff-substitute's decision on the fourth question.

Argued for the respondent;—(1) There was no agreement between the parties to dispense with notice. Such an agreement must be in writing or at least must be specific. The object of the required notice was to certiorate the landlord, not that the improvements were to be executed, but that they were to be executed on the footing that compensation for them under the Act was to be claimed. The fact, therefore, that the respondent was aware that the improvements were being executed did not afford any presumption that he had dispensed with such notice. All that was done here was merely done in accordance with the custom of the estate as to drainage, and it did not appear that the question of notice had ever been raised. In such circumstances what had been done here could not give rise to an inference that an agreement to dispense with notice had been arrived at. To support such an inference the facts must indicate that the parties had the question of notice under consideration; and where, as here, the agreement between the parties referred not to notice but to other matters it was unsafe to extend the agreement by inference so as to cover the question of notice. (2 and 3) It was the duty of the tenants to afford the landlord the reasonable opportunity required by the statute, and it rested on the tenants to take steps for that purpose. Here they had done nothing. The appellants' letter of 26th April 1913 showed that

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[1] Hamilton Ogilvy v. Elliott, (1905) 7 F. 1115, *per* Lord Kincairney, Ordinary, at p. 1124.

[2] Hope v. Derwent Rolling Mills Co., Limited, (1905) 7 F. 837; Sellar v. Aiton, (1875) 2 R. 381.

they had not given the respondent the necessary opportunity prior to the sale in the preceding February. The Sheriff-substitute had erred in that he had imposed the duty of taking the first step upon the respondent.[1] (4) The grounds on which the arbiter had proceeded in estimating the compensation were speculative. The question was what loss would the tenant have incurred had he done all he could to prevent, or to reduce the amount of, loss. The items mentioned by the arbiter did not fall within the description of "unavoidable" loss or expense.

LORD MACKENZIE.—The questions in this case arise in a note of appeal in a stated case under the Agricultural Holdings (Scotland) Act, 1908, and relate to matters in dispute between the proprietor of the farm of Balgowan and the tenants whose tenancy was determined as at Whitsunday 1913. The matter was dealt with by the arbiter, Mr Hannah, and after he had issued certain proposed findings a case was, at the request of the landlord, stated for the opinion of the Sheriff-substitute, who has disposed of the matters that we now have to consider.

The first of those relates to a claim for compensation for certain drainage improvements executed as described in the case; and the question of law is:—"On the facts found by me to be admitted or proved, am I entitled to hold that there was an agreement to dispense with written notice to execute drainage in terms of section 3 (4) of the Agricultural Holdings (Scotland) Act, 1908, and to award compensation in respect of such improvements?" Upon that question the arbiter and the Sheriff-substitute have taken different views. [His Lordship summarised the facts stated in the case and continued]—It is quite plain, therefore, from the facts found in the case that there was no compliance with the requirements of section 3, subsection 1, of the Act. In that subsection it is provided:—[His Lordship quoted the subsection]. The notice required in this subsection was admittedly not given; but it was argued on behalf of the appellants that, although this was so, yet looking to the provision in subsection 4 it might be inferred in certain cases—of which it is contended that this is one—that there was an agreement to dispense with any notice under this section, including notice of an intention to execute an improvement of the class comprised in Part II. of the First Schedule to the Act. We had an argument on the question whether an agreement to dispense with notice could be inferred from facts and circumstances, or whether it was necessary that, as the notice is to be given in writing, so such an agreement should be proved by writing also. It is not necessary to pronounce an opinion upon that point in the present case. It may be that in a future case such facts and circumstances may be presented that the Court would consider itself entitled to draw the inference that there was an agreement to dispense with notice.

The ground of judgment in the present case is that, on no view of the facts and circumstances, can it be said that the appellants here, as tenants of the farm, did bring themselves within the provisions of the Agricul-

[1] Brown v. Mitchell, 1910 S. C. 369, *per* Lord President Dunedin, at p. 384.

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tural Holdings Act with regard to compensation for improvements by way of drainage. Upon that point, the argument stated by Mr Johnston appeared to me to be quite conclusive. Speaking for myself, I may say that I do not think that our attention at the outset was sufficiently directed to the important finding at the top of page 5 of the case, from which it appears quite plainly that all that was done by the tenants and by the landlord upon the occasion when the drainage improvement was executed was done entirely in conformity with the custom on the estate. The cartage and laying of the drains was done by the claimants at their own expense, and the tiles, for which the order was given from the estate office by the factor to the claimants, were charged against, and paid for by, the estate. The arrangement to which appeal is made, and from which the Court is asked to draw the inference that there was an agreement between the landlord and tenants to dispense with the statutory notice, was an arrangement which was made without any reference at all to the Act of Parliament. If it were the case, as was contended by the appellants, that the object of requiring such notice to be given is merely in order that the landlord may have knowledge of what is being done, then it might be possible to lay a foundation for the argument on behalf of the appellants. But this is not the purpose of the statutory notice; on the contrary, its purpose is to certiorate the landlord that what is being done is being done on statutory conditions. And, when one bears in mind the facts which have been found by the arbiter in this case, I think it is impossible to hold as to this work, which was done upon the footing of the estate custom, that there are any facts which can be regarded as inferring an agreement on the part of the landlord that no notice should be given to him as required by the statute. I think the Court would be slow in any case in construing any agreement which has no reference to notice at all as equivalent to a dispensation with notice under the provisions of the Act of Parliament. Accordingly, upon that matter I think the arbiter was mistaken in the view which he took, and that upon this point the judgment of the Sheriff-substitute should be affirmed.

With regard to the other matters which were brought up by way of appeal on the part of the landlord, I am of opinion that the Sheriff-substitute has also taken a sound view. The first of these matters arises on the second question which is put, namely: "In respect of the terms of the notice, dated 26th April 1913, given by the claimants to the respondent, are the claimants barred from founding on any other alleged previous circumstances to supersede a similar notice prior to the sale of 13th February?" That arises under the provisions of section 10 of the Act. That section provides:—"Where the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit," then "the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or

removal of his household goods or his implements of husbandry, produce, or farm stock, on or used in connection with the holding." As a proviso to that the Act of Parliament says: "Provided that no compensation under this section shall be payable (*a*) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce, and stock as aforesaid." The argument was that inasmuch as there was a sale of part of the tenants' stock on 13th February 1913, and as the tenants through their agents, as we were informed, wrote on 26th April 1913 a letter stating that "in terms of section 10 of the Act we hereby give you notice that you can now have an opportunity of inspecting the goods, implements, and stock on the farm of Balgowan," and that inasmuch, also, as that letter was written after part of the stock had been realised, the tenants are barred from maintaining that they gave the landlord a reasonable opportunity of making a valuation of the goods. I think that is a quite untenable position. The question must be determined not with reference to anything that was written or said on behalf of the tenants, but with reference to the proper construction of proviso (*a*), section 10. Therefore, so far as the second question is concerned, I think there is no difficulty at all.

The third query raises the question of the construction to be put upon subsection (*a*). The Court is asked: "On the facts found by me to be admitted or proved am I entitled to find that a reasonable opportunity was given to the landlord by the tenants of making a valuation prior to the sale of 13th February 1913, in terms of section 10, proviso (*a*)?" No question, of course, could arise with regard to the second sale, which was on the 17th May 1913, because that was after the letter of 26th April, and therefore the question arises only in regard to the first sale on 13th February 1913. It appears to me that under subsection (*a*) there is no duty on the part of the tenant to do anything. There is no provision that he is to give intimation. What is said is that he is to give the landlord "reasonable opportunity," and what "reasonable opportunity" is must, of course, depend on the circumstances of each case. But to say that the landlord in the present case had not reasonable opportunity is, I think, hopeless on the facts of the case; because the necessary notice under subsection (*b*) was given by the claimants so far back as 24th May 1912, and the first of the sales was not until 13th February 1913. The notice given on 24th May was in terms of proviso (*b*) of section 10 of the Act. Therefore the landlord had due notice that the tenants intended to claim compensation under the section so far back as 24th May 1912. If after his making a request thereafter for a reasonable opportunity to make a valuation of the goods on the premises the tenants had obstructed him and prevented him from getting what under subsection (*a*) he was entitled to get, then there would have been ground for complaint. So also if the tenant had hurried on a sale so that the landlord had no reasonable opportunity of making a valuation. On the facts in the present case I think the landlord had no ground of complaint.

That leaves only the last question which is:—"On the facts found by me to be admitted or proved am I entitled to find that the sums proposed to be awarded as loss in connection with the sales of dairy stock and

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tural Holdings Act with regard to compensation for improvements by way of drainage. Upon that point, the argument stated by Mr Johnston appeared to me to be quite conclusive. Speaking for myself, I may say that I do not think that our attention at the outset was sufficiently directed to the important finding at the top of page 5 of the case, from which it appears quite plainly that all that was done by the tenants and by the landlord upon the occasion when the drainage improvement was executed was done entirely in conformity with the custom on the estate. The cartage and laying of the drains was done by the claimants at their own expense, and the tiles, for which the order was given from the estate office by the factor to the claimants, were charged against, and paid for by, the estate. The arrangement to which appeal is made, and from which the Court is asked to draw the inference that there was an agreement between the landlord and tenants to dispense with the statutory notice, was an arrangement which was made without any reference at all to the Act of Parliament. If it were the case, as was contended by the appellants, that the object of requiring such notice to be given is merely in order that the landlord may have knowledge of what is being done, then it might be possible to lay a foundation for the argument on behalf of the appellants. But this is not the purpose of the statutory notice; on the contrary, its purpose is to certiorate the landlord that what is being done is being done on statutory conditions. And, when one bears in mind the facts which have been found by the arbiter in this case, I think it is impossible to hold as to this work, which was done upon the footing of the estate custom, that there are any facts which can be regarded as inferring an agreement on the part of the landlord that no notice should be given to him as required by the statute. I think the Court would be slow in any case in construing any agreement which has no reference to notice at all as equivalent to a dispensation with notice under the provisions of the Act of Parliament. Accordingly, upon that matter I think the arbiter was mistaken in the view which he took, and that upon this point the judgment of the Sheriff-substitute should be affirmed.

With regard to the other matters which were brought up by way of appeal on the part of the landlord, I am of opinion that the Sheriff-substitute has also taken a sound view. The first of these matters arises on the second question which is put, namely: "In respect of the terms of the notice, dated 26th April 1913, given by the claimants to the respondent, are the claimants barred from founding on any other alleged previous circumstances to supersede a similar notice prior to the sale of 13th February?" That arises under the provisions of section 10 of the Act. That section provides:—"Where the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit," then "the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connection with the sale or

removal of his household goods or his implements of husbandry, produce, or farm stock, on or used in connection with the holding." As a proviso to that the Act of Parliament says: "Provided that no compensation under this section shall be payable (*a*) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce, and stock as aforesaid." The argument was that inasmuch as there was a sale of part of the tenants' stock on 13th February 1913, and as the tenants through their agents, as we were informed, wrote on 26th April 1913 a letter stating that "in terms of section 10 of the Act we hereby give you notice that you can now have an opportunity of inspecting the goods, implements, and stock on the farm of Balgowan," and that inasmuch, also, as that letter was written after part of the stock had been realised, the tenants are barred from maintaining that they gave the landlord a reasonable opportunity of making a valuation of the goods. I think that is a quite untenable position. The question must be determined not with reference to anything that was written or said on behalf of the tenants, but with reference to the proper construction of proviso (*a*), section 10. Therefore, so far as the second question is concerned, I think there is no difficulty at all.

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That leaves only the last question which is:—"On the facts found by me to be admitted or proved am I entitled to find that the sums proposed to be awarded as loss in connection with the sales of dairy stock and

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implements are loss and expense unavoidably incurred by the tenants upon or in connection with said sales, and directly attributable to their quitting the holding." Upon that matter the proposed finding of the arbiter was:—"That the claimants sustained loss and expense directly attributable to their quitting the holding, unavoidably incurred by them in connection with the sale of their stock, implements, and dairy utensils, that from the evidence led, and my own knowledge, I assess the loss sustained on these sales as follows"—and then he assesses the amount at £195. That does not seem *prima facie* to be an excessive sum in view of the fact that the amount realised from the two displenishing sales was something like £3400. The ground upon which the arbiter proceeded—as disclosed in the statement of facts—was apparently that "the sale of the dairy stock was a good sale, so far as public displenishing sales go, and that at least fair values were obtained for the various animals so far as such sales go. It was, however, proved to the arbiter's satisfaction that during the tenancy the claimants had built up by selection and breeding a good milking herd, the value of which as a herd to the tenants was greater than the *cumulo* value of the component units sold at a displenishing public sale to individual purchasers. It was further found proved that the implements and dairy utensils were sold at break-up prices, and did not realise anything approaching their value. It was also proved that the tenants did not receive at the public sale the full value of the horses and brood mares sold."

Now, I am of opinion that the judgment of the Sheriff-substitute upon that point should be affirmed, and the plainest and most obvious ground is that we have no materials in the case for coming to any other conclusion. Even supposing the argument which was submitted to us on the construction of section 10—upon the meaning to be attached to the words "loss and expense"—were sound, I do not know how we could possibly give effect to it, or turn it into pounds, shillings, and pence in the present case. I do not, for my part, see that there are any grounds stated in the case for holding that the arbiter acted *ultra vires* in coming to the conclusion that he reached. This being the case, it is probably not the proper occasion for going into a discussion of what exactly is the meaning of "loss and expense." When the arbiter has found that the loss or expense is directly attributable to the tenants quitting the holding, and is unavoidably incurred by them in connection with the sale of their stock, I am unable to see that he has done anything that he was not warranted in doing under the Act. *Prima facie* the term "expense" would appear to be more applicable to the case of the removal of stock and to refer to the cost attending the removal. In a case of this kind, what the tenant would be entitled to would be not merely the expense of the sale but the loss through deterioration of the stock upon a sale; and the elements which are mentioned by the arbiter are certainly relevant to be taken into consideration. I think that, in the absence of a special averment of facts which would show that injustice had been done to the landlord, I should say that the arbiter as a rule would take the facts as he found them, and if there had been a sale he would deal with the matter on the footing of a sale, and if a removal on the footing of a removal. He was not bound

to enter into speculative matters. For example, if he entered into the question of what would have been the result if, instead of selling their stock, &c., the tenants had removed to an adjoining farm, he would be entering into the region of speculation. However, it is not necessary to express a concluded opinion upon these points, because in order to decide the present question it is enough to say that there is no material upon which we can hold that the arbiter has acted *ultra vires*. Therefore, on the whole matter I am of opinion that we should adhere to the decision of the Sheriff-substitute.

June 19, 1914. Barbour v. M'Douall. Lord Mackenzie.

LORD DUNDAS and LORD GUTHRIE concurred.

THE COURT dismissed the appeal and affirmed the opinion of the Sheriff-substitute.

SIMPSON & MARWICK, W.S.—E. A. & F. HUNTER & Co., W.S.—Agents.

PETER M'CONNACHIE, Petitioner.—*D. P. Fleming.*

No. 93.

Diligence—Arrestment—Ship—Maritime lien—Form of process for making maritime lien effective.

June 19, 1914. M'Connachie.

It is competent to initiate proceedings for the purpose of making a maritime lien effective by presenting a petition to the Lord Ordinary on the Bills for a warrant to arrest the vessel.

Form of order pronounced by the Lord Ordinary.

ON 19th June 1914, Peter M'Connachie, writer in Greenock, presented a petition to the Lord Ordinary on the Bills asking for a warrant to arrest the s.s. "Wm. Eisenach," then lying in the harbour of Greenock.

1ST DIVISION. Ld. Anderson.

The petitioner averred that he was holder of a promissory-note for £850, granted by the master of the ship for necessary disbursements at the port of Stettin, payable ten days after the arrival of the ship at Greenock, that the ship had not yet been ten days at Greenock, but that the master was about to put the vessel to sea in order to defeat the petitioner's lien over her.

The Lord Ordinary (Anderson) reported the matter to the First Division, and drew the attention of the Court to the fact that, though there was no precedent for making such an order in the Bill Chamber, Lord President Dunedin had indicated, in his opinion in the case of *Clan Line of Steamers, Limited*, v. *Earl of Douglas Steamship Company, Limited*,[1] that proceedings with a view to making good a maritime lien might properly be initiated by obtaining in the Bill Chamber such an order as had been pronounced by the Second Division in the case of *Lucovich*.[2]

The LORD PRESIDENT said that the Lord Ordinary on the Bills might grant the application,* following the form of interlocutor in *Lucovich's* case,[2] with this exception, that the master of the vessel should be ordained to appear at the bar on the morning of the following Tuesday.

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[1] 1913 S. C. 967. [2] (1885) 12 R. 1090.

* But *cf.* C. A. S. 1913, D. i. 6.

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M'Connachie.

LORD JOHNSTON and LORD SKERRINGTON concurred.

THE LORD ORDINARY on the Bills pronounced the following order:—"Appoints the said petition with a copy of this deliverance to be served upon W. Grunberg, master of s.s. 'Wm. Eisenach' and designed in the petition, and allows him to appear at the bar of this Court on Tuesday, 23rd June 1914, at 10 o'clock A.M., and lodge answers to this petition, within eight days after service, if so advised; grants warrant to messengers-at-arms to arrest the s.s. 'Wm. Eisenach' *ad interim*, and that on exhibition of a certified copy of this interlocutor, and appoints the execution of arrestment to be reported to the Lord Ordinary within twenty-four hours." *

WILLIAM B. RAINNIE, S.S.C., Agent.

No. 94.

June 26, 1914.

Macdonald v. Keeper of the General Register of Sasines.

MRS ANNIE MACDONALD, Petitioner.—*Anderson, K.C.—A. M. Stuart.*
THE KEEPER OF THE GENERAL REGISTER OF SASINES, Respondent.—*Chree, K.C.—W. Mitchell.*
SIR JAMES PATTEN MACDOUGALL, Deputy Clerk Register, Minuter.—*Gillon.*
DONALD GOW, Respondent.—*Skinner.*

Public Records—Writ—Registration—Keeper of General Register of Sasines—Discretion to refuse to register writ—Procedure where exercise of discretion challenged.

The Keeper of the General Register of Sasines has a discretion to refuse to register any deed presented to him. Any question which may arise with regard to an exercise of this discretion should be referred, in the first instance, either by the Keeper or by the party presenting the deed, to the Deputy Clerk Register, and by him, in cases of doubt or difficulty, to the Court.

Observed that the practice recently followed by the Keeper of referring such questions to the Secretary for Scotland, with a request that Crown counsel should be consulted, was incorrect, but that the Deputy Clerk Register might, if he so pleased, consult Crown counsel on such a question.

Public Records—Writ—Registration—General Register of Sasines—Deed in form of general testamentary settlement—Insufficient description of subjects—Refusal to register.

Circumstances in which the Court *refused* to ordain the Keeper of the General Register of Sasines to record in that Register a deed in the form of a general testamentary settlement, the granter of which was still alive.

Observations (*per* the Lord President) on the circumstances in which the Keeper might refuse to record a deed in which the subjects to which it applied were insufficiently described.

1ST DIVISION. ON 25th September 1913 Mrs Annie Macdonald presented a petition to the Court, praying that the Keeper of the General Register of

* This interlocutor differs from that pronounced in the case of *Lucovich*, in respect that, being a Bill Chamber interlocutor, it contains no order for intimation on the walls and in the Minute-book.

Sasines should be ordained to record a deed, which had been presented to him, in the Register of Sasines.

The deed in question was in the form of a general testamentary disposition, dated 27th September 1912, by William Macdonald, the petitioner's son. In it the granter "in order to settle my affairs in the event of my decease," disponed his whole means and estate to his wife, Mrs Mary Murray or Macdonald, in the event of her surviving him, and appointed her to be his sole executor. The deed contained the following clauses:—"And I hereby specially provide and declare that the before-written conveyance in favour of my said wife is granted subject to the liferent right presently enjoyed and to be enjoyed by my mother, Mrs Annie Macdonald, should she survive me, of the house in No. 140 M'Donald Road, Edinburgh, the title to which is in my name, and burdened with £135, which I undertake to pay out of my own funds, it being understood that my said wife shall, as I at present do, keep the house wind and water tight and pay the annual feu-duty and proprietor's taxes of said house during my mother's lifetime. . . . And I, the said Mrs Mary Murray or Macdonald, in the event of my surviving my said husband, undertake to see the said right of liferent to his mother implemented at the sight and to the satisfaction of Alexander Campbell, Solicitor, Supreme Courts, Edinburgh, whom failing, his son, Robert Somervell Campbell, solicitor there, who is hereby appointed by me, the said William Macdonald, to see that the said right of liferent of said house, or its equivalent, is secured to my said mother, and to see that the said balance of £135 and interest is paid by me, and failing this I authorise and empower my said mother to pay up the said balance and take the title to the said house to my said mother in liferent and my said wife, whom failing, myself or my successors and assignees in fee subject to repayment of the sum advanced by my said mother to redeem the said house, or otherwise, to sell the said house and invest the free proceeds for behoof of my said mother in liferent, and my wife, whom failing, myself or my successors or assignees in fee: And I dispense with the delivery hereof: And I consent to registration hereof for preservation." The following warrant of registration was endorsed on the deed:—"Register on behalf of Mrs Annie Macdonald, widow, 140 M'Donald Road, Edinburgh, for my rights and interests within mentioned in the Register of the county of Edinburgh. ANNIE MACDONALD."

The petitioner averred that this deed, duly stamped and bearing the warrant of registration, had been presented to the Keeper of the General Register of Sasines on 14th July 1913, but that the Keeper had refused to record it. She further averred that the house in question had been purchased with moneys provided by the petitioner and her family, and that the title thereto had been taken in William Macdonald's name, although he in fact held it in trust for himself, his mother, and his sister; that no qualification to the title had been put in writing until the execution of the deed in question, the object of which was, she averred, to define her rights in the property and to maintain her in the liferent thereof in respect of advances she had made towards the purchase price; that in May 1913, in order to prejudice her rights, William Macdonald had granted a disposition of the subjects to Donald Gow, who had, since the date on which the petitioner's deed had been

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presented, recorded this disposition in the Register of Sasines; and that it was necessary, in order to establish the petitioner's rights, to have her deed recorded as at the earlier date of its presentation.

Answers were lodged for the Keeper of the General Register of Sasines and for Donald Gow. The answers for the former contained the following statement:—"The description of that house contained in said document does not conform to the statutory requirements regulating registration of writs in the Register of Sasines. It is not one of the classes of description recognised in Scots conveyancing, *e.g.*, general or particular description, nor is it a description in statutory form. In any event it is not a description sufficient for the identification of the property. *Quantum valeat* it may be made available as a mid-couple in the completion of the title of the party alleged to be in right of the liferent. Should a deed containing a description of lands in terms so vague be admitted to the Register it would cause much confusion and needless expense, particularly in regard to searches and to rights, whether of ownership or of security, in relation to the lands."

Counsel were heard before the First Division (consisting of the Lord President, Lord Mackenzie, and Lord Ormidale) on the petition and answers on 1st and 22nd November 1913.*

On 3rd December 1913 the Deputy Clerk Register lodged a minute in which he stated that the discussion in the petition had been brought under his notice, and in which, with a view to informing the Court as to his position and duties as Deputy Clerk Register, he referred to the authorities, &c., undernoted.[1]

On 17th December 1913 the Court remitted to the Deputy Clerk Register and to the Deputy Keeper of the Signet to inquire and report as to the practice of the Keeper of the General Register of Sasines to reject or return writs transmitted to him for registration.

A report in terms of this remit was made, the material conclusions of which are set forth in the opinion of the Lord President.

Counsel for the parties intimated that they did not desire to present further argument.

At advising on 26th June 1914,—

LORD PRESIDENT.—In this case an appeal is made to us to exercise the *nobile officium* of this Court under unprecedented circumstances, for we are asked to ordain the Keeper of the General Register of Sasines forthwith to record, in the appropriate division of the Register, a deed of settlement granted by William Macdonald, dated 27th September 1912, as on the date when it was presented for registration in the said Register.

* On the subject of the Keeper's powers to return or refuse writs presented to him for registration reference was made, *inter alia*, to the Report of Committee on Land Registration in Scotland, 18th October 1897 (P. P., 1898, vol. xxxiv. p. 427, [c. 8727]), secs. 7 to 46, "Control of Register," and especially to the statutes there cited.

[1] Campbell v. Stuart, (1795) M. 13,140; Land Registers Act, 1868 (31 and 32 Vict. cap. 64), secs. 9, 10, 20, and 24; Lord Clerk Register (Scotland) Act, 1879 (42 and 43 Vict. cap. 44); and letter from Lord President Inglis to the then Lord Clerk Register, dated 15th December 1875, printed in the Report of the Committee on Land Registration in Scotland, *cit. sup.* sec. 33.

Now I do not say that we might not, under certain circumstances, accede to that request. I am certain that these circumstances do not exist in the present case for, when examined, the deed which we are asked to ordain the Keeper to record appears to be a testamentary settlement, and nothing else, executed by the son of the petitioner, who is still alive and may to-morrow revoke the whole deed if he pleases. For the settlement of the succession to his means and estate after his death he dispones to his wife, but only in the event of her surviving him, his whole estate, but under burden of the liferent right presently enjoyed by his mother, Mrs Annie Macdonald, the petitioner, should she survive him, in the house in No. 140 M'Donald Road, Edinburgh, "the title to which is in my name." Now, how a valid infeftment in the liferent right could pass upon an ambulatory deed is to me incomprehensible. It would, I think, be a sheer abuse of the Register of Sasines to record this deed in it. But that was not the ground upon which the Keeper of the Register refused to accept the deed for registration, for, in the answers given in by him, he explains "that No. 140 M'Donald Road is a tenement of houses consisting of a number of flats and houses therein, one of which (the respondent has been informed) is the house referred to in said writ. The description of that house contained in said document does not conform to the statutory requirements regulating the registration of writs in the Register of Sasines. It is not one of the classes of description recognised in Scots conveyancing, *e.g.*, general or particular description, nor is it a description in statutory form. In any event it is not a description sufficient for the identification of the property . . . Should a deed containing a description of lands in terms so vague be admitted to the Register it would cause much confusion and needless expense, particularly in regard to searches, and to rights, whether of ownership or of security, in relation to lands."

Now, that seems to me like good sense. But it was argued to us on behalf of the petitioner that the Keeper of the Register had no duty, and, therefore, no right, to question the sufficiency of the description in any deed tendered to him for registration; that he had no discretionary power in the matter, and was bound, without cavil or question, to record the deed as it was presented to him. To this view thus stated we found ourselves wholly unable to accede, for we considered that a highly-placed official like the Keeper of the Register of Sasines was bound, in the faithful discharge of his statutory duties, to exercise some care and control over the Register in order to secure its efficiency for the purposes for which it was created. But, before determining the limits and scope of the discretionary power which we considered was confided to the Keeper of the Register, we thought proper to remit to the Deputy Clerk Register and the Deputy Keeper of the Signet to inquire into and report as to the practice of the Keeper of the General Register of Sasines to reject or return writs transmitted to him for registration.

We now have before us the report of these two very capable public officials. It is a very satisfactory document from all points of view, and I cannot but express on behalf of my brothers Lord Mackenzie and Lord Ormidale and of myself our indebtedness to Sir James Patten Macdougall

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and Sir George M. Paul for the pains they have taken to investigate and elucidate this important although hitherto somewhat obscure topic.

As we fully anticipated, it appears from the report that "the rejection or return of a writ has its source in the initiative of the Keeper, and—except as regards the two disqualifications of defects in the stamp-duty and in the warrant of registration—it seems to have no statutory basis, beyond this, as the Keeper explains to us, that he believes himself to be by implication charged with the maintenance of the correctness and purity of the Register in the interests of proprietors, purchasers, lenders, and others dealing with land." It further appears from the report, as we might have anticipated, that the Keeper finds it difficult, even almost impossible, to apply general rules; that each case of rejection or return must be considered upon its own merits; and further, that, in performance of the duty which, on a fair view of the requirements of the statute, he believes to be imposed upon him, the Keeper informed the reporters that he held himself bound to refuse to record a writ which does not contain the essentials to enable him to frame a statutory minute, and that this has been the invariable practice of successive Keepers since at least 1853. And it appears from the report that during the past sixty years no fewer than 28,963 deeds have been rejected upon a variety of different grounds which are summed up under seven separate and distinct heads in the report. Two of these heads seem to me to be singularly apposite to the case in hand, (1) writs have been rejected—and during the last sixty years to the number of no fewer than 663—on the ground that they were wholly inappropriate to the Register of Sasines—a ground of objection which might have been taken, although it was not taken, in the present case; (2) writs have been rejected, during the period I have mentioned, to the number of no fewer than 120, on the ground of error in description and insufficiency in description. That is as one might naturally have expected, because it would be impossible for the Keeper of the Register faithfully to discharge his statutory duty if he were to admit to the Record any deed however insufficient might be the description of the property conveyed, burdened, or released from burden. In the performance of his statutory duty it would be impossible for him to fulfil the function which is his, if he were not to exercise this discretionary power. So that, so far as precedent and practice are concerned, the act of the Keeper in this instance seems to have been fully justified.

If the Keeper of the Register, subject to the Deputy Clerk Register's approval, were to lay down a general rule that he would refuse to accept for registration any deed which was, in its description of the property conveyed, burdened, or released from burden, disconform to statutory requirements—the requirements of the 41st section of the statute of 1874 and the corresponding Schedule—I think it very unlikely that the Court would interfere with his discretion. In this case, therefore, we come to the conclusion that the Keeper has acted well within his discretionary powers.

But I must add that we do not, for the reason I am about to state, consider that this case has come before us in the proper form. Towards the close of the report before us a reference will be found to the report of the

committee presided over by Lord Low issued in 1898, in which the existing law and practice relative to the control of the Register of Sasines are exhaustively dealt with. To the conclusions of that report I desire very specially to direct the attention of the profession. In its conclusions I, in common with your Lordships, entirely concur.

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Now I find, on referring to Lord Low's report, that he points out that under the existing law the control over the Sasine Office is vested *inter alia* (firstly) in the Deputy Clerk Register, under the powers in sections 9 and 10 and 20 and 24 of the Land Registers Act of 1868, as regards the forms of indexes and abridgments and the direction and initiation, as well as the general powers of superintendence in use to be exercised from early times by the Lord Clerk Register under the control of the Court; and (secondly) in the Court of Session, in so far as its original powers have not been taken away by the Act of 1868. And then, summarising the existing law and practice relating to the control of the Register, Lord Low's report proceeds: "The general powers of control of the Court of Session and the Deputy Clerk Register should be expressly recognised, and express power should be given to the Deputy Clerk Register at his own instance, or at that of others having interest in the efficiency of the Register, to apply to the Court for direction in any circumstances of doubt or difficulty as to the working of the Lands Rights Registration system." From all this I conclude that in future, if any controversy arises with regard to the propriety of the action of the Keeper of the Register of Sasines in refusing or rejecting any deed transmitted to him for registration, that controversy ought, in the first instance, to be referred to the Deputy Clerk Register, and that reference may be made at the instance either of the Keeper of the Register of Sasines himself or of the agent of the party whose deed has been refused. If the Deputy Clerk Register finds himself in any doubt or difficulty, then it is his duty to refer to this Court for direction and guidance, because the Deputy Clerk Register now, as in the place of the Lord Clerk Register, is subject to the control and supervision of this Court in the performance of his statutory duties under the Lands Registration Act of 1868.

That I consider is the correct course to follow in the future in the event of any controversy arising. But I observe from a passage at the close of the report before us that this course has not been followed in recent years, because it appears that, where the Keeper has had any difficulty in deciding what action he should take in any particular case, his practice is to refer it to the Secretary for Scotland with a request that Crown counsel may be consulted, and that cases of this kind have recently occurred. Now I have no doubt whatever that that is an incorrect procedure which has been adopted in recent times, and as I chanced to be one of the law officers of the Crown who was consulted on these recent occasions I think it right to say that the attention neither of the Secretary for Scotland nor of the law officers of the Crown was directed to the conclusions of Lord Low's report, or indeed to the duties imposed by statute upon the Deputy Clerk Register. The opinion was asked and was given in the ordinary routine of the office, just as any public department refers —and rightly refers—to the law officers of the Crown for aid where legal

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difficulty arises. I see no objection whatever to the Deputy Clerk Register, if he so pleases, consulting the law officers of the Crown upon any question of doubt or difficulty, but the reference to the law officers ought to be made at the instance of the Deputy Clerk Register and not of the Secretary for Scotland, and in all cases the ultimate decision must rest with this Court. That, it appears to me, is the course of procedure which ought to be followed in future where any dispute of this kind arises.

In the present instance I am for refusing the prayer of the petition.

LORD MACKENZIE and LORD ORMIDALE concurred.

THE COURT approved of the report by the Deputy Clerk Register and the Deputy Keeper of the Signet, and refused the prayer of the petition.

CAIRNS & ROBERTSON, S.S.C.—SIR WILLIAM S. HALDANE, W.S.—JOHN NICOL, Solicitor—Agents.

No. 95.

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Baikie v. Kirkwall Educational Trust.

ALFRED BAIKIE, Petitioner (Respondent).—*Murray, K.C.—J. A. Inglis.*

THE GOVERNORS OF THE KIRKWALL EDUCATIONAL TRUST AND OTHERS, Respondents (Reclaimers).—*Macmillan, K.C.—Dunbar.*

Entail—Disentail—Effect of disentail—Debts affecting the heirs of entail—Burden imposed on heirs of entail in favour of third parties—Preservation of third parties' rights—Entail Amendment Act, 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 6 *and* 32.

A deed of entail contained a condition that the whole succeeding heirs of entail should, in all time thereafter, make payment annually of a sum of £200 to a certain kirk-session.

An heir of entail in possession presented a petition for disentail and contended that, as this condition was dependent on the continued existence of the entail, he was entitled to disentail without giving security for the further payment of these annual sums.

Held (*altering* judgment of Lord Anderson) that, under secs. 6 and 32 of the Entail Act of 1848, the condition was a debt affecting the heirs of entail for the perpetual payment of which the petitioner must give security before the lands could be disentailed.

1ST DIVISION. Ld. Anderson.

ON 17th June 1913 Alfred Baikie, the heir of entail in possession of the entailed estate of Tankerness, in the county of Orkney and Zetland, presented a petition for authority to disentail the estate.

Answers were lodged for the Governors of the Kirkwall Educational Trust and the Kirk-Session of the Paterson Congregation, Kirkwall, of the United Free Church.

The circumstances in which the petition was presented, and the contentions of the petitioner and of the respondents, sufficiently appear from the following passage in the opinion of the Lord Ordinary:—

"It is averred in the answers that, by the original deed of entail, which is dated 17th April 1860, the entailer, by article 10th of the said deed, declared it to be a condition of the entail that the heirs of entail should pay to the Session of the United Presbyterian Congregation of Kirkwall the sum of £200 per annum, one-half to be devoted to educational purposes and the other half to religious

purposes.* The said annual sum was regularly paid by the heirs of entail to the Session of the United Presbyterian Congregation of Kirkwall, between the years 1869 and 1889. Since the year 1889 the one-half of this annual sum, which is directed to be applied by said Session to educational purposes, has been paid to and administered by the Governors of the Kirkwall Educational Trust, who are a body incorporated by Order in Council under the provisions of the Educational Endowments (Scotland) Act, 1882. The other half of said annual sum continued to be paid to the Session of the United Presbyterian Church of Kirkwall until the union of the Free Church of Scotland and the United Presbyterian Church in 1900, after which union the said half was paid to and administered by the Session of the Paterson Church, Kirkwall, of the United Free Church of Scotland. The said annual sum was not made a real burden on the entailed estate, and no security was provided for its due payment beyond what is involved in that payment being made a condition of the entail.

"The respondents now maintain that the Court, as a condition of the disentail, should order the said annual payment to be charged upon the said lands, or should order such provisions as may appear to be just to be made for said annual payment. The respondents, in short, maintain that security should now be provided for payment in perpetuity of said annual sum.

"The petitioner, on the other hand, contends that he and those who may succeed him in the disentailed lands, as well as these lands, should be freed, on disentail, of all further payments to the respondents.† He maintains that the statutory effect of disentail is to put an end to the conditions of the entail as formulated in the entailing disposition, and that the obligation to the respondents is one of these conditions."‡

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* The deed provided:—"But declaring always that these presents are granted with and under the burden of the foresaid liferent and the burdens, conditions, prohibitions, provisions, declarations, and others after written, that is to say, with and under the following burdens and conditions, viz.:— . . . (Tenth) That the said whole heirs of entail, after the death of me and my said spouse, shall in all time thereafter, make payment to the Session of the United Presbyterian Congregation of Kirkwall, of the sum of Two hundred pounds, annually, and that in equal portions, half yearly at the terms of Whitsunday and Martinmas, commencing the first payment at the first of these terms that shall happen after the death of the longest liver of me and my said spouse, of the proportion corresponding to the period between the date of that event and the said first term thereafter." Then followed a declaration of trust for the administration of these payments by the Session.

† In the schedule of debts affecting the entailed estate or the heirs of entail lodged by the petitioner this provision of £200 per annum was included; but in a note appended to the schedule it was stated that this provision and certain other annual payments "are included in this schedule as conditions affecting the heirs of entail during the subsistence of the entail, but the petitioner contends that they are not, and cannot be made, real burdens on the lands."

‡ The Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), enacts:—Sec. 6. "Where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session under this Act in order to disentail such estate, in whole or in part . . . he shall make and produce in such application an affidavit setting forth that there are no

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On 18th March 1914 the Lord Ordinary (Anderson) pronounced an interlocutor containing, *inter alia*, a finding in the following terms:—"Finds (1) that the annual sum of £200, directed to be paid to the Session of the United Presbyterian Congregation of Kirkwall, falls to be secured, in terms of section 6 of the Entail Amendment Act, 1848, but that only during the lifetime of the petitioner, the present heir of entail in possession, and that on the death of the petitioner and the opening of the succession to a new series of heirs, the obligation to pay the said annuity will come ot an end."*

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entailer's debts or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee of the said entailed estate or the heirs of entail, or, if there are such debts or provisions, setting forth the particulars of the same . . . and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same. . . ."

Sec. 32. "An instrument of disentail under this Act may be in the form or as nearly as may be in the form set forth in the Schedule to this Act annexed . . . and such instrument, when duly executed, and recorded . . . in terms of this Act, shall have the effect of absolutely freeing, relieving, and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive of the tailzie under which such estate is held . . . Provided always that such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or encumbrances, or rights or interests, of whatsoever kind or description, held by third parties, and lawfully affecting the fee or rents of such estate, or such heir in possession or his successors, other than the rights and interests of the heirs-substitute of entail in or through the tailzie under which such estate is held, but that all such charges, burdens, and encumbrances, and rights and interests, other than as aforesaid, shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded."

* "OPINION.—[After the narrative quoted *supra*, his Lordship proceeded]—I had an excellent argument from both sides of the bar, with an exhaustive citation of authority. I have come to be of opinion that the true solution of the question is to be found in a *via media* between the extreme contentions urged by the parties.

"The point is ruled by the provisions of the 6th section of the Rutherfurd Act (11 and 12 Vict. cap. 36). Shortly stated that section provides, where there is an application for disentail, for disclosure of debts which affect, or may be made to affect, the fee of the entailed estate or the heirs of entail, in order that the Court may make provision for the payment of such debts. If, therefore, the section applies to the foresaid annual payments, the petitioner can only obtain the order to disentail which he desires on condition of making provision for the subsisting debt.

"The petitioner maintained that the section did not apply. He contended, at the outset, that there was no debt in existence. I am of opinion that there is a subsisting debt. The respondents have a *jus quæsitum* to the said annual payment, whereby they could compel payment from each successive heir of entail. The petitioner's next point was that the debt did not fall under any of the kinds or classes of debt dealt with by the section. There are three of these classes, (1) entailer's debts, (2) other debts, and (3) provisions to husbands, widows and chil-

The respondents reclaimed, and the case was heard before the First Division (without Lord Johnston) on 26th June 1914.

Argued for the reclaimers;—The petitioner, as heir of entail in possession, held the entailed estate under the obligation which the entailer had imposed upon him in favour of the respondents, and that obligation constituted a debt affecting the heirs of entail, which could not be defeated or affected by any deed of disentail.[1] Even if this had not been an entail but only a simple destination, the burden could have been made effective against the heir.[2] The case of *Dalgleish* v. *Rudd*[3] was distinguishable, because in that case the event on which alone the burden could come into existence had not occurred. The Lord Ordinary was wrong in limiting the respondents' rights to the lifetime of the petitioner. Authority to disentail could only be granted subject to the provision of perpetual security for the annual payment to which the respondents

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dren. The debt is not the entailer's debt, as it did not become exigible until after the entailer's death, nor does it fall under the third of the above classes. But it is clearly covered by the general words of the second class, and it affects, or may be made to affect, the heir of entail, that is, the heir of entail in possession, who is the petitioner. The petitioner founded strongly upon the case of *Dalgleish*, 25 R. 225. That case is distinguished from the present in these respects, (1) there the burden was only prospective; here it is actual; (2) there the creditor's right was dependent on the succession of a particular heir, who, because of the disentail could never succeed; here the creditor's right has vested and is operative. The case of *Dalgleish*, accordingly, does not seem to apply.

"The respondents urged, and I think rightly, that the part of the deed of entail which deals with this matter is testamentary. They contended that the entailer contemplated a payment in perpetuity of this annual sum. That may be so, but only because the entailer intended the entail to be perpetual. The entailer has made no provision, and probably he could not do so, to obviate the statutory effects of disentail. If I gave effect to the respondents' contention, I apprehend I should be making a new testamentary disposition on behalf of the entailer, which I have no power to do. I should (1) be providing a real security for payment of the annuity, as to which he made no provision, and (2) I should be laying the obligation of paying this sum on a different series of obligants from that fixed by the entailer. I should really be imposing the whole of the original obligation on the petitioner, and the entailer never contemplated or intended that this should be done.

"I must accordingly limit any condition I impose on the petitioner to the extent of the debt due by him. What is the extent of his obligation to the respondents? It is to pay them £200 a year during all the years of his life. I think the petitioner, as a condition of the disentail, must make provision for the discharge of the obligation to this extent. I shall accordingly grant the prayer of the petition for disentail of the entailed lands, on the petitioner finding security for the due and regular payment to the respondents of said annual sum during all the years of his life. On his death, when the succession opens to a new series of heirs, the obligation in favour of the respondents will come to an end. The following additional authorities were cited by the petitioner, *Stirling Crawfurd*, 15 D. 456; *Howden*, 12 S. 734; *Duke of Richmond*, 16 S. 172; *Schank*, 22 R. 845; *Bruce*, 1 R. 740; by the respondents, *Irving*, 9 Macph. 539; *Earl of Caithness*, 1912 S. C. 79. . . ."

[1] Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), secs. 6 and 32.

[2] Earl of Caithness v. Sinclair, 1912 S. C. 79, Lord Kinnear, at p. 85.

[3] (1897) 25 R. 225.

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were entitled, because, in accordance with the statutory provisions referred to, existing rights of third parties had to be preserved entirely unaffected by any deed of disentail.[1]

Argued for the respondent;—The burden in favour of the reclaimers imposed upon the heir in possession of the entailed estate was a condition of the entail, not a debt affecting the heirs of entail; and being a condition of the entail it subsisted only while the entail existed.[2] It had to be regarded as within the contemplation of the entailer that the obligation should exist no longer in the event of the estate being disentailed, because he laid the burden upon the heir in possession and not upon the lands. The debt so constituted was not within the first or the third categories of debts enumerated in section 6 of the Act of 1848, and it could not be regarded as within the remaining category of "other debts," because these must be debts *ejusdem generis* with those enumerated.[3] Section 32 of the Act could not afford any further support to the contention of the reclaimers, because it was merely executorial. Further, this provision must be construed as a condition of the entail and not as a testamentary provision. In the event of the heirs of entail failing and the estate passing to heirs whomsoever the condition would fly off. Accordingly, if any provision were made for the payment of £200 per annum to the reclaimers, it should not be made upon the basis of the actuarial value of such a payment in perpetuity without allowance for the contingency of failure of the heirs of entail.

Lord President.—Mr Inglis has said very well all that is to be said on the part of the petitioner in this case, but I have no doubt whatever that the first finding of the Lord Ordinary's interlocutor cannot stand.

This deed of entail which, when these proceedings come to an end will have vanished, contains a clause to the effect that the said whole heirs of entail, after the death of the entailer and his spouse, "shall in all time thereafter, make payment to the Session of the United Presbyterian Congregation at Kirkwall of the sum of £200 annually and that in equal portions half-yearly at the terms of Whitsunday and Martinmas." Now, standing the entail, there can be no doubt whatever that each heir of entail in succession in possession of that entailed estate would be bound to pay the £200 to the Kirk-Session of the United Presbyterian Congregation of Kirkwall; and, if he failed to make payment, the Kirk-Session would be entitled to proceed against the estate for the purpose of making good the annual payment of £200. Now, the petitioner desires to get rid of the entail altogether, and he is entitled to do so—but only on condition, as I read section 6 of the Act of 1848, that the Court, before they proceed with the disentail proceedings, shall see that all such debts as are referred to in section 6 are provided for. The Court is to order

[1] Irving v. Irving, (1871) 9 Macph. 539, Lord Benholme, at p. 543.

[2] Dalgleish v. Rudd, 25 R. 225, Lord Young, at p. 235, Lord Moncreiff, at p. 237.

[3] Crawfurd, (1853) 15 D. 456; Howden v. Porterfield, (1834) 12 S. 734; Duchess-Dowager of Richmond v. Duke of Richmond, (1837) 16 S. 172; Duncan, Entail Procedure, 231, and case of Carrick Buchanan there referred to.

such provision as may appear just to be made for all debts affecting, or that may be made to affect, the fee of the estate or the heirs of entail. Now, if this is—as I think it clearly is—one of the debts which affects the heirs of entail of this estate so long as the entail is extant, just provision must be made for it. The effect of the deed of disentail, when it is executed and the entailed estate is freed from the fetters, is not to destroy such a claim as this, for section 32 quite clearly and distinctly provides that the effect of the disentail is to leave intact such burdens, charges, and encumbrances, rights and interests, and that they are to remain just as valid and operative, in all respects, as if the deed of disentail had never been executed.

It does not appear to me that the two clauses to which I have referred —section 6 and section 32—are open to two meanings. I have no doubt that this is one of the debts referred to in section 6 and one of the debts referred to in section 32, and that the Lord Ordinary has plainly gone directly against the statute. The provision he thinks ought to be made, and which he would make, is to pay £200 a year to the respondents during all the years of the life of the petitioner. That is exactly what the Entail Act says is not to be done. What is to be done is to make the burden as effective and as fully operative as if the deed of entail remained in full force.

I am, therefore, for recalling the first finding in the Lord Ordinary's interlocutor and substituting for that finding a finding to the effect that the annual sum of £200 directed to be paid to the Kirk-Session of the United Presbyterian Congregation of Kirkwall falls to be secured in terms of section 6 of the Entail Amendment Act of 1848, and for remitting to the Lord Ordinary to see that it is so secured.

Lord Mackenzie.—I am of the same opinion, and I think that to take any other view would be going directly contrary to section 6 and to section 32 of the Rutherfurd Act.

Lord Skerrington.—As matters stand at present, the respondents' claim is secured by the fetters of the entail. By the recording of the instrument of disentail, the respondents' security would be prejudiced and they would require to resort to diligence against the estate. Now, the Rutherfurd Act, by its 6th section, foresaw such a state of matters, and it conferred a right upon the creditor to intervene and to object to the disentail being given effect to until security had been given for his just rights and interests, whatever these might be. In the present case I do not think there is any doubt as to the nature of the interest which ought to be secured. Accordingly I agree with your Lordships.

The Court pronounced an interlocutor in the following terms:—"Alter the said interlocutor by deleting from the first finding therein the portion thereof commencing with the words 'but that only' to the end thereof: With this alteration, adhere to the said interlocutor, and remit to the Lord Ordinary to proceed as accords."

J. C. & A. Steuart, W.S.—Robson & M'Lean, W.S.—Agents.

No. 96. THOMAS BLACK FOWLER, Pursuer (Respondent).—*Macphail, K.C.*—*Fisher.*

June 27, 1914. THE NORTH BRITISH RAILWAY COMPANY, Defenders (Reclaimers).—*Cooper, K.C.*—*J. R. Dickson.*

Fowler v. North British Railway Co.

Reparation—Negligence—Railway—Nervous shock resulting from fright—Door of railway carriage flying open.

Process—Proof or jury trial.

In an action of damages for personal injuries against a railway company the pursuer averred that, while travelling in a carriage on the defenders' railway, he leaned across to deposit tobacco ashes in an ash-holder placed at the opposite side of the carriage door, when the door suddenly flew open and he with great difficulty saved himself from being thrown out; that the speed at which the train was travelling caused the door to swing backwards and forwards violently; that the glass in the window was broken into fragments, and the door itself damaged; and that he endeavoured to shut the door, but was unable to do so. He further averred that he was greatly alarmed; that the shock arising from the danger in which he was placed caused severe injury to his nervous system, and that he had ever since suffered in his health. He also averred fault on the part of the defenders' servants for the insecure fastening of the door. The defenders pleaded that the action was irrelevant.

Held (following *Cooper* v. *Caledonian Railway Company*, (1902) 4 F. 880), that the pursuer had stated a relevant case for inquiry, but (*rev.* judgment of Lord Ormidale) that owing to the delicacy of the questions of fact and law involved the inquiry should be by proof and not by jury trial.

1ST DIVISION. Ld. Ormidale. ON 21st February 1914 Thomas Black Fowler, furniture dealer, Edinburgh, brought an action against the North British Railway Company, concluding for £100 as damages in respect of personal injuries sustained by him owing to the fault of the defenders.

The pursuer stated that he had purchased from the defenders a ticket from Berwick-on-Tweed to Edinburgh, and averred:—"At Berwick Station the pursuer entered a North-Eastern railway carriage and took his seat in the right-hand corner with his face towards the engine. The pursuer was alone in the carriage. He sat quietly reading a newspaper and smoking." (Cond. 3) "Shortly after leaving Dunbar the pursuer leaned across in order to deposit the ash from the cigarette which he was smoking in the ash-holder provided on the side of the door opposite to him. The train was at that time travelling at a high rate of speed. While the pursuer was in the act of leaning across for this purpose the carriage door suddenly flew open without any warning, and the pursuer with great difficulty saved himself from being thrown, or blown, out of the carriage. The pursuer had in no way touched or come against the lock of the said door. The speed at which the train was travelling caused the open door to swing backwards and forwards violently. The glass in the window of the door was broken into fragments, and the door itself was damaged. The pursuer endeavoured to shut the door, but was unable to do so. The train was stopped by railway signals at Drem, and the door was closed by the Railway Company's officials." (Cond. 4) "By the occurrence the pursuer was greatly alarmed. He narrowly escaped being

thrown out of the train, and the shock, arising from the danger in which he was placed, has caused severe injury to his nervous system. On his arrival in Edinburgh the pursuer was suffering from sickness and faintness, and was obliged to consult a doctor. Ever since the occurrence he has suffered in his health. The alarm of the occurrence preyed on his mind, and he has had to receive frequent attention from his medical advisers. In particular, the pursuer has suffered from sleeplessness, nausea, faintness, and giddiness. He has not yet fully recovered his health." (Cond. 5) "In addition to the personal suffering caused to him, the pursuer sustained damage from the foresaid occurrence owing to the interference with his personal attention to business. For fully three weeks, at an especially busy period of the year, the pursuer was prevented by his condition of health from giving more than a few hours' attention daily to his business." (Cond. 6) "The occurrence by which the pursuer was injured as aforesaid was due to the fault or negligence of the defenders' servants. The door swung open while the train was in motion through not being securely fastened. The absence of proper fastening would have been detected had any reasonable inspection been made before the train left on its journey, but such inspection was either not made at all, or was conducted in a careless and inefficient way."

The pursuer pleaded;—The pursuer, having sustained injury owing to the fault of the defenders, is entitled to reparation from the defenders.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (4) The alleged injuries to the pursuer having been caused, or materially contributed to, by his own negligence, the defenders should be assoilzied.

On 22nd May 1914 the Lord Ordinary (Ormidale) approved of the following issue for the trial of the cause, viz.:—"Whether on 16th December 1913 the pursuer while travelling as a passenger on the defenders' railway from Berwick-on-Tweed to Edinburgh was injured in his person through the fault of the defenders to his loss, injury, and damage?"

The defenders reclaimed and the case was heard before the First Division (without Lord Johnston) on 27th June 1914.

Argued for the reclaimers;—A railway company was not bound to take special precautions for nervous persons, their duty being to provide for persons of ordinary physical and mental strength.[1] It was not averred that the pursuer was a man of delicate health, and there was no averment of any danger such as would alarm a reasonable man. Therefore the action was irrelevant. The pursuer's attempt to shut the door, and his neglect to pull the communication cord, placed him in a situation for which the defenders were not responsible.[2] In any event the action was unsuitable for jury trial and, if it was not dismissed, proof should be ordered.

Argued for the respondent;—The pursuer having averred negligence, and injuries resulting therefrom, the action could not be

[1] Cooper v. Caledonian Railway Co., (1902) 4 F. 880, Lord Stormonth-Darling (Lord Ordinary), at p. 882.

[2] Adams v. Lancashire and Yorkshire Railway Co., (1869) L. R., 4 C. P. 739.

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dismissed as irrelevant. A person placed in reasonable apprehension of danger, and suffering injury to health in consequence thereof, was entitled to have damages assessed by a jury for negligence causing that apprehension.[1] The present case was indistinguishable from the case of *Cooper* v. *Caledonian Railway Company*.[2]

LORD PRESIDENT.—Speaking for myself, if it were not for the authority of the case of *Cooper* v. *Caledonian Railway Company*[2] which I find myself unable to distinguish substantially from this case, I should have considered the averments of the pursuer to be irrelevant. In respect of that decision, I am disposed to allow inquiry here; but I am clear that that inquiry ought not to be before a jury. This is a case totally unsuited for investigation before a jury; for questions of great delicacy, both of fact and law, will obviously arise. I propose, therefore, that we should recall the interlocutor of the Lord Ordinary, and remit to him to allow a proof in common form.

LORD MACKENZIE and LORD SKERRINGTON concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to allow a proof.

JAMES SCOTT, S.S.C.—JAMES WATSON, S.S.C.—Agents.

No. 97.

June 30, 1914.

H. R. MARSDEN, LIMITED, Pursuers (Respondents).—*Paton.* ALEXANDER BRUNTON & SONS, Defenders (Reclaimers).—*Macquisten.*

H. R. Marsden, Limited, v. Brunton & Sons.

Expenses—Abandonment of reclaiming note or appeal—Expenses of respondent.

Held (after consultation with the Judges of the Second Division) that, "as a general rule, when a motion is made by a reclaimer or appellant for the refusal of a reclaiming note or an appeal which has already been sent to the Roll, the respondent will be allowed in the case of a reclaiming note two guineas, and in the case of an appeal three guineas, of expenses. But in certain exceptional cases a remit will be made to the Auditor to tax the respondent's account of expenses. Where a reclaiming note or appeal has appeared in the Roll, or would in ordinary course soon appear in the Roll, then the respondent may, after communication with his opponent, proceed to print such documents as he thinks necessary for the presentation of his case to the Court; and, if he does so, then his expenses will be allowed if the Court, having regard to all the circumstances of the case, think that his preparations were reasonable." As a general rule "communication with the other side on the question of printing is indispensable if there is to be a remit of the respondent's account of expenses to the Auditor."

Circumstances in which, where a reclaiming note had been abandoned, the Court, applying the foregoing rules, allowed a respondent two guineas of expenses, but refused to remit his account of expenses for taxation.

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[1] Dulieu v. White & Sons, [1901] 2 K. B. 669, Kennedy, J., at pp. 673 and 679; Bell v. Great Northern Railway Co. of Ireland, (1890) 26 L. R. (Ir.) 428; Wallace v. Kennedy, (1908) 16 S. L. T. 485; Gilligan v. Robb, 1910 S. C. 856; A v. B's Trustees, (1906) 13 S. L. T. 830.

[2] 4 F. 880.

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H. R. Marsden, Limited, v. Brunton & Sons.

1st Division. Lord Dewar.

In an action at the instance of H. R. Marsden, Limited, against Alexander Brunton & Sons, the Lord Ordinary (Dewar), on 18th June 1913, decerned against the defenders in terms of the conclusions of the summons. The defenders reclaimed against this interlocutor, and the case was sent to the Roll of the First Division on 9th July 1913. On Friday, 12th June 1914, the case was put out in the Roll for hearing before the Extra Division in the following week, both parties having been aware for some days previously that the case would be put out for hearing in that week. On the same day intimation was made by the reclaimers to the respondents that the reclaiming note was to be abandoned.

On 17th June counsel for the reclaimers moved the Court, in Single Bills of the First Division (without Lord Mackenzie), to refuse the reclaiming note on payment of £2, 2s. of expenses to the respondents.

Counsel for the respondents asked for full expenses and for a remit to the Auditor, and stated that, although he had not been instructed for the hearing and no printing had been done, copies of certain documents which the respondents considered necessary for the hearing had been prepared for the printer. It was not stated that notice of the intention to print had been given to the reclaimers.[1]

At advising on 30th June 1914,—

Lord President.—We have found that there has been considerable diversity in practice and fluctuation of judicial opinion relative to the allowance of expenses to a respondent in cases where appeals or reclaiming notes have been withdrawn before hearing. Accordingly we thought it advisable to consult the Judges of the Second Division, and the conclusion we have arrived at is this: As a general rule, when a motion is made by the reclaimer or appellant for the refusal of a reclaiming note or an appeal which has already been sent to the Roll, the respondent will be allowed in the case of a reclaiming note two guineas, and in the case of an appeal three guineas, of expenses. But in certain exceptional cases a remit will be made to the Auditor to tax the respondent's account of expenses. Where a reclaiming note or an appeal has appeared in the Roll, or would in the ordinary course soon appear in the Roll, then the respondent may, after communication with his opponent, proceed to print such documents as he thinks necessary for the presentation of his case to the Court; and, if he does so, then his expenses will be allowed if the Court, having regard to all the circumstances of the case, think that his preparations were reasonable.

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[1] A note of the following authorities was subsequently handed to the Court:—*For defenders and reclaimers.*—Kirkwood v. Knox, (1868) 6 Macph. 898; Robertson v. Robertson's Executors, (1899) 2 F. 77; Davidson v. Allen, (1878) 5 R. 763; Maclachlan v. Mackay, (1899) 2 F. 163; Gilchrist & Co. v. Smith, (1901) 3 F. 329; Wyllie v. Richard, (1837) 16 S. 111; Gordon v. Kellie, (1848) 11 D. 166; Smith Sligo v. Knox, (1880) 8 R. 41. *For pursuers and respondents.*—Little Ormes Head Limestone Co. v. Hendry & Co., (1897) 25 R. 124; Johnston v. Rae, (1876) 3 R. 879; M'Guire v. Union Cold Storage Co., 1909 S. C. 384; Gilchrist & Co. v. Smith, 3 F. 329; Smith Sligo v. Knox, 8 R. 41; Henderson v. Menzies, (1901) 3 F. 858.

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It is of course impossible to lay down any hard and fast rule with regard to the time within which such preparation may be considered justified and the expenses allowable. Each case must depend upon its own special circumstances.

We think that it ought to be a general rule, but not an invariable rule, that communication with the other side on the question of printing, is indispensable if there is to be a remit of the respondent's account of expenses to the Auditor.

The present case we think falls under the general rule, and the respondent should have two guineas of expenses, because he had not communicated with the other side before making such preparations as he says he had made in anticipation of the hearing.

LORD JOHNSTON.—I am of the same opinion. There is one aspect of this matter which has always impressed itself upon me in considering such questions, and that is the impropriety of sending to the Court a series of separate and supplementary prints of documents, confusing the process and making it extremely difficult for the Court to follow the speeches of counsel. There was a time in which what used to be called joint prints were quite common. It seems, so far as my experience goes, that recently agents have deemed it their interest rather to avoid a joint print, if not to resent the suggestion that there should be one.

When one considers the matter on principle and practice, there is no doubt in principle that documents put in evidence are part of the proof, and that, strictly, the reclaimer would be bound to print the documents just as much as the proof. But there is equally little doubt that the reclaimer is by practice allowed to select the documents which he considers necessary for his own case. Still he cannot but know that the documents selected by him may require to be supplemented to include his opponent's case, and common sense, if not professional courtesy, requires that the reclaimer should submit to the respondent what he proposes to print, in order that it may be supplemented if necessary.

Now that appears to me to be a duty the performance or non-performance of which should affect the question of expenses. But then I do not think that the respondent is entitled to incur expense without communicating with the appellant as to what he wishes, and with a proper intimation that, if he is not met, he is to protect himself by printing what he requires. I think there ought to be reasonable communication between the parties, and that only on proof of such communication and intimation as I have referred to can a respondent claim expenses in such circumstances as we have here.

LORD SKERRINGTON.—I concur.

THE COURT refused the reclaiming note, remitted to the Lord Ordinary to proceed, and found the defenders liable to the pursuers in £2, 2s. of expenses.

CLARK & MACDONALD, S.S.C.—WALLACE & PENNELL, S.S.C.—Agents.

JOHN CARLTON, Pursuer (Respondent).—*A. O. M. Mackenzie, K.C.*—*J. B. Young.*
WILLIAM SINCLAIR, LIMITED, Defenders (Appellants).—*Duffes.*

No. 98.
July 2, 1914.
Carlton v. William Sinclair, Limited.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1)—*Accident arising out of and in the course of the employment—Workman assisting fellow-servants to work for a third party.*

A carter in the service of carting contractors was employed to deliver goods to consignees. It was his duty to sling the goods from his lorry into tackle provided by the consignees, but he had no duty to receive or stow the goods inside the consignees' warehouse. A custom prevailed among the carters, which was not proved to have been known to their employers, that, when several were delivering goods at the same time, one remained outside and slung the goods from all the lorries, while the others entered the warehouse and helped the consignees' servants to receive and stow the goods. For these services each carter, including the one who remained with the lorries, received remuneration from the consignees. When the carter, in accordance with this custom, was slinging goods from several lorries belonging to his employers, he was injured by accident while working on a lorry other than that of which he was in charge.

Held that the accident did not arise out of and in the course of his employment with the contractors.

Goslan v. *James Gillies & Co.*, 1907 S. C. 68, *distinguished.*

1ST DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Glasgow, in which John Carlton claimed compensation from William Sinclair, Limited, in respect of injuries sustained while in their employment, the Sheriff-substitute (D. J. Mackenzie) awarded compensation, and, at the request of the employers, stated a case for appeal.

The case set forth:—"(1) That the respondent is a carter, and was in the employment of the appellants on 19th December 1913: (2) That on above date the respondent was sent by the appellants, along with another carter in their employment, named Imrie, to convey twenty bags of glucose from the premises of the Anchor Line to the warehouse of Messrs Burton, Son, & Sanders, Kinning Park, Glasgow: (3) That on arrival at said warehouse the respondent found four other lorries there, each with a lorryman in the service of the appellants, and that these lorries contained sugar in bags also for delivery to Messrs Burton, Son, & Sanders: (4) That the duty of the appellants' carters consisted in delivering the goods by slinging the bags on to tackle which was provided by the consignees, and that they had no duty to receive or stow the goods inside the consignees' warehouse: (5) That in accordance with a custom which prevailed among the carters, one remained on the lorries, slinging the bags from each in turn, while the others assisted Messrs Burton, Son, & Sanders' men in receiving and stowing the goods in the warehouse. This practice was not instructed by the appellants, and it is not clear from the evidence whether or not it was within their knowledge: (6) That the carters, including the man who slung the bags, were in the habit of receiving sixpence each for their services from Messrs Burton, Son, & Sanders, but that this practice was not approved of, or consented to, by the appellants: (7) That on this occasion the respondent, while slinging

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bags of sugar from the third lorry in succession, not being his own lorry, was struck by a bag and the lifting tackle, which gave way and knocked him down, injuring his left hand and side: (8) That he still suffers from the injury to his left hand, and is incapacitated from following his occupation as a carter: (9) That although the respondent was not engaged in slinging bags from his own lorry, he was so engaged on the lorry of a fellow-workman, and was in the employment of the appellants at the time."

The Sheriff-substitute "found in law that said accident and injury arose out of and in the course of the respondent's employment with the appellants," and awarded compensation.

The questions of law for the opinion of the Court were, *inter alia*:—"(1) Whether, upon the evidence as stated above, I could competently find that the said accident arose out of and in the course of the employment of the respondent with the appellants within the meaning of the Workmen's Compensation Act, 1906?"

The case was heard before the First Division (without Lord Mackenzie) on 2nd July 1914.

Argued for the appellants;—When he was unloading a lorry other than that of which he was in charge, the respondent was doing the work of a fellow-servant in pursuance of an arrangement for hire entered into with third parties, viz., the consignees, and in so doing he was not acting in the course of his employment.[1] It was no part of the respondent's duty to sling goods from the lorry of another carter, and it was the duty of the consignees' servants to attend to the stowing of goods in their warehouse. What was done by the respondent to oblige a fellow-workman or the consignees was done without the knowledge of his employers, and was not in accordance with any system of theirs. If he had been dealing with the goods on his own lorry in accordance with the appellants' system and had been injured, then the appellants might have obtained indemnity from the consignees if the injury had been due to the fault of their servants,[2] and the respondent had no right to adopt a system whereby he became a fellow-servant of the servants of the consignees to the prejudice of his employers' right to claim indemnity.

Argued for the respondent;—It was expressly found that it was the duty of the respondent to sling goods on to tackle, and all that could be said against his work here was that he was doing this work on another man's lorry. But all the lorries engaged in conveying goods to the premises of the consignees were those of the respondent's employers, and all the carters were his fellow-servants in their employment. In such circumstances it was an absurdly narrow limitation to put upon his duties to say that he must only sling goods from his own lorry. At any rate it was a reasonable extension of these duties to help to unload a fellow-servant's lorry. The kind of work he was doing was exactly the kind of work he

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[1] M'Allan v. Perthshire County Council, Western District, (1906) 8 F. 783; Smith v. Morrison, (1911) 5 Butterworth's W. C. C. 161; Cronin v. Silver, (1911) 4 Butterworth's W. C. C. 221; Smith v. Lancashire and Yorkshire Railway Co., [1899] 1 Q. B. 141; Reed v. Great Western Railway Co., [1909] A. C. 31, *per* Lord Macnaghten, at p. 33; Conway v. Pumpherston Oil Co., Limited, 1911 S. C. 660, *per* Lord President Dunedin, at p. 665.

[2] Workmen's Compensation Act, 1906, sec. 6.

was employed to do, and in the cases where a workman had been held to have undertaken work he was not entitled to perform the work had been something quite outside the scope of his employment.[1] Further, the work that it was alleged was done here for the consignees, or for the respondent's fellow-servants, was done to expedite the work of the appellants, because it enabled their workmen to unload a number of lorries in a very much shorter time than would be occupied if each carter confined his attention to his own lorry. What was done by the respondent was therefore done in the interest of his employers.[2]

LORD PRESIDENT.—I think the arbitrator has reached a wrong conclusion in this case, and that the accident which befell the respondent did not arise out of or in the course of his employment. His employers are a firm of carting contractors who have lorries, horses, and men engaged, *inter alia*, in carrying goods from the docks to various places of business in Glasgow. On the occasion in question the lorryman who was hurt had carried the goods from the quay to a consignee in Kinning Park. The consignee, for reasons of his own, which are not explained but which we can conjecture, when he found a number of lorries congregated at his premises, invited all the lorrymen except one to go inside and assist in receiving and stowing the goods in his warehouse. The one who was left outside had the duty thrown upon him of slinging all the bags from all the lorries which were congregated outside. That was the system which the consignees adopted and which the lorrymen fell in with. They were remunerated by the consignee for the performance of that duty. But that was not the duty for which the lorrymen were engaged by their employers.

The fourth finding in the case sets out quite clearly that the duties of the lorrymen were confined to carrying the goods to the premises, and slinging the goods by tackle which was supplied by the consignee, who received the goods and stowed them by his own servants and not by servants employed by the carting contractor. Accordingly it appears to me that, at the time when the accident happened, the respondent was in reality engaged in performing the work of the consignee and was not engaged in work for which he was employed and paid by his own masters.

The cases cited appear to me to have no bearing upon the present. The one which comes nearest to it is that of *Goslan* v. *James Gillies & Company*.[3] The reason for the decision there is quite plain when one sees that, although the injured man was not when he met with his accident engaged in the work for which he was specially employed, he was engaged in performing his master's work and was merely rendering a helpful hand to his fellow-employees in furthering his master's interests. The only peculiarity in this case is that the kind of work in which the respondent was engaged

[1] Smith v. Fife Coal Co., Limited, 1913 S. C. 662; Kerr v. William Baird & Co., Limited, 1911 S. C. 701; M'Diarmid v. Ogilvy Brothers, 1913 S. C. 1103.

[2] Menzies v. M'Quibban, (1900) 2 F. 732, *per* Lord President Kinross, at p. 734; Goslan v. James Gillies & Co., 1907 S. C. 68.

[3] 1907 S. C. 68.

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at the time when the accident befell him was the same as that for which he was employed, and that the lorry on which he was injured was a lorry which belonged to his employer, and was driven by an employee of the employer. These facts seem to me to be wholly immaterial, for the ground of my judgment is that the respondent was not engaged in his master's business but in the business of the consignee at the time when the accident befell him.

Accordingly I propose that we should answer the first question in the negative.

LORD JOHNSTON.—I entirely concur with your Lordship. This case seems to me not to be covered by the case of *Goslan*[1] (which is the only one cited on either side which really bears upon the question), but is in contrast with it; and I think that that contrast justifies an entirely different judgment. It is quite true that the servant here was doing, in a sense, the work that he was employed to do, but he was doing it as part of an arrangement which entirely altered his employment, for he was not doing merely his own work, but the same work for one or more of his fellow-employees, in order to liberate them to do the work of another employer. He was, therefore—just as much as they were, because in concert with them—performing work not for his own master, but for the consignee of the goods being delivered, which the consignee was bound to supply men to do for himself. Although, therefore, he was doing technically the sort of thing which he was employed to do, it seems to me that he was just as much as any of the other four doing work outside the scope of his employment, and, therefore, I do not think that he is entitled to recover compensation from his proper employers.

LORD SKERRINGTON concurred.

THE COURT answered the first question of law in the negative.

WEIR & MACGREGOR, S.S.C.—WARDEN & GRANT, S.S.C.—Agents.

No. 99.

July 2, 1914.

Pressley v. Burnett.

GEORGE PRESSLEY, Pursuer (Respondent).—*M. P. Fraser—A. M. Stuart.*

JOHN ALEXANDER BURNETT, Defender (Appellant).—*Sandeman, K.C.—Lippe.*

Reparation—Negligence—Contributory negligence—Motor car—Collision at night—Pursuer on wrong side of road—Pursuer misled by defender's failure to show proper light.

A motor car was travelling at night on its proper, *i.e.*, the near or left, side of a country road, but, in contravention of the Motor Cars Order, 1904, without having a light burning upon the off or right side of the car. An approaching motor bicyclist, seeing only one light, mistook the car for a bicycle; and, imagining that the dark mass of the car was a cart travelling in the same direction as himself, swerved into the middle of the road to enable him to pass the cart when he overtook it. In consequence of this manœuvre he collided with the motor car and was injured. When the collision occurred he was about three feet on his wrong side of the centre of the road.

[1] 1907 S. C. 68.

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In an action of damages at the instance of the motor bicyclist against the driver of the car, *held* that the pursuer had not been guilty of contributory negligence, in respect that the error which he had committed in going over to the wrong side of the road had been induced by the fault of the defender in not having his off side light burning; and accordingly that the defender was liable in damages.

Extra Division. Sheriff of Aberdeen, Kincardine, and Banff.

GEORGE PRESSLEY, 494 King Street, Aberdeen, brought an action in the Sheriff Court at Aberdeen against John Alexander Burnett of Kemnay for £500 as damages for personal injuries and loss sustained by the pursuer in a collision which occurred on the public road between Blackburn and Kintore, on the night of the 20th September 1912, between a motor bicycle ridden by the pursuer, which was travelling from Kintore to Blackburn, and a motor car owned and driven by the defender, which was proceeding in the opposite direction.

The pursuer averred, *inter alia*;—(Cond. 3) "Said collision happened a little after 10.30 P.M. on said 20th September 1912, being at a period between one hour after sunset on 20th September, and one hour before sunrise on 21st September 1912. Between these hours it was the duty of defender in terms of Article II. (7) Motor Cars (Use and Construction) (Scotland) Order, 1904,* in driving his said motor car to carry on the extreme right or off side a lamp, lighted, constructed, and placed so as to exhibit a white light, visible within a reasonable distance in the direction towards which his car was proceeding, and in this duty he failed. Defender was charged in the Aberdeen Sheriff Court on 9th October 1912 with a contravention of said Article II. (7) on the occasion in question and pleaded guilty. It was further the duty of defender in driving his motor car along said road to steer clear of the pursuer's bicycle, and in this duty he failed. Defender was driving his said motor car along said road with only one light exhibited on the extreme left or near side. Pursuer had a bright light on the front of his motor bicycle, and had defender kept a proper look-out, as it was his duty to do, he could easily have avoided running into pursuer's bicycle. Said collision was due to the fault of defender in failing to have a light on the off side of his motor car, and to his gross carelessness, recklessness, and negligence in failing to steer clear of pursuer's motor bicycle."

The defender averred, *inter alia*;—"Explained and averred that at the time when the collision between pursuer's motor bicycle and

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* The Locomotives on Highways Act, 1896 (59 and 60 Vict. cap. 36), enacts:—Sec. 2. "During the period between one hour after sunset and one hour before sunrise, the person in charge of a light locomotive shall carry attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations to be made by the Local Government Board."

The Motor Cars (Use and Construction) (Scotland) Order, 1904, made by the Local Government Board, dated 30th March 1904, enacts:—Art. II. (7) (1). "The lamp to be carried attached to the motor car in pursuance of section 2 of the Act of 1896 shall be so constructed and placed as to exhibit . . . a white light, visible within a reasonable distance in the direction towards which the motor car is proceeding . . . The lamp shall be placed on the extreme right or off side of the motor car in such a position as to be free from all obstruction to the light."

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defender's motor car occurred, the defender was driving his car carefully, at a moderate speed, on his proper side of the road. The collision occurred just after the pursuer had come round a curve in the road, without giving any notice of his approach, and when the collision occurred the pursuer was riding his motor bicycle carelessly and negligently at too high a rate of speed and on the wrong side of the road. The pursuer's bicycle struck defender's car at or near its front off wheel. The collision was thus due entirely to the fault and negligence of the pursuer in (1) riding his bicycle on the wrong side of the road; (2) failing to keep a proper look-out, and to give due warning of his approach; and (3) riding at too high a rate of speed. Pursuer saw, or ought to have seen, the light on the front of defender's car, and had he kept to his own side of the road, pursuer's bicycle and defender's car would have passed each other in safety."

The defender pleaded, *inter alia*;—(1) The pursuer having by his own fault and negligence caused, or at least materially contributed to, any injuries sustained by him, the defender should be assoilzied.

A proof was allowed and led. It was proved that at the time of the collision the motor car of the defender was travelling on the proper, *i.e.*, the left or near side of the road; the right or off side lamp was not lit, but one lamp was burning (either the left or near side lamp, or an acetylene headlight situated in the centre of the front of the car). Immediately before the collision the motor bicyclist swerved slightly from his own side of the road, *i.e.*, his left or near side, across the centre of the road on to the other side, and came into contact with the right hand side of the car at a point about three feet beyond the centre of the road. Neither the car nor the bicycle was travelling at an excessive speed, and both drivers were keeping a good look-out. The circumstances which caused the motor bicyclist to execute the manœuvre mentioned were thus described by Lord Mackenzie:—"When he was travelling on his own, the left side of the road, at a rate which he estimates at about 12 miles an hour, he saw travelling on the opposite side of the road, at a distance of 200 yards off, a light which he took to be that of a bicycle. At the side of that light there appeared to him to be a huge dark mass. The dark mass which he saw appeared to him to be an object which he was going to overtake. He thought it was a cart. This induced him to go to the centre of the road with the intention of passing on the right side—*i.e.*, the proper side—of the cart. He took the centre of the road so as to make sure of not running into the back of the cart, leaving at the same time sufficient room for what he thought was a cyclist to pass him. It is plain, from an examination of the evidence, that the pursuer cannot be charged with an attempt to cut in between what he supposed was a bicycle and a cart, because, according to his theory, by the time he overtook the cart the bicycle would have travelled a considerable way past it. According to my estimate of the time it would have taken the pursuer to overtake the cart from the moment he first saw it this would have been about half a minute. Instead of overtaking the cart as he expected, he ran into the defender's motor car in about a quarter of a minute."

On 17th June 1913 the Sheriff-substitute (Young) pronounced the following interlocutor:—"Finds that between 10.30 and 11 on the night of 20th September 1912, a collision took place between a

motor car driven by the defender and a motor cycle belonging to and ridden by the pursuer on the public highway between Aberdeen and Kintore at a point about 10 miles from Aberdeen and near to the farm steading of Boghead: Finds that this accident happened through the fault of the defender in disregarding a statutory order and failing to carry on the extreme right or off side of the said car a lamp placed so as to exhibit a white light visible within a reasonable distance in the direction towards which the car was proceeding: Finds that contributory negligence on the pursuer's part has not been proved; and finds that in consequence of the said accident the pursuer has suffered injury and loss which may be reasonably estimated at £100: Therefore decerns against the defender for payment to the pursuer of the sum of £100 in name of damages with interest from the date hereof until payment . . . ."

The defender appealed, and the case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 17th June 1914.

Argued for the appellant;—The pursuer had been guilty of contributory negligence, and could not, therefore, recover damages from the defender, although the latter had admittedly been in the wrong in not having both side lamps lit. The fact that the defender's fault lay in not having complied with a statutory regulation did not affect the ordinary law regarding contributory negligence. The truth of this proposition was apparent from innumerable shipping cases in which a vessel in breach of a provision of the Merchant Shipping Act was yet allowed to plead that the other vessel was to blame for the collision. If the pursuer's own negligence was a *causa proxima* of the accident, and if reasonable prudence on his part would have avoided it, then the fact that there might also have been contemporaneous negligence on the part of the defender, which affected the accident, did not entitle the pursuer to a verdict.[1] The pursuer, on the facts proved, had been guilty of gross negligence. He had, firstly, no right to assume that the single light he saw was the light of a bicycle; it might have been the light of a van or other vehicle, or, as it proved to be, the light of a car with a defective set of lamps. A person using a public road was bound to take care of himself, and was not entitled to go full speed ahead, placing the same implicit trust in the lights he saw as did an engine-driver driving a railway engine. In the second place, even if the light had been the light of a bicycle, his conduct upon his own showing was wholly inexcusable. The only proper course for him to have pursued was to have slowed down behind the imaginary cart, and to have waited until the supposed bicycle, which might have been a motor bicycle travelling quickly, had passed. It was a cardinal rule of the road that a driver was not entitled to encroach on the course of an advancing vehicle with the object of passing a vehicle travelling in the same direction as himself, unless it was certain that he could do so without in anyway interfering with the free progress of the approaching vehicle. There was rarely room for such certainty at night; and at any rate the exist-

[1] Gibb v. Edinburgh and District Tramways Co., Limited, 1913 S. C. 541; Edinburgh and Leith Hiring Co., Limited, v. Midlothian County Council, (1906) 13 S. L. T. 758; The "Bernina," (1887) 12 P. D. 58, *per* Lindley, L.J., at p. 89.

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ence of any such certainty in the present case was quite incompatible with the pursuer's confused and contradictory story of the dark moving mass. The cases cited by the respondent for the purpose of proving that the plea of contributory negligence was not open to a person in breach of a statutory regulation were distinguishable in that they dealt with the relationship of master and servant, which was complicated by the element of contract. The case was quite different from the class of cases, of which the "*Bywell Castle*"[1] was an example, where one party by a wrong manœuvre put another into a position of difficulty, because here the pursuer would never have been in a position of difficulty had he remained as he should have done behind the supposed cart.

Argued for the respondent;—The accident had been entirely caused by the defender not having his off side lamp lit according to the statutory regulations. His failure to have the lamp lit misled the pursuer, and induced him to execute a manœuvre which would have been perfectly safe and legitimate if the supposition upon which he had been induced to make it had been well founded. He had not attempted to cut rashly in between the supposed bicycle and the cart because, according to his theory, by the time he overtook the cart the bicycle would have travelled a considerable way past it. His manœuvre accordingly was safe and legitimate, granted the existence of the premises on which it was founded. But even if it were not, it was at the worst a mere error in judgment, and error in judgment was not negligence, and had not the legal effects of negligence, especially in a case where the erroneous judgment was suddenly made in the face of a difficult situation brought about by the wrongdoing of the other party. Further, the plea of contributory negligence was not open where the party founding upon it was in breach of a statutory regulation, or at anyrate in such a case the negligence must be gross and palpable.[2]

At advising on 2nd July 1914,—

Lord Dundas.—The accident out of which this action of damages arises occurred about 10.30 p.m. on 20th September 1912 upon the public road between Aberdeen and Kintore, about 10 miles from Aberdeen. The pursuer was riding on a motor bicycle; the defender was driving his motor car unaccompanied by anyone. The machines were going in opposite directions; they collided; and the pursuer sustained serious injuries. The Sheriff-substitute awarded him £100; and no question is raised by either party as to this award, if liability attaches to the defender.

It is, I think, proved that, at and prior to the point of collision, the defender's car was proceeding at a moderate speed on the proper side of the road. But he did not exhibit a white light on the extreme right (or off) side of the car, as he was bound to do in terms of the Motor Car Order set out on the record. The defender seems to have his own ideas as to the

[1] (1879) 4 P. D. 219; Pollock on Torts (9th ed.), p. 490.

[2] Glegg on Reparation, (2nd ed.) pp. 456, 457; Wilson v. Wishaw Coal Co., (1883) 10 R. 1021; Pringle v. Grosvenor, (1894) 21 R. 532; Black v. Fife Coal Co., Limited, 1912 S. C. (H. L.) 33; Baddeley v. Earl Granville, (1887) 19 Q. B. D. 423; David v. Britannic Merthyr Coal Co., [1909] 2 K. B. 146, *aff.* (on different grounds) [1910] A. C. 74.

scope and meaning of the order; but he admits that he pleaded guilty in the Sheriff Court to a complaint charging him with having contravened the order. Now, I do not say that breach of a statutory order such as this would, as a fact *per se*, necessarily infer fault on the part of the contravener, so as to involve him in liability for damages, if an accident occurred (*cf. e.g.*, *Macfarlane* v. *Colam*, 1908 S. C. 56). It might be established that the absence of the prescribed light had no material bearing upon or relation to the occurrence of the accident. On the other hand, the fact of contravention may be of the greatest moment, and may of itself import liability as for fault and negligence, if it appears that the absence of the light was intimately connected with the occurrence of the catastrophe. I am satisfied that this was so in the case before us; and that the defender was in fault.

The defender pleads, however, that the pursuer cannot recover damages, because he himself was guilty of grave contributory negligence. The case in this aspect of it is, in my judgment, a narrow one; but I have come to be of opinion that the Sheriff-substitute arrived at the right conclusion. The negligence attributed to the pursuer is stated on record under three heads—(1) that he was on the wrong side of the road, (2) was not keeping a proper look-out, and (3) was riding too fast. I do not think there is any sufficient proof of the second and third heads. The defender's evidence is in conflict with the pursuer's, and is not materially corroborated. It is in regard to the first head that the difficulty and delicacy of the case arise. It is proved that at the moment of the accident the pursuer's cycle was on the wrong side of the centre of the road to the extent of about three feet. The defender's counsel presented a formidable argument to the effect that this was the proximate cause of the accident; that it would not have occurred if the pursuer had kept to his proper side; and that the defender had done nothing to induce the pursuer to deviate from that position. I have come to the conclusion, however, that the pursuer's deviation, to the extent mentioned, from his proper course was due, as I shall explain, to the defender's fault in not showing an off side light, as required by the order; and that the pursuer's error, not in itself a very large one, cannot be founded on by the original wrongdoer as contributing to the accident and relieving him of his liability. The pursuer,—the general honesty of whose testimony there seems to be no reason to doubt,—says that he saw a single light, apparently approaching him, at a distance which he estimated at about 200 yards. There is a good deal of conflict or confusion in the evidence as to whether or not the defender's car at the time in question was showing a headlight as well as the near side light. I do not propose to go into that matter; it does not seem to me to be of much importance; I think we are bound to assume that the pursuer saw only one light,—it may, for all that appears, have been the acetylene headlight, or it may have been the near side light. He says,—"I have always found that one light represents a cycle, and I took this light to be the light of some bicycle." I do not think the supposition was in any way unreasonable. I notice, for what it is worth, that the witness Hardie, a motor and cycle agent, says,—"If I met a single light on the road I certainly would assume

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it was a bicycle, until I could see it was any other thing." The pursuer further states that, by the side of the single light which he saw, "there appeared to be a huge dark mass" which was only visible for a few seconds, and which he took to be a cart proceeding in front of, and in the same direction as, his own cycle. "This induced me to go to the centre of the road with the intention of getting on the right of this dark mass . . . I anticipated no danger in passing the light, having made up my mind it was a bicycle; but having lost sight of the dark mass, I took the centre of the road so as to make sure of not running into the back of it." The pursuer says he did not intend to go beyond the centre of the road; but in point of fact he did so, as already mentioned. It was urged for the defender that, taking the pursuer's story as correct, he adopted a grossly negligent course in endeavouring to cut in between the (supposed) approaching cycle and the (supposed) retreating cart; and two witnesses,—Betts and Hardie, the latter a witness for the pursuer,—give their opinions to this effect, in answer to hypothetical questions. I do not, however, think that the pursuer's course can correctly be described as an attempt to "cut in" between the two objects he supposed himself to be dealing with. If, at the moment of his first observation of the light, it was about 200 yards distant, and if (as the pursuer depones) he was then riding uphill at a rate of about twelve miles an hour, he would not take more than about thirty seconds to overtake and pass the retreating vehicle; and his divergence to the right, in order to pass it, could scarcely be regarded as premature; and, if the approaching light had in fact been that of a cycle, he would, looking to the evidence as to the width of the road, have cleared it with abundant ease, notwithstanding his deviation from his previous course. The truth, of course, is that the approaching light was not upon a cycle, but was a light,—either the near one, or possibly the headlight,—of the defender's motor car; and that a considerable portion of the road, which the pursuer supposed to be unoccupied, was occupied by the body of the car as it projected between the light exhibited and the extreme off side, where a white light ought to have been shining. If an off side light had been exhibited, I do not see how the accident could have occurred. The pursuer would have seen that a motor car was approaching, and kept to his own side of the road. The absence of the off side light was, to my mind, the true cause of the mishap. I do not think the pursuer can be held in fault because, being misled by the darkness of the car's off side, he misjudged the situation; even though, in the course of a manœuvre which, if his conception of the situation had been correct, would have involved no danger, he came over the centre line of the road to the extent of about three feet. In my judgment, therefore, the defender was in fault, and the pursuer was not guilty of contributory negligence. I am for affirming the interlocutor of the Sheriff-substitute.

Lord Mackenzie.—This is a narrow case, but in my opinion there are not sufficient grounds for disturbing the judgment of the Sheriff-substitute. The defender does not deny that he was in fault, in respect that he was not at the time of the accident carrying a light on the extreme right or

off-side of his motor car. His case is that he has proved such negligence on the part of the pursuer as to disentitle him from recovering damages. It is, of course, just as necessary for the defender to prove affirmatively contributory negligence on the part of the pursuer as it is for the pursuer of an action to prove primary fault on the part of the defender. The pursuer maintains that what is charged against him as fault is at most an error of judgment, and that this error of judgment was due to the fact of his being misled owing to the defender not carrying the necessary light. This view I am prepared to take.

Upon the question whether the defender had his head lamp lit and the lamp on his near side, I think the evidence is in such a state that we are not in a position to differ from the view of the Sheriff-substitute, who accepts the pursuer's statement that, before the accident, he saw only one light advancing to meet him. If this were so, I take it from the evidence of James Hardie, who is a cycle and motor agent, that the pursuer was entitled, meeting a single light on the road, to assume it to be a bicycle. The same witness points out that a motor car having only one side light would be apt to mislead a motor cyclist coming from the opposite direction. The pursuer says that he was misled. The situation, as it presented itself to him, was as follows :—[Here followed the passage quoted *supra* in the narrative of facts]. The defender says that he kept as near to his left side of the road as possible (and I accept the evidence of the defender's witnesses on this point), but this only emphasises the fact that there would be the more free space, according to the expectation of the pursuer, even if he crossed somewhat the *medium filum* of the road. The pursuer had no warning, owing to the state of the defender's lights, that any part of that space was occupied by a motor car. I am unable to hold that the pursuer was not entitled, half a minute before he expected to overtake a cart going in the same direction, to pull out from his side of the road for the purpose of passing.

These considerations appear to me to be sufficient for the disposal of the case. I am unable to hold that the defender has proved contributory negligence, and am therefore of opinion that the judgment appealed against should be affirmed.

Lord Cullen.—I concur. It is clear, and is not disputed, that the defender was in fault in not having a lighted lamp on the off side of his car. The absence of this light was calculated to mislead the pursuer regarding the species of vehicle which was approaching him; and, according to his evidence, which I see no reason to doubt, it did mislead him. He judged the approaching vehicle to be a bicycle. I do not think he can be blamed for so thinking. The bulk of the defender's car, vaguely perceived in the darkness, he took to represent some other vehicle proceeding in the direction in which he was going. With a view to passing it he swung out into the roadway, crossed the middle line, and collided with the off side of the car. If the light he saw had been that of a bicycle, as he supposed, he would have been in safety, as the part of the road where the collision occurred would have been free for his passage. It was the defender's fault which led the pursuer to make more free with

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the roadway than would have been in accordance with his duty had he had warning that the other side of the road was occupied, to a width of five feet or so, by a motor car. In these circumstances, I am of opinion that the defender is not entitled to charge the pursuer with contributory negligence.

THE COURT dismissed the appeal.

W. & J. L. OFFICER, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 100.

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Fife County Council v. Fife Coal Co., Limited.

COUNTY COUNCIL OF FIFE, First Parties.—*Constable, K.C.—Cochran-Patrick.*
THE FIFE COAL COMPANY, LIMITED, AND OTHERS, Second Parties.—*Macmillan, K.C.—W. T. Watson.*

Local Government—Water-rates—Power of County Council to levy water-rates prior to supplying water.

Terms of clauses in a private Act of Parliament which were *held* to entitle a County Council to levy a domestic and a public water-rate, although the works authorised by the Act had not been constructed, and the County Council were consequently not in a position to supply water to the parties assessed.

1ST DIVISION. ON 11th June 1914 a special case was presented for the opinion and judgment of the Court upon questions which had arisen upon the interpretation of certain provisions of the Kirkcaldy District Water Order Confirmation Act, 1913.

The County Council of Fife and the Kirkcaldy District Committee thereof were the *first parties*, and the Fife Coal Company, Limited, and others were the *second parties*.

By the Act of 1913 the Kirkcaldy District Committee of the County Council of Fife were authorised to construct certain works; and, further, they were required to lodge annually with the clerk to the County Council an estimate of the expenses incurred or to be incurred for the purposes of the undertaking; and the County Council was authorised and required to levy public water-rates, and was authorised and required to levy domestic water-rates to meet these expenses.*

* The following provisions, *inter alia*, of the Kirkcaldy District Water Order Confirmation Act, 1913 (2 and 3 Geo. V. cap. clxix.), were quoted and narrated in the case as follows:—

"13. Section 58 of the Order of 1913 enacts as follows:—'The District Committee shall, and they are hereby authorised and required, once in every year on or before the fifteenth day of August, to lodge with the Clerk to the County Council an estimate of the expenses incurred or to be incurred for the purposes of the undertaking and water supply under the Order of 1910 and this Order, and of the water revenues other than assessments for and during the year next ensuing the fifteenth day of May then last past, including the sums necessary for payment of interest on and repayment of principal of any money borrowed for providing such supply.'

"14. Section 59 of the Order of 1913 provides:—'The estimate to be made up in manner before provided shall be submitted to the Finance Committee of the County Council, who shall revise the same and submit

After quoting the provisions of the Act of 1913, the case stated:—

"20. The first parties have not yet constructed the works authorised by the Order of 1913 . . . and are not yet supplying water for domestic purposes from any of these works. . . .

"21. Purporting to act in execution of section 58 of the Order of 1913 above quoted, the District Committee prepared an estimate of their financial requirements for the year 15th May 1913 to 15th May 1914 . . . The said estimate . . . showed a sum of £4000 requiring to be raised by assessment for these purposes. The said estimate was approved by the County Council, who resolved to levy a public water-rate for the year 1913-14 at 3d. per £, yielding approximately £3000, and a domestic water-rate at 9d. per £, yielding approximately, £1000, which together were estimated to yield the said sum of £4000.

"22. In pursuance of the said resolution demand notes for pay-

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the estimate so revised to the County Council at their meeting in the month of October in each year, and the County Council may, and they are hereby authorised and required annually to, impose and levy an assessment, to be called the domestic water-rate, upon all lands and heritages within the limits of supply, at such rate in the pound as shall be sufficient when supplemented by the public water-rate (if any) aftermentioned, and the other water revenues received under the powers of this Order, to defray the expenses referred to in the immediately preceding section. Provided that as regards all persons who shall be the owners or occupiers of any dwelling-houses, railway stations, or other buildings (other than tenements situated in a private close or place), they shall not be liable to be assessed in respect thereof for the domestic water-rate, unless such dwelling-houses, railway stations, or other buildings shall have been actually supplied with water under this Order, or unless some pipe of the District Committee, or through which the District Committee is entitled to give a supply to such premises, shall be laid down within one hundred yards of the same, measuring from the outer wall of such dwelling-houses, railway stations, or other buildings, or of any domestic offices in contact with and occupied as appurtenances of such dwelling-houses, railway stations, or other buildings, and that as regards the owners or occupiers of tenements situated in a private close or place, they shall not be liable to be assessed in respect of such tenements for the said domestic water-rate, unless such tenements shall have been actually supplied with water under this Order, or unless some pipe of the District Committee or through which the District Committee is entitled to give a supply to such premises shall be laid down within one hundred yards of the entrance to such close or place, or the nearest part thereof. . . .' Provision is also made that in the case of agricultural subjects only the dwelling-houses and their appurtenances shall be subject to domestic water-rate, and that canals, railways, tramways, water-works, gas-works, electric power or electric supply works, and underground water, gas, or electric pipes, and all mines, minerals, and quarries shall for the purposes of the domestic rate be rated on one-fourth of the annual value.

"15. Section 60 of the Order of 1913 authorises the County Council (if they think fit) to levy a public water-rate not exceeding 3d. in the pound on all lands and heritages within the limits of supply under the Order.

"17. Section 66 of the Order of 1913 provides:—'Until the District Committee are supplying water for domestic purposes from the works which they are by this Order and the Order of 1910 authorised to construct, or from some of such works, the County Council may from time to time pay all interest and instalments of principal as the same respec-

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ment of these rates were on or about 26th December 1913 sent out by the County Council to all the ratepayers within the limits of supply under the Order of 1913. The whole of the second parties hereto, being ratepayers within the said limits of supply, were served with said notes. . . .

" 23. Appeals against payment of the said water-rates were duly lodged with the County Clerk by the second . . . parties. The said appeals, which were founded upon the interpretation of the provisions of the Order of 1913 and the rights and powers conferred on the first parties thereby, were heard on 13th January 1913 by a committee of the County Council, to whom the matter was remitted, and were dismissed.

" 24. Questions having thus arisen between the parties hereto upon the interpretation of the provisions of the Order of 1913, they agreed to obtain the opinion and judgment of the Court of Session upon the matters in dispute, and the present special case has accordingly been adjusted for that purpose.

" 25. The first parties maintain that under section 68 of the Order of 1913 the costs of obtaining the Orders of 1910 and 1913 must be repaid within five years after the commencement of the Order of 1913, and under sections 41 and 47 certain annual payments . . . must be met during the year ending 15th May 1914, and that for the purpose of meeting said payments and others incurred or to be incurred they are entitled and 'required' in terms of sections 58 and 59 of the Order, to levy a domestic water-rate upon the second parties as ratepayers in the district, irrespective of any consideration as to the supply of water from the new works authorised by the Orders of 1910 and 1913. . . . The first parties further maintain that in terms of the discretionary power conferred by section 60 of the Order of 1913 they are entitled to impose and levy on the second parties a public water-rate in supplement to the domestic water-rate. . . .

" 26. The second parties contend (1) that the County Council cannot competently levy a domestic water-rate within the limits of supply under the Order of 1913 unless and until the District Committee are in a position to supply and do supply water for domestic purposes within these limits from the works authorised by the Orders of 1910 and 1913, and (2) that until the domestic rate is levied no public rate can be imposed."

The following were the questions of law which are the subject of

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tively may become due and require to be paid or set aside in respect of the moneys borrowed under this Order in respect of such works, and shall accumulate such payments with interest at such rate as the County Council may determine, not exceeding 4 per centum per annum, and shall charge the same against the rates leviable by them under this Order, and when and so soon as the domestic water-rate authorised by this Order shall become leviable the County Council may, and they are hereby authorised and required, from time to time to levy that rate to such an increased annual amount as when supplemented by the public water-rate (if any) may be required to repay any moneys so accumulated by them as aforesaid within such period from the date of borrowing as they may determine, not exceeding the respective periods specified in the section of this Order, whereof the marginal note is "Periods for repayment of borrowed moneys," and the moneys so accumulated shall be deemed to be capital expenditure for the purposes of this Order.'"

this report:—"(1) Are the first parties entitled to levy from the second parties a domestic water-rate for the year ending 15th May 1914? (2) Are the first parties entitled to levy from the second parties a public water-rate for the year ending 15th May 1914?"

The case was heard before the First Division (without Lord Mackenzie) on 2nd and 3rd July 1914.

LORD PRESIDENT.—The rating clauses in this statute appear to me to be as clear as their policy seems unimpeachable. An imperative duty is imposed upon the District Committee, once a year before 15th August, to make up an estimate of the expense incurred or to be incurred in connection with the order. And we see from the items that there are a variety of these expenses which must be paid at once, or within a certain limited period defined by the statute. The District Committee proceeded to discharge its duty under the 58th section. It made up a list of its financial requirements. We have the items before us. None of these items is challenged. In compliance with the statutory directions, it submitted its budget—if I may so call it—to the County Council. And the County Council are clearly authorised by this Act of Parliament to impose, in order to meet this expenditure, a domestic water-rate sufficient, when it is added to the public water-rate (if any) and the revenues which the Committee draw from the consumers of water, to meet the expenditure. There are certain persons who, when this domestic water-rate is imposed, are entitled to exemption—those who are owners of dwelling-houses, railway stations, and all other buildings which are not actually supplied with water, and the owners or occupiers of farmhouses that have not a pipe within 100 yards. Agricultural lands appear to be exempt, and there are certain statutory limitations on the valuation of other assessable subjects.

Now, it is expressly admitted in the case that the County Council, when it imposed the domestic water-rate which is here challenged, gave exemption to those persons who, by virtue of these statutory provisions, are entitled to be released from any claim. And the only objection taken to the imposition of this domestic water-rate is that the District Committee are not yet in a position to supply water. Well, why should they not impose the domestic water-rate before they are actually in a position to supply water? The statute does not forbid them to do so. The statute, on the other hand, lays upon them statutory obligations to meet which it seems to be imperative that the domestic water-rate should be levied; and, in the absence of any statutory provisions to the contrary, and being confronted with a clear statutory authority to impose the rate, I think it would be out of the question to say that we should interdict—for it would come to that—the County Council from imposing this domestic water-rate which the statute authorises them to impose, because they are not yet in a position to supply water to these consumers.

Appeal has been made to the 66th section of the statute for the purpose, I suppose, of showing that there was a way out of their difficulty opened up by the statute to the County Council to secure their money without imposing a rate. But I think that the answer, which is two-fold, is complete: (first) that the 66th section is optional and not imperative;

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Ld. President.

and (second) that its operation is confined to a mere accumulation of instalments and interest of money borrowed for the purpose of constructing the works.

I am, therefore, of opinion that the domestic water-rate may be levied now by the County Council.

With regard to the public water-rate, I really think there can be no arguable question raised. The 60th section of the statute is clear and distinct in its terms and is unqualified. [His Lordship then proceeded to deal with a question with which this report is not concerned.]

LORD JOHNSTON.—I agree in the result which your Lordship has come to, but I desire respectfully to dissociate myself, on one point, from your Lordship's expression of opinion. Your Lordship indicated that the enactments on this question of rating and assessment were clear. I regret to say I think they are clear. But your Lordship added, as I understood, that the policy was unimpeachable. That I venture to doubt, because, as it seems to me, the result is a perfect *reductio ad absurdum* of rating for a purpose such as that in question. The works authorised by the order are not under construction, and even if undertaken are certain not to be finished for a considerable time. During that period all the money which is required by the County Council and District Committee for the annual service, in providing what is truly intended to be a water supply for domestic use, will be cast not upon the shoulders of those for whom that domestic supply is being provided, but upon the shoulders of others who do not now need, and never will need, a domestic supply. The result seems to me to be grotesque. At the same time, owing, I think, to somewhat inconsiderate adoption of provisions from former private Acts and orders, and inconsiderate introduction of exceptions in this order, that result cannot be prevented.

Under these circumstances, regret it as much as I may, I am bound to concur with your Lordship in answering the first question as your Lordship proposes. On the second question I have no difficulty whatever, and entirely agree with your Lordship.

LORD SKERRINGTON.—I concur with your Lordships in the result at which you have arrived, but I think it my duty to say that I do not discover, in any of the clauses of the statute, the anomalies which seem to have struck my brother, Lord Johnston.

The difficulty in this case, if there be a difficulty, seems to me to arise from the form of the first and second questions which ask whether the rating authority is entitled to levy from the second parties, in the first place, the domestic water-rate, and, in the second place, the public water-rate. It appears, however, from the special case, that the second parties admit that any special exemptions to which the Provisional Order entitled them have been given effect to. Accordingly, the proper form for the first two questions was whether the rating authority was entitled, for the year in question, to impose and levy these assessments?

When one looks at sections 58, 59, and 60 of the Provisional Order, it is plain that only one answer can be made to these questions, namely, in

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the affirmative. The sole argument to the contrary is that, when one reads section 59, one discovers that there are so many exemptions from which particular classes of ratepayers will be entitled to take benefit that, in the final result, injustice may be done to persons who own canals, railways, tramways, water-works, gas-works, mines, minerals, and quarries.

Lord Skerrington.

I am not in the least concerned—nor do I think the Provisional Order was in the least concerned—with the question whether, in particular circumstances, what may seem to be a heavy incidence of taxation might fall upon particular persons. People must just take their chance of things of that kind. Such considerations throw no light upon the construction of sections 59 and 60, and do not avail to displace their plain meaning. I accordingly agree with your Lordships that the first and second questions must be answered in the affirmative.

THE COURT answered the first and second questions in the affirmative.

RONALD & RITCHIE, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 101.

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Spence v. Spence.

ISABELLA GRAY OR SPENCE, Pursuer (Reclaimer).—*Maclaren.*
LOCKHART JAMES SPENCE, Defender (Respondent).—*T. G. Robertson.*

Process—Reclaiming note—Competency of reclaiming note prior to closing of record.

In an action of declarator of marriage the pursuer sought, before the record had been closed, to amend the summons by adding an alternative conclusion of damages for breach of promise and seduction. The Lord Ordinary refused the amendment, continued the adjustment of the record, and granted leave to reclaim. The pursuer having reclaimed—

Held that the reclaiming note was competent although the record had not been closed.

1ST DIVISION. Lord Dewar.

ON 20th March 1914 Mrs Isabella Gray or Spence brought an action against Lockhart James Spence concluding for declarator of marriage. Before the record was closed the pursuer sought to amend the summons, (1) by substituting for a conclusion appropriate to declarator of marriage by declaration *de præsenti* a conclusion for a declaratory finding of facts and circumstances relevant to infer marriage; (2) by adding an alternative conclusion for damages for breach of promise and seduction.

On 23rd June 1914, after hearing counsel on a minute for the pursuer craving leave for these amendments, the Lord Ordinary (Dewar) pronounced an interlocutor in the following terms:—"Allows said amendment so far as regards the conclusion for declarator: *Quoad ultra* refuses said minute: . . . Continues the adjustment of record to a day to be afterwards fixed: and grants leave to reclaim."

The pursuer reclaimed, and, on the calling of the reclaiming note in Single Bills before the First Division (without Lord Mackenzie) on 3rd July 1914, counsel for the defender objected to the competency of the reclaiming note, and argued;—The Lord Ordinary had erred in granting leave to reclaim before the record was closed,

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because it was incompetent to reclaim while the record was still subject to adjustment in the Outer House.[1] Even if leave to reclaim had been competently granted, it was necessarily implied that that leave should not be exercised until the record was closed. It was highly inconvenient that a reclaiming note should be considered when there was no complete statement of the case before the Court, and this reclaiming note should be dismissed. Alternatively, it was open to the Court to delay consideration of the reclaiming note until after the record was closed.[2]

Argued for the reclaimer;—The respondent's objection to the competency of the reclaiming note should have been stated in the Outer House when leave to reclaim was sought. Leave having been granted, the reclaiming note was competently presented on the tenth day, but could not be competently presented if delayed to await the closing of the record.[3] In none of the provisions of the statutes or Acts of Sederunt regulating the requirements to be observed in presenting a reclaiming note was any reference made to the closing of the record, and the presentation of a reclaiming note prior thereto was competent since it was not expressly excluded.[4] The present reclaiming note could, in terms of the recent Act of Sederunt,[5] be disposed of on the summons, the minute of amendment, and the defences.

LORD PRESIDENT.—The Court is of opinion that this reclaiming note is competent, and, in the circumstances, highly expedient.

THE COURT repelled the objection to the competency of the reclaiming note, and sent the case to the Summar Roll.

JOHN ROBERTSON, Solicitor—ALLAN M'NEILL, S.S.C.—Agents.

No. 102.

July 3, 1914.

Crichton Stuart v. Ogilvie.

THE HONOURABLE LORD NINIAN CRICHTON STUART, Complainer (Respondent).—*Pitman*—*Wilton.*

JOHN BARRIE OGILVIE, Respondent (Reclaimer).—*Sol.-Gen. Morison*—*Lippe.*

Lease—Power of resumption—Notice—Resumption for "building, planting, feuing, or other purposes"—Statute—Construction—Ejusdem generis—Agricultural Holdings (Scotland) Act, 1908 (8 *Edw. VII. cap.* 64), *sec.* 18 (1) *and* (5).

The Agricultural Holdings (Scotland) Act, 1908, sec. 18, enacts, by subsec. (1), that in leases from year to year six months' notice of termination must be given; but by subsec. (5) it provides this exception:—"The provisions of this section relative to notice shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes. . . ."

A landlord let a grass park from year to year, and in the lease reserved power to resume possession on one month's notice, for "any

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[1] Brown v. Virtue & Co., Limited, (1889) 16 R. 987; Court of Session (Scotland) Act, 1868 (31 and 32 Vict. cap. 100), secs. 54 and 28. Lord Johnston referred to section 5 of the Court of Session Act, 1850 (13 and 14 Vict. cap. 36).

[2] C. A. S., 1913, D. i. 3. [3] Court of Session Act, 1868, sec. 54.

[4] Harper v. Inspector of Rutherglen, (1903) 6 F. 23.

[5] C. A. S., 1913, D. i. 2.

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Crichton Stuart v. Ogilvie.

purpose whatever except that of letting to another agricultural tenant." The landlord sought, on one month's notice, to resume possession of the park for the purpose of grazing pedigree sheep of his own. The tenant objected that, as this purpose was not *ejusdem generis* with "building, planting, feuing," it was not covered by the words "or other purposes," in subsec. (5); and, accordingly, that he was entitled to six months' notice.

Held that the purpose was covered by the words "or other purposes" in the subsection, and that the landlord was entitled to resume on one month's notice in terms of the lease.

Observed that, as "building, planting, feuing" did not form a genus, no question of *ejusdem generis* construction could arise.

Observed, further, that "or other purposes" covered any purpose consistent with the good faith of the lease.

1st Division. Lord Hunter.

On 11th April 1913 Lord Ninian Crichton Stuart, proprietor of the estate of Falkland, brought an action of suspension and interdict against John Barrie Ogilvie, farmer, Westfield Farm, Falkland, in which he craved the Court to interdict the respondent from trespassing on a park at Falkland House.

The circumstances in which the action was brought were thus narrated by the Lord Ordinary in his opinion:—"The complainer, who is the proprietor of the estate of Falkland in the county of Fife, seeks to interdict the respondent, who is tenant of the farm of Westfield on that estate, from unlawfully entering or trespassing upon the park at Falkland House in said county, known as the Mansion House Park, belonging to the complainer, and from grazing sheep or cattle or other live stock in said park, or in any other way interfering with the complainer's possession thereof. By minute of lease between the parties, dated 21st and 24th January 1907, the park known as the Mansion House Park, extending to 41 acres or thereby, was along with two other parks, possession of which was subsequently resumed by the complainer, let to the respondent for one year from Martinmas 1906 and from year to year thereafter. By the third article of this lease the complainer reserved to himself 'power to resume in whole or in part the lands hereby let for any purpose whatever, except that of letting to another agricultural tenant, on giving one month's notice of his intention so to do to the tenant,' it being provided that the respondent should be entitled to compensation for any loss or damage sustained by such resumption. By letter dated 10th February 1913 and addressed to the respondent the complainer's factor gave notice that the complainer would resume possession of said park as at 31st March 1913. It was explained to respondent by letter dated 21st February 1913 that the park was required for the grazing of pedigree sheep belonging to the proprietor. The respondent disputed the complainer's right to resume possession of the land, and proceedings were in consequence taken in terms of the Sheriff Courts (Scotland) Act, 1907, to have him ejected. He was ejected and his live stock removed at his sight to one of his own parks. Notwithstanding this ejection the respondent replaced his cattle in the field in question, and on 10th April, and again on 11th April, the complainer caused the respondent and his stock to be removed. Hence the present proceedings."

The complainer pleaded, *inter alia*;—(1) The respondent's occupation of said Mansion House Park having been terminated, in terms

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of the minute of lease between the complainer and the respondent, the complainer is entitled to be protected against interference by the respondent with his right of possession thereof.

The respondent pleaded, *inter alia*;—(3) In respect that on a true and sound construction of the minute of lease between the parties the complainer was not entitled to give the respondent the notice of 10th February 1913, and the respondent accordingly was not bound by its terms, the note should be refused. (4) In respect that the clause in said minute of lease founded on by the complainer, which purports to give the complainer power to resume possession on giving one month's notice of his intention so to do, is inept, and of no force or effect, the note should be refused.*

On 27th June 1913 the Lord Ordinary (Hunter) repelled the pleas in law for the respondent, and granted interdict as craved.†

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* The Agricultural Holdings (Scotland) Act, 1908 (8 Edw. VII. cap. 64), enacts:—Sec. 18 (1). "Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end . . . (*b*) in the case of leases from year to year . . . not less than six months before the termination of the lease." (5) "The provisions of this section relative to notice shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes. . . ."

† "OPINION.—[After the narrative quoted *supra*]—I think it clear that, so far as the terms of the lease are concerned, the complainer was entitled to give the notice he did, and to resume possession of the park at 31st March 1913. The respondent, however, maintains that the clause in the lease which purports to give the complainer power to resume possession on giving one month's notice of his intention to do so is inept and of no force or effect. This argument is based upon the provisions of the Agricultural Holdings (Scotland) Act, 1908 (8 Edward VII. c. 64). It is provided by section 18 (1) of that Act that 'Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end . . . (*b*) in the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease'; and by (2) of the same section that 'Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year and thereafter from year to year.' According to the respondent's contention, this clause by implication prohibits contracting out, and incorporates into all year to year leases a condition that the tenancy shall not be terminated unless notice to terminate has been given six months before the termination of the lease by one of the parties to the other. I think that a good deal may be said against this view, particularly in a case like the present, where the written lease is prior to the statute, and nothing is said therein as to express arrangements, lawfully entered into between landlord and tenant before the passing of the Act, becoming void or being modified by its provisions. In the view I take of the case it is not necessary for me to express a final opinion upon this matter.

"The complainer's counsel rested their argument mainly upon the terms of subsection (5) of section 18 of the 1908 Act, which provides,—'The provisions of this section relative to notice shall not apply to any stipulation in a lease entitling the landlord to resume land for building, planting, feuing, or other purposes, or to subjects let for any period less than a year.' The question is whether other purposes referred to in that provision include grazing of pedigree sheep. The Solicitor-General, founding

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The respondent reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 3rd July 1914.

Argued for the reclaimer;—By the operation of the Agricultural Holdings (Scotland) Act, 1908,[1] the provision of the reclaimer's lease upon which the complainer relied in support of his right to resume possession on one month's notice was inept. The reclaimer was entitled to six months' notice, because the purpose for which the complainer sought to resume possession was not within the class of purposes excepted by subsection (5) of section 18 of the Act from the provisions of that section which required six months' notice in the case of a lease from year to year. *The Admiralty* v. *Burns*[2] was distinguishable, because it was clear that the particular words in question there did not form a genus; whereas the particular words in subsection (5) of section 18 of the Agricultural Holdings Act clearly applied to an ascertained class of purposes, viz., such as were neither pastoral nor agricultural. "Other purposes," therefore, in that section fell to be construed as purposes *ejusdem generis, i.e.*, purposes neither pastoral nor agricultural.

Counsel for the respondent were not called on.

Lord President.—The lease between the complainer and the respondent provides that the complainer should have power to resume the lands let for any purpose whatever except that of letting to another agricultural tenant. The complainer proposed to take advantage of that clause and to resume possession of the land in question for the purpose of grazing it himself in order to rear pedigree sheep, and it is not disputed that, under his contract, he is entitled to resume for that purpose. But it is said that by the Agricultural Holdings Act, 1908, passed after this contract had been entered into, the purposes for which the complainer is entitled

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upon the rule of construction that general words following particular and specific words are restricted to the same genus as those words, maintained that the provision in subsection (5) did not confer upon the landlord right to resume land on short notice where he proposed to use the land himself for agricultural or grazing purposes, but limited the right to purposes *ejusdem generis* with building, planting, and feuing. As regards this rule of construction it is to be observed that, as Lord Kinnear said in the case of *The Admiralty* v. *Burns*, 1910 S. C. 531, at p. 536,—'It is a rule of construction only, that is to say, it is a canon which must be used to guide the Court in construing a written instrument in order to find out what is the true intent and meaning of the language used, and I think we must be cautious in applying it as if it were an abstract rule of law which could be used to force a meaning upon the words of the contract irrespective of other indications of what is the true intention of the parties.'

"As I read section 18 of the Act of 1908 I think that the intention of the Legislature was to allow unrestricted freedom of contract between landlord and tenant where it is in the contemplation of both parties to a lease that the landlord, for his own purposes, may desire to resume possession of the land let. In the present case the purpose for which the complainer desired the park was one which, in my opinion, both parties might, in entering into the contract, contemplate as reasonably probable, and therefore covered by the terms of the provision. It would have been different if the landlord had availed himself of the clause as to notice with the intention of re-letting the land to another tenant. . . ."

[1] 8 Edw. VII. cap. 64, sec. 18 (1) (b).

[2] 1910 S. C. 531, Lord Kinnear, at p. 538.

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to resume the land are limited, in other words, that the statute has expressly altered the terms of the bargain between landlord and tenant here.

I cannot think that that effect was produced by the 5th subsection of the 18th section, to which we were referred. It provides that the landlord may resume in a case such as this for the purpose of "building, planting, feuing, or other purposes." Now, it is quite true that the landlord does not propose to resume for building, planting, or feuing, but he does propose to resume for another purpose; and the question that was argued to us was this:—Whether or no the words "other purposes" are limited by the words which precede them to purposes *ejusdem generis*, according to the familiar rule of construction. I think that they are not, because, in the first place, I do not think that this clause in the Agricultural Holdings Act is one to which the rule of *ejusdem generis* applies at all, and that for the reason which was given by Lord Kinnear in the case of *The Admiralty* v. *Burns*,[1] where he says,—"The second observation is perhaps of more importance, and it is this, that if you are to limit general words by holding that they must cover only things that are *ejusdem generis* with preceding specific words, you must find that these specific words themselves are *ejusdem generis* with one another." Now, I cannot think that building, planting, and feuing are *ejusdem generis* with one another, and accordingly I think that this clause of the Act of Parliament is not one to which the rule of construction applies.

But I, for my part, go further, and say that "other purposes" in the statute in question must clearly include "any purpose" which is a matter of express contract between the landlord and the tenant, even although it might not be *ejusdem generis* with words which we see in the Act of Parliament; and I think it would be out of the question to hold that an Act of Parliament could so seriously modify the contract—or rather delete or alter entirely the contract—between landlord and tenant as would be the case here if we were to hold that "other purposes" did not include a purpose which was made matter of express contract between the parties.

I therefore propose to your Lordships that we should adhere to the interlocutor of the Lord Ordinary.

Lord Johnston.—I agree in the conclusion to which your Lordship has come, for this very simple reason. You cannot, I think, reduce the purposes enumerated in subsection 5 of section 18 of the Agricultural Holdings Act, 1908, to any category other than this—if it can be called a category—that they must be purposes inconsistent with the continued occupation of the subjects by the tenant and at the same time must be consistent with the good faith of the lease. Now in this lease we have a power to the landlord to resume the lands or any part of them "for any purpose whatever," with the very express exception of that of letting to another agricultural tenant. Resumption for any purpose is inconsistent with the tenant's continued occupation. But if it is for the landlord's personal use, and not to enable him to relet to another tenant, it is not inconsistent with the good faith of the lease. And, therefore, in my

[1] 1910 S. C. 531, at p. 538.

opinion, the complainer is not in any way precluded by the terms of the enactment in question from exercising that right.

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LORD SKERRINGTON.—Section 18 (5) of the Agricultural Holdings Act, 1908 speaks of the resumption of land for "building, planting, feuing, or other purposes." These words seem to me to refer to a distinction which has always been familiar to lawyers between terminating a lease as regards either the whole or a part of the subjects, and resuming either the whole or a part of the subjects for some particular purpose. Accordingly, it is essential to the idea of resumption that the landlord should have some definite purpose in view—I mean a purpose different from simply terminating a tenancy in order that he may be free to relet the property to anyone else. The effect of section 18 (5) is that we must read this lease and see whether it contains a *bona fide* clause of resumption, or whether, under the guise of resumption, it authorises the landlord to terminate the lease on giving some short notice such as the law allowed prior to the Act of 1908, and such as it has been suggested that the Act of 1908 will not tolerate. Now, the clause in the lease is plainly a *bona fide* clause of resumption, because, although the purposes are extremely wide—"any purpose whatever"—the right of the landlord is so limited that he must not resume for the purpose of letting to another agricultural tenant. In other words, he must not resume for the purpose of terminating the lease. Accordingly, I agree with your Lordship in thinking that the Lord Ordinary was right, and that we should affirm his interlocutor.

THE COURT adhered.

J. & F. ANDERSON, W.S.—JOHN S. MORTON, W.S.—Agents.

JAMES CRAIG (Healy & Young's Trustee), First Party.—*Chree, K.C.—A. Crawford.*
JOHN MAIR AND ANOTHER (Mrs Annie Simpson or Mair's Trustees), AND OTHERS, Second Parties.—*Paton.*

No. 103.

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Healy & Young's Trustee v. Mair's Trustees.

Ground-annual—Discharge—Confusio.

Held that ground-annuals could not be extinguished *confusione* upon the creditor therein becoming the proprietor of the subjects burdened; *per* the Lord President and Lord Johnston on the ground that ground-annuals are in their nature incapable of being extinguished *confusione*, *per* Lord Skerrington on the ground that the personal obligation of the original debtor still subsisted.

Opinion of Lord Kinnear in *Murray* v. *Parlane's Trustee*, (1890) 18 R. 287, *approved*.

1ST DIVISION.

ON 13th March 1914 a special case was presented for the opinion and judgment of the Court upon a question whether certain ground-annuals had been extinguished *confusione* by having become payable to the duly infeft proprietors of the subjects over which they had been created.

James Craig, C.A., Edinburgh, as trustee under a deed of dissolution of partnership and trust-disposition and assignation, granted

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by Messrs Healy & Young, Writers, Glasgow, and John Ross Young and Christopher John Healy, the individual partners of that firm, was the *first party;* and John Mair and another, Mrs Annie Simpson or Mair's trustees, and others, creditors under certain bonds and dispositions in security over the subjects burdened with the ground-annuals in question, were the *second parties.*

The ground-annuals in question, three in number, had been created over three plots of ground in Paisley in August and September 1898. In October, November, and December of the same year the subjects were further burdened with the bonds and dispositions in security held by the second parties. By a series of transmissions the first party became, in April 1913, the proprietor of the ground-annuals and also of the subjects from which they were payable. The second parties maintained that the ground-annuals had thereupon become extinguished *confusione;* the first party maintained that they still subsisted, and, accordingly, were still prior charges to the heritable bonds.

The complicated series of transactions by which these various interests were created were set forth in the special case as follows:—

"2. The first party as trustee under the foresaid deed of dissolution and trust-disposition is now vested in—(First) Property Springburn Road and Albert Street, Paisley, which consists of five plots of ground, conform to disposition in his favour granted by David Strathie, chartered accountant in Glasgow, judicial factor on the trust-estate of the deceased John Ross, coppersmith in Glasgow, conform to act and decree after mentioned, dated said disposition 18th and recorded in the foresaid Register of Bookings, &c., kept for the burgh of Paisley on 25th April 1913; and (second) five ground-annuals of £20, £25, £20, £20, and £15, created over the foresaid five plots of ground respectively, conform to disposition and assignation granted by the said David Strathie as judicial factor foresaid in his favour, dated 18th, and recorded in the foresaid Register of Bookings 25th April 1913. The present case relates to the first three of said ground-annuals, being those secured over the first three plots of ground before mentioned.

"3. The circumstances under which the first party so acquired from the said judicial factor on the said John Ross's trust-estate the said five plots and the said ground-annuals, payable therefrom are as follows:—The said John Ross died on 5th December 1874, and by his trust-disposition and settlement, dated the 12th day of August 1868, and relative codicil, dated the 20th day of December 1870, and both registered in the Books of Council and Session on the 21st day of December 1874, conveyed his whole estate to the trustees therein named for the purposes therein expressed. In the year 1899 the trustees under said trust-disposition and settlement were the now deceased Mrs Isabella Watson Ross or Young, the daughter, and her children the said John Ross Young and James Gladstone Young and Miss Elizabeth James Young, the grandchildren, all of the said John Ross; and the said Mrs Young as liferentrix, and her said children as fiars, were the sole beneficiaries on the estate of the said John Ross.

"4. In the year 1898 the said five plots of ground were held by the said John Ross Young and James Gladstone Young and by Hugh Wilson, joiner and builder in Govan, as trustees for them-

selves, and they constituted said five ground-annuals over said plots of ground respectively as follows:—The foresaid ground-annuals of £20 and £25 over the foresaid two plots of ground containing 239¾ and 427 square yards respectively, were constituted by contract of ground-annual entered into between the said John Ross Young, James Gladstone Young, house factor in Glasgow, as individuals, and the said Hugh Wilson, as trustees and trustee for behoof of themselves as aforesaid of the first part, and James Watson, builder in Partick, dated 22nd, and recorded in the foresaid Register of Bookings 24th, both days of August 1898, and the foresaid ground-annuals of £20, £20, and £15 over the foresaid three plots of ground, containing 335, 334, and 296 square yards respectively, were constituted by contract of ground-annual entered into between the said John Ross Young, James Gladstone Young, and Hugh Wilson, as trustees foresaid of the first part, and the said James Watson of the second part, dated 23rd, and recorded in the foresaid Register of Bookings 26th, both days of September 1898.

"5. By disposition and assignation, dated 23rd, and recorded in the foresaid Register of Bookings 25th, both days of March 1899, Mrs Isabella Watson Ross or Young, wife of James Young, residing at Bella's Choice, Uddingston, the said John Ross Young, Elizabeth James Young, residing at Bella's Choice aforesaid, and the said James Gladstone Young, as trustees of the said John Ross, in consideration of the sum of £1700 paid by them, acquired the said ground-annuals from the said John Ross Young, James Gladstone Young, and Hugh Wilson, as trustees foresaid.

"6. After acquiring the foresaid ground-annuals, Mr Ross's trustees thereafter acquired the ground and buildings thereon from which the foresaid ground-annuals were payable, and the same were conveyed to the said trustees by disposition in their favour, granted by the said James Gladstone Young (then heritably vest in the ground), with consent of the said James Watson, dated 18th, and recorded in the foresaid Register of Bookings 20th, both days of April 1899. The disposition bears to be granted in consideration of the sum of £4200, £1750 of which bears to be paid by Mr Ross's trustees to James Gladstone Young, and the balance of £2450 was the cumulo amount of . . . four bonds, . . . then affecting the said four plots of ground containing 239¾, 427, 335, and 334, square yards. Mr Ross's trustees did not take over and become responsible for the personal obligations in the aforesaid bonds, although these remained a burden on their titles, and they have since paid interest thereon. . . ."

These bonds and dispositions in security were granted by James Watson and James Gladstone Young in October, November, and December 1898, and were thus of date subsequent to the creation of the ground-annuals. These were the bonds which were now held by the second parties to the case.

The case further set forth:—

"8. On the petition of the said James Gladstone Young, as one of the trustees of the said John Ross, the trust-estate of the said John Ross was sequestrated, and the said David Strathie was appointed judicial factor thereon on 14th May 1909 conform to act and decree by the Lords of Council and Session. At the date of the appointment of the said David Strathie the trust-estate of the said John Ross included the said five plots of ground

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and buildings thereon, and the said five ground-annuals payable therefrom.

"The first party as trustee foresaid, and in virtue of the aforementioned deed of dissolution of partnership and trust-disposition and assignation referred to, was vested in the said John Ross Young's beneficial interest in the estate of the said John Ross, his grandfather, and he also acquired the interests therein of the other beneficiaries, the said James Gladstone Young and Elizabeth James Young, who had disponed them to the said Christopher John Healy, who by the said deed of dissolution of partnership and trust-disposition and assignation disponed them to the first party. The first party being then the sole beneficiary, the said David Strathie as judicial factor foresaid conveyed to him, with consent of the bondholders and without prejudice, the said five plots of ground by the disposition first above mentioned, and the ground-annuals by the disposition and assignation first above mentioned.

"9. In these circumstances a question has arisen between the first party and the second parties as to whether or not the three ground-annuals in question have been extinguished *confusione* by having thus become the property of the duly infeft proprietors of the subjects over which they have been created. The first party who contends that the ground-annuals have not been extinguished and discharged is desirous of realising them and devoting the proceeds thereof for behoof of the creditors of the trust-estate over which he has been appointed trustee. He is, however, not in a position to do so until the question between the parties hereto is determined, and unless it is determined in his favour. On the other hand it is the interest of the second parties that confusion should be held as operating, as it is very doubtful if the properties if held as burdened with the ground-annuals will, when realised, be sufficient to meet the respective bonds over the properties."

The contentions of parties were stated thus:—"The first party contends that the said ground-annuals being duly constituted burdens upon the subjects in question, and irredeemable rights therein constituted by infeftment, cannot be extinguished and discharged merely by having become the property of the duly infeft proprietors of the subjects over which they have been created, who are not personally liable in payment thereof, and who have all along had an interest to have them kept up, and that the said ground-annuals are not extinguished and discharged. The second parties contend that the ground-annuals are mere burdens secured over the heritable properties and do not in the circumstances require a formal discharge for their extinction, and that the right to the heritable properties and to the ground-annuals being vested in the same persons the ground-annuals have *ipso facto* become extinguished *confusione*."

The question of law was:—"(*a*) Whether the three ground-annuals in question are still real burdens upon the said subjects; or (*b*) Whether they have ceased to exist as such and have been extinguished and discharged *confusione*, and are no longer real burdens upon the said subjects?"

The case was heard before the First Division (without Lord Mackenzie) on 30th June and 1st July 1914.

Argued for the first party;—For the operation of the doctrine of *confusio* it was necessary that the debit and credit side of the obli-

gation should be merged in the same person in the same capacity, without any interest to keep the obligation alive.[1] Here there was no identity of person and capacity. Ross's trustees were sole creditors but were not sole debtors, because James Watson's personal obligation still subsisted.[2] Moreover, their right of credit and their right of property in the subjects burdened were not co-extensive; their right of credit being over the whole lands unaffected by the bonds, their right of property being only in so much as remained after satisfying the bonds. Further, there was here a clear interest to keep the obligation alive, because this was a case of a ground-annual payable from lands held in security by postponed bondholders, and it was necessary that the bond of annualrent should be kept up so as to be preferable in competition with the right of such bondholders.[3] In any event, a ground-annual was an *ex facie* irredeemable right in land completed by infeftment, and there was no authority for holding that such rights could be extinguished *confusione*.[4] Though the right of credit in each termly payment under a contract of ground-annual might be extinguished as it fell due while the party entitled thereto was proprietor of the subjects chargeable therewith, that did not affect the continuing obligation to meet these payments which attached to the subjects at every succeeding term. Under a contract of ground-annual there was no principal sum due, there was only a continuing liability for termly payments, and the considerations affecting an obligation to pay a capital sum did not apply.[5]

Argued for the second parties;—For conveyancing purposes ground-annuals were in the same position as other heritable securities; and the rights and preferences of the creditor under a contract of ground-annual were the same as those of the holder of a bond and disposition in security,[6] the debt under a contract of ground-annual being, in fact, the capitalised value of the termly payments.[7] Accordingly ground-annuals could be extinguished *confusione* in the same way as heritable securities. Further the proprietor of heritable subjects could not effectually create a real burden over them in his own favour by contract of ground-annual,[8] and it followed that

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[1] Stair, I. xviii. 9; Ersk. Inst. III. iv. 27; Bell's Prin. 580; Colvile's Trustees v. Marindin, 1908 S. C. 911.

[2] Miller v. Small, (1853) 15 D. (H. L.) 38.

[3] M'Kenzie v. Gordon, (1838) 16 S. 311; Fleming v. Imrie, (1868) 6 Macph. 363, Lord Justice-Clerk Patton, at pp. 366-7; King v. Johnston, 1908 S. C. 684; Duff's Feudal Conveyancing, 201.

[4] Murray v. Parlane's Trustee, (1890) 18 R. 287, Lord Kinnear (Lord Ordinary), at p. 288.

[5] Love v. Storie, (1863) 2 Macph. 22, Lord Neaves, at p. 31; Cuming v. Irvine, (1726) M. 3042; Murray v. Neilson, (1728) M. 3043; Cuninghame v. Cardross, (1680) M. 3038; Welsh v. Barstow, (1837) 15 S. 537; Lawrie v. Donald, (1830) 9 S. 147; Lockhart v. Duke of Gordon, (1739) M. 10,736.

[6] Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 3; Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 30.

[7] Bell's Trustees v. Copeland & Co., (1896) 23 R. 650.

[8] Church of Scotland Endowment Committee v. Provident Association of London, Limited, *supra*, p. 165, Lord Skerrington (Lord Ordinary), at pp. 168-9.

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no more could he keep up such a burden in his own favour. Ground-annuals were subject to the principles of common law governing the doctrine of extinction *confusione*, because two separate estates in land were not constituted thereunder requiring feudal forms to operate extinction, as in the case of the *dominium directum* and the *dominium utile*.[1] In the absence of such conveyancing necessity *concursus debiti et crediti* sufficed *ipso jure* to operate extinction.[2] The cases of *Murray* v. *Parlane's Trustee*,[3] and *M'Kenzie* v. *Gordon*,[4] did not affect the present question, because in these cases the decisions turned upon the consideration of circumstances disclosing intention, and, even if intention were a legitimate consideration, there was in the present case no question of intention. The dicta in the former of these cases as to irredeemable rights were merely *obiter*. The case of *Colvile's Trustees* v. *Marindin*[5] had no bearing upon the present case, because it dealt with very special considerations as to a tailzied destination.

At advising on 7th July 1914,—

Lord Johnston.—The facts of this case, though complicated, are for the purpose of the question raised quite simple. In 1898 the proprietor of certain subjects in Paisley sold and conveyed them to James Watson in consideration of a ground-annual reserved, but also constituted in the same deed. The clause of constitution imposed a personal obligation for the ground-annual on Watson and his heirs. Watson or his disponee borrowed £2450 on security of the property, but necessarily subject to the ground-annual, by bond and disposition in security. Thereafter by disposition and assignation John Ross's trustees in March 1899 acquired the ground-annual for the sum of £1700. Thereafter by disposition John Ross's trustees in April of the same year acquired the property over which they already held the above-mentioned ground-annual for the sum of £4290, made up of the £2540 with which the subjects were burdened by the above-mentioned bond and disposition in security, and of £1750 in cash. John Ross's trustees did not undertake the personal obligation in the bond. The first party represents the holder of the ground-annual and of the property thus acquired on separate titles, and the second parties represent the bondholders. The second parties maintain that *ex confusione* the ground-annual has been extinguished. The first party maintains the contrary.

It is I think impossible to reduce the law of extinction of obligations *confusione* to any statement which will logically cover all the cases which

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[1] Motherwell v. Maxwell, (1903) 5 F. 619, Lord Kinnear, at p. 632; Bald v. Buchanan, (1786) M. 15,084.

[2] Lord Blantyre v. Dunn, (1858) 20. D. 1188, Lord Ivory, at pp. 1195-6; Love v. Storie, 2 Macph. 22, Lord Neaves, at p. 31; King v. Johnston, 1908 S. C. 684; Hogg v. Brack, (1832) 11 S. 198; Balfour-Melville's Marriage-Contract Trustees v. Balfour-Melville's Trustee, (1896) 4 S. L. T. 111.

[3] 18 R. 287.

[4] 16 S. 311, (1839) M'L. & Rob. 117, Lord Chancellor Cottenham, at p. 123.

[5] 1908 S. C. 911.

have arisen or may arise, but I think that it may be accepted that it ought not to be extended in application out of mere deference to legal logic. I have used the expression "extinction of obligations," but primarily I think that confusion proper only applies to obligations which sound in a payment of money, though by analogy it has been extended to cases which do not directly come under that category. The doctrine rests on the common-sense view that a man cannot be both creditor of and debtor to himself, and therefore when the right of credit and the obligation of debit are merged in one person the obligation is extinguished *confusione*, or *ipso facto* discharged. I think that such extinction or discharge takes place *ex lege* and independently of intention.[1]

The question of extinction *confusione* has arisen in relation to heritable bonds, where the owner of the heritage has come to be in right of the bond, or *vice versa* where the bondholder has become owner of the heritage; in relation to leases where the tenant has become proprietor of the subject; in relation to ground-annuals where the person in right of the ground-annual has become proprietor of the property, or *vice versa* where the proprietor of the property has become in right of the ground-annual (the only authority on this aspect of the question[2] does not, however, owing to specialties, decide the general question which is raised here); in relation to the dues of superiority where the right of superiority and property have merged in the same person; and possibly in other circumstances. It is, at first sight, difficult to reduce these different cases to one clear principle. But I think that they can all be reconciled, if it be kept clear that what is discharged by confusion proper is an obligation immediately exigible and sounding in a payment of money.

In the case of a heritable security what is discharged is the bond. The fact that it is secured by a conveyance of heritage is a mere accident. The heritable security is an accessory. If the right to demand payment and the obligation to make payment of the bond have vested in the same person, the obligation is discharged by the *concursus debiti et crediti*, and the burden on the heritage flies off. It is the bond that is discharged, not the security. But the *concursus debiti et crediti* must be complete. The debtor and creditor may be the same individual, yet if such individual is debtor in one character and creditor in another character, there is no such *concursus* and therefore no extinction *confusione*. The law of entail supplies an illustration, which very clearly elucidates the whole matter. Suppose an heir of entail in possession acquires right to a bond which represents an entailer's debt, or one of these debts which statute now allows to be imposed on the entailed estate, there is no *concursus debiti et crediti*, for he acquires in his own right what he is due merely as heir of entail. What he acquires, unless he voluntarily takes a discharge or an assignation to himself as heir of entail, he transmits to his own heir. His obligation, on the other hand, is as heir of entail and it transmits only against the succeeding heirs. On his death the succession diverges, the right in the bond going to his own heir, that in the estate

[1] Menzies's Lectures, (ed. 1900) p. 891.
[2] Murray v. Parlane's Trustee, 18 R. 287.

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and with it the obligation in the bond to his heir of entail. In the meantime what happens to the termly interest as it becomes due? That is an obligation immediately sounding in the payment of money; and, as he is in possession drawing the rents, the heir of entail in possession is personally liable in payment of the termly interest. Accordingly, *concursus debiti et crediti* takes place, and the termly payments are discharged, as they become due, *confusione*.

I think that here is the key to the present question. In the case of a ground-annual there is no obligation to pay a principal sum, there is only an obligation to pay an annuity in perpetuity. For I cannot subscribe to the view that "the annual payment under the contract of ground-annual is not the amount of the debt; the debt is the annual payment capitalised," which is the ground of judgment in *Bell's Trustees*.[1] The recurring termly payments may be extinguished *confusione*, while the right to the ground-annual and to the property are vested in the same person, yet the ground-annual as a perpetual obligation will not be extinguished *confusione*, for there is nothing further demandable at the time, that sounds in a payment of money, to be extinguished.

There is a valuable passage in Lord Ivory's opinion in the case of *Lord Blantyre* v. *Dunn*,[2] where his Lordship is dealing with the case of an heir of entail in possession acquiring an entailer's debt secured on the estate, which may with advantage be considered. But while this passage aptly illustrates the position which I have endeavoured to present, I demur to Lord Ivory's use of the term "suspended." There is confusion so far as termly payments are concerned as they become due. But there is no suspension of liability. The liability for anything but the termly payments rests on the estate and on the heir of entail *qua* heir of entail. That when he acquires right to the bond he allows it to lie dormant is not suspension. Suspension predicates the operation of law.

Returning to the question of the ground-annual:—in *Murray's* case,[3] Lord Kinnear puts the matter in another form, but entirely consistently, I think, with what I have said, as thus:—"The ground-annuals are in a different position. These are *ex facie* irredeemable rights, and no authority has been cited for holding that an irredeemable right in land, completed by infeftment, can be extinguished *confusione*. . . . It would appear to me to have been competent for the testatrix to keep up the ground-annuals as separate rights in her own person if she desired to do so." That is, I think, because they are not obligations reducible to a capitalised value, but for an annual sum only accruing due from term to term, and in perpetuity. I doubt, however, whether the result is really affected by the form of the title, notwithstanding that it is true that the right to the ground-annual, though not feudalised in the wider sense, is completed by infeftment, though by the infeftment not of the creditor in the ground-annual, but of the disponee in the lands.[4] But so is a security for a sum of money by reservation. And a heritable bond must equally be made real by infeftment on, or recording of, the disposition in security.

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[1] 23 R. 650, Lord Trayner, at p. 653. [2] 20 D. 1188, at p. 1195.
[3] 18 R. 287, at p. 288. [4] Bell's Lectures, (2nd ed.) p. 1142.

It is the absence of any capital liability, and the perpetuity and irredeemability of the obligation, which I think produce the result at which Lord Kinnear arrives. Now unfortunately the case of *Murray*[1] is not an authority on the subject now in question,—for it was not there raised directly, and was mixed up with a question of testamentary intention. Lord Kinnear's opinion was not confirmed by the Inner House, and was indeed somewhat misapprehended, I think, by Lord Rutherfurd Clark, whose own opinion is not stated with the accuracy which usually characterised him. In the Inner House the decision proceeded upon intention, but that intention must have been the intention of the creditor in the ground-annual when she made her will, and not her intention when she acquired the property on which it was a burden. I think for the reason I have given that we may with confidence follow the ground of judgment of Lord Kinnear in *Murray's* case.[1]

I do not think that I need refer at length to the other instances of the application of confusion. It does not take place between superior and vassal where the estates of superiority and property merge in the same person, not merely for the reason which excludes it in the case of ground-annuals, but because feudal principle and practice require the extinction of the vassal's estate by consolidation. It is a feudal estate in and not a right secured on or out of land.[2]

In the case of leases, of which *Blantyre* v. *Dunn*[3] is a leading example, confusion proper does not take place, but by analogy the same rule has been applied, on the ground that a man cannot be at the same time proprietor and tenant of the same subject.

For the above reasons I would propose to your Lordships to answer the question thus;—head (*a*) in the affirmative, and head (*b*) in the negative.

Lord Skerrington.—I concur with your Lordship in your answer to the question of law.

Originally and as a matter of history a ground-annual was nothing more than a perpetual rent-charge or annuity which was secured over land by the infeftment of the owner of the land and not by the infeftment of the owner of the annuity. I call the latter "owner" and not "creditor" because no one was personally bound for payment of the annuity. In the case of a ground-annual of this simple character there is a technical difficulty in holding that the ground-annual or annuity-right can continue to subsist after both the land and the annuity have come to belong to the same owner. How, it may be asked, is it legally competent and possible that a man's own title of property and his infeftment therein can be burdened with a perpetual annuity in his own favour? When this question requires to be decided legal ingenuity will no doubt discover some sufficient answer to the legal puzzle. It would be monstrous that postponed heritable creditors should take a gratuitous advantage because the owner of a ground-annual constituting a preferable charge on an estate had bought the estate itself as a further investment.

In the present case, however, there is a very simple reason for deciding

[1] 18 R. 287. [2] Motherwell, 5 F. 619. [3] 20 D. 1188.

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that the ground-annuals referred to in the Special Case are still real burdens upon the subjects, and that they were not extinguished and discharged when John Ross's trustees, who had purchased the ground-annuals, subsequently purchased the subjects over which the ground-annuals were secured. The ground-annuals in question were not mere rent-charges of the simple character which I have described; but were rights of a complex and artificial character created by formal written contracts made in the year 1898 between the owners of the subjects for the time being, of the first part, and a certain James Watson, builder in Partick, of the second part. By these contracts James Watson bought the subjects and became owner thereof subject to the reserved burden of the ground-annuals in favour of the sellers. He further bound himself personally to pay the ground-annuals as they fell due, and in further security therefor he disponed to the sellers not only ground-annuals of corresponding amount but also the subjects themselves. It was not argued and could not have been argued with any plausibility that Mr Watson's personal obligation to pay the ground-annuals had been discharged, or in any way affected, by the circumstance that the ownership of the ground-annuals and the ownership of the lands had come to vest in the same persons. It necessarily follows that the real burdens as reserved and the heritable securities as constituted by the contracts of ground-annual continue to exist as they were originally created—*North Albion Property Investment Company, Limited*, v. *MacBean's Curator Bonis*,[1] *Mackirdy* v. *Webster's Trustees*.[2] To hold otherwise would impose new and different contracts upon Mr Watson.

We are not asked to decide, and I express no opinion, as to whether any particular termly payments of the ground-annuals have been discharged *confusione*.

Lord President.—I concur in the opinion of Lord Johnston, which I have had an opportunity of reading. *Confusio* is, in my judgment, a highly artificial doctrine and I, for my part, decline to give it any logical extension, or to apply it to any case in which it has not hitherto been held to operate. (First) Agreeing, I think, with Lord Johnston, I hold that *confusio* always operates *ipso jure* or not at all, and accordingly that it does not apply to feudal rights which cannot be extinguished except by the observation of feudal solemnities. (Second) Agreeing also, I think, with Lord Johnston, I hold that where the doctrine applies it absolutely extinguishes the obligation; and that cases of supposed temporary suspension are not exceptions to the rule, but are cases to which the doctrine of *confusio* does not apply.

To apply the doctrine to the case of recurring perpetual termly payments, such as annuities, feu-duties, or ground-annuals, appears to me to border on the absurd, for in this relation I draw no distinction between a feu-duty and a ground-annual.

Going further, I think, than your Lordships, I hold that this case is completely covered by authority. *Murray* v. *Parlane's Trustee*,[3] in my judgment, decides this case, for the Court there held that the ground-

[1] (1893) 21 R. 90. [2] (1895) 22 R. 340. [3] 18 R. 287.

annuals were not extinguished because the testatrix did not intend that they should be extinguished. The Court were unanimous in holding that ground-annuals could not be extinguished *ipso jure;* and if the doctrine of *confusio* always (as I hold) operates *ipso jure*, then it is absolutely inapplicable to ground-annuals. And the Court, in deciding there that *confusio* did not take place *ipso jure*, decided that *confusio* did not apply to ground-annuals. In agreeing with Lord Johnston, I hold that Lord Kinnear's opinion is quite unassailable—that a ground-annual, being an *ex facie* irredeemable right, cannot be held to be extinguished *confusione*. It is an irredeemable right in land completed by infeftment, and, as Lord Kinnear points out, there is no authority in principle for holding that it can be extinguished *confusione*. No doubt Lord Kinnear's view was combated by Lord Rutherfurd Clark, but on a ground on which Lord Kinnear did not rest his opinion. If Lord Rutherfurd Clark had approached a criticism of Lord Kinnear's opinion on the ground on which Lord Kinnear rested it, I do not know to what conclusion he would have come; but I rather suspect that, great lawyer as he was, he would have expressed himself, as Lord Trayner did, to the effect that the Lord Ordinary's view that ground-annuals being irredeemable rights perfected by infeftment cannot be extinguished *confusione*, could not be gainsaid.

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It may, no doubt, be true that, so long as Ross's trustees held the ground-annuals and were also the owners of the property, James Watson might not be sued for payment of the ground-annual; but that would not be on the ground that the right was extinguished or temporarily suspended. The right still existed, but it would be idle to enforce it when there would be immediate relief against the property which the trustees continued to hold.

Upon these grounds I concur with your Lordships in thinking we ought to answer the questions as Lord Johnston proposes.

THE COURT answered head (*a*) of the question of law in the affirmative and head (*b*) in the negative.

M. J. BROWN, SON, & Co., S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

PHILIP STEIN, Pursuer.—*Ingram*—*J. Smith Clark.*
JEANETTE RITCHIE RAMSAY OR STEIN AND ANOTHER, Defenders.

No. 104.

July 9, 1914.

Stein v. Stein.

Husband and Wife—Nullity of marriage—Error—Fraudulent concealment—Wife pregnant to third party at date of marriage.

Held that concealment by a woman from her husband at the time of their marriage that she was pregnant to another man entitled the husband to have the marriage declared null and void.

Question whether this would have been so if issue had been born of the marriage.

ON 10th March 1914 Philip Stein, upholsterer in Edinburgh, brought an action against Jeanette Ritchie Ramsay or Stein, and her infant child, concluding first for declarator that a pretended marriage entered into between the pursuer and the first defender was null and void, and second for declarator that the pursuer was not the father of the second defender. The action was undefended,

1ST DIVISION. Ld. Anderson.

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and was brought in circumstances disclosed in the following narrative quoted from the opinion of the Lord Ordinary:—"In this action the pursuer avers that on 6th September 1913, in Edinburgh, he went through a form of marriage before witnesses with the defender Jeanette Ritchie Ramsay. On the same date the marriage was registered on the warrant of the Sheriff-substitute of the Lothians. The pursuer states that the said defender was, at the date of the marriage, over four months pregnant to another man, but this was unknown to the pursuer and said defender concealed the fact from him. He alleges that, if he had known this, he would not have married her. The parties lived together till 5th October 1913, when they separated on account of differences. The pursuer, at that time, was still unaware of defender's pregnancy. On 13th January 1914 the said defender gave birth to a female child, who is still alive, and who is registered under the name of Elizabeth Doris Ramsay or Stein. This child was a full time child and must have been procreated in April 1913. The pursuer states that he only began to keep company with said defender in August 1913 and avers that he is not the father of the said child. In these circumstances the pursuer, on 13th March 1914, raised the present action against the said Jeanette Ritchie Ramsay and also against her said child, and he craves declarator (1) that the said pretended marriage is null and void and (2) that he is not the father of said child. The summons was served personally on the first named defender and edictally upon the child. No defences have been lodged."

On 2nd June 1914, after a proof, the Lord Ordinary (Anderson) reported the cause to the First Division.*

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* "OPINION.—[After the narrative of the pursuer's averments quoted *supra*]—I allowed the pursuer a proof before answer which I took on 23rd May 1914. I hold, on the proof, that the pursuer has proved the foresaid averments.

"With regard to the second declaratory conclusion I see no reason why the pursuer should not obtain the decree which he seeks. He has proved that the said child is not his, and it seems to me he has an interest to have this fact judicially declared, so that he may have an answer ready to any demand which may be made against him for the aliment of that child.

"The first declaratory conclusion raises an important and difficult question. In the legal system of this country there is no decided case either for or against the pursuer's contention, while in the institutional writings there are conflicting statements as to the law. In the systems of other countries, there is to be found diversity of practice.

"The legal principle on which the pursuer bases his claim to have the marriage annulled is that of fraud. The pursuer's counsel did not maintain the general proposition that antenuptial unchastity would afford a ground of nullity. He founded on the special circumstance that the woman was pregnant at the date of the marriage ceremony. He maintained that this was not a case of error as to accidental qualities, but amounted to an error regarding what is essential which had been induced by the fraudulent concealment of her condition by the defender. He contended that if it be necessary to establish *error personæ* induced by fraud he has done so. He says that the pursuer was under the belief that he was marrying a woman ready to play her part in fulfilling the primary function of marriage—the begetting of children—and he discovered that she was incapable of discharging her matrimonial duty in this respect. On this point a decision of Lord Low's was quoted with effect (*Wilson*, 1904, 11 S. L. T. 702).

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The case was heard before the First Division (without Lord Mackenzie) on 30th June 1914, Lord Anderson being also present.

In the course of the argument for the pursuer, the substance of which is sufficiently disclosed in the opinion of the Lord Ordinary, the undernoted authorities were referred to.[1]

At advising on 9th July 1914,—

LORD SKERRINGTON.—This case has been reported to us by the Lord Ordinary in order that we may decide an important question of marriage law, viz., whether a man is entitled to have his marriage declared a nullity because the woman whom he purported to marry concealed from him the fact that she was at the time with child to another man. The marriage which the pursuer seeks to annul was an irregular one which was

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The pursuer's counsel advanced an argument which is peculiarly applicable to Scotland. Referring to Steuart of Pardovan's Collections as to Church Discipline, pp. 240 *et seq.*, he pointed out that antenuptial unchastity may still be visited, under the regulations of Presbyterianism, with ecclesiastical discipline, and that, if the pursuer had been a member of a Presbyterian congregation, he would have been liable to this discipline. It was further pointed out that, if a person in the position of the pursuer makes no challenge as to the paternity of a child borne by his wife shortly after marriage, he remains under ignominy as having been antenuptially incontinent, and may be liable to the aforesaid ecclesiastical penance. If he raises the question of paternity and does so successfully it seems little short of monstrous that he is to be under obligation to continue cohabitation with the woman with whom he has had to contest this point. If the marriage is annulled the father of the child may marry the defender and legitimise the child. I do not propose to attempt to set forth the arguments against the pursuer's contention. Everything that can be urged against this contention will be found in the elaborate judgment in the English case of *Moss*, [1897] P. 263, to which I shall subsequently make reference.

"With regard to authority—in our own system Stair is against the contention of the pursuer (Inst. I. iv. 6; I. ix. 9); Bankton, on the other hand, is entirely in the pursuer's favour (Inst. I. v. 35 and 36). Bankton follows the civilians in the views he expresses and refers to Voet on the Pandects, Lib. 24, Tit. II., sec. 15, and Carpzovius' Ecclesiastical Definitions, p. 288. Lord Fraser does not express an opinion one way or other, but refers to the diversity of practice in different legal systems, in Husband and Wife, pp. 451 *et seq.* An exhaustive examination of the law of different countries on this point will also be found in the English case of *Moss* v. *Moss*, [1897] P. 263, in which the President, Sir Francis Jeune, decided that, according to the law of England, circumstances similar to those of the present case did not afford ground for annulling the marriage.

"The impression I have formed is adverse to the pursuer, but I considered it my duty to report the case for these reasons (1) that there has been no decision in Scotland on the point, (2) that the views of Stair and Bankton are in conflict, (3) that the action is undefended, and (4) that the question of the status of the child is involved."

[1] Stair, I. iv. 6, I. ix. 9, and IV. xl. 24; Bankton, I. v. 35 and 36; Fraser, Husband and Wife, 2nd ed. i. 450; Carpzovius Def. Ecc. 288 and 290; Voet, XXIV. ii. 15; Bishop on Marriage and Divorce, i., secs. 484 and 528; Deuteronomy, xxii. 13-21; Wilson v. Horn, (1904) 41 S. L. R. 312; Moss v. Moss, [1897] P. 263; Reynolds v. Reynolds, (1862) 3 Allen, 605; Harvie v. Inglis, (1837) 15 S. 964.

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followed by a joint application to the Sheriff for a warrant to register it, all as permitted by section 2 of the Act 19 and 20 Vict. cap. 96. The Sheriff granted the warrant, and the marriage was duly registered. Nothing, however, turns upon the form of the alleged marriage, because the pursuer does not aver that he laboured under any mistake as to the identity of the woman, nor does he allege that he and she did not seriously and deliberately accept each other as husband and wife. Accordingly the question would have been the same if the parties had been regularly married *in facie ecclesiæ*.

A proof was led before the Lord Ordinary. He has not pronounced formal findings of fact, but from his opinion it appears that he held the following facts to be proved, viz.:—That the parties went through a form of marriage in Edinburgh on 6th September 1913; that the defender was at that time pregnant to another man of a child which was procreated in April 1913, was born on 13th January 1914, and is still alive; that she concealed her pregnancy from the pursuer; and that if he had known of her condition he would not have married her. The action is undefended. His Lordship has further found facts to be proved which negative any suggestion of condonation on the part of the pursuer. My interpretation of these informal findings is that on or before 6th September 1913 the defender knew, or at least suspected, that she was pregnant, and that she did not in fact believe that the pursuer had any knowledge or suspicion of her condition. In exceptional circumstances a woman might be ignorant of her pregnancy, and might not even suspect its existence, notwithstanding that she was four months gone with child. That might happen in the case of a young and innocent girl who had been the victim of violence. Again, in exceptional circumstances, a woman who knew or suspected herself to be pregnant might believe that the man whom she had promised to marry either knew of the pregnancy or suspected it, and had waived all inquiry on the subject. That might happen if a man chose to marry a woman within nine months of her husband's death, or a woman who had recently and notoriously been leading an unchaste life, or a woman whose appearance suggested that she was either pregnant or suffering from some disease. In the present case no facts have been proved which displace the *prima facie* inference to the effect that the defender knew or suspected herself to be pregnant on 6th September 1913, and that she did not believe that the pursuer shared her knowledge or suspicions. In these circumstances I hold that a duty of disclosure lay on the defender, and that she acted fraudulently towards the pursuer by not informing him that she knew or suspected herself to be pregnant.

According to the law of Scotland marriage is something more than a mere contract. Its terms and conditions are regulated by the law and not by the agreement of parties. Once a marriage has been entered into it produces results which are independent of the volition of the spouses, and which may be described as a legal status. None the less it is true that unless there is a valid contract these legal results do not follow. Given the contract, the status follows as matter of necessity. It is universally admitted that a mistake by one of the spouses as to the identity

of the other nullifies the contract and therefore the status. The mistake under which the pursuer laboured came as near to being a mistake as to identity as it possibly could without actually coming within that category. There is an obvious difference between marrying a woman who is single in every sense of the word and a woman who is integrally united to another living human being. The idea of sharing his bed with a woman who was pregnant to another man would be repugnant to most husbands. If, however, such a marriage is binding upon a man who has entered into it in ignorance of his wife's condition, he cannot on discovering her condition treat her as one who has been guilty of a matrimonial offence or who has forfeited her right to share his bed and board and to receive the care and consideration to which her physical condition entitles her. Further, he must make due provision according to his means for her approaching confinement. Though not bound to maintain the child after its birth unless *lucratus* by the marriage, or to allow it to reside permanently in his house, he would not be entitled to separate it from its mother unless and until that could be effected without risk of injury to the mother or to the child. Unless his wife was willing to join with him in a conspiracy of silence as regards the existence of the child, the unfortunate husband would be subjected to constant humiliation and ignominy. On the other hand, if he made some arrangement which saved his own reputation and his wife's feelings, he would incur a serious risk of being held to be the legal father of his wife's child. Though the maxim *Pater est quem nuptiæ demonstrant* does not apply to a child who was not born *justo tempore*, a presumption of fact might easily arise to the same effect—*Gardner* v. *Gardner*.[1]

All these consequences are so serious and so destructive of matrimonial happiness, that I am not surprised that Lord Bankton in his Institute (I. v., sections 34-36, vol. i., p. 115) drew a sharp distinction between a case such as the present one and all other examples of error except error as to identity. He says (section 34): "Mistake in the person, no doubt, annuls the marriage, unless it is homologated by the party after he is undeceived; which was the case of the patriarch (Gen. xxix. 15 *et seqq.*); but a mistake in the fortune, or other quality or circumstance not essential to marriage, will not give ground for annulling it; because, tho' 'tis probable, if the party had truly known that circumstance, he or she would not have married, yet it was incumbent upon them to have inquired into these matters, as when a man marries a woman, with whom he expected a portion, and happens to be disappointed." Section 35: "But the case is different, when a man ignorantly marries a woman that is with child to another at the time; for then it would seem lawful for him to insist, that the marriage may be declared void, as being fraudulently contracted on the part of the woman. This is conform to the Mosaic law, the civil law, and that of other Protestant countries at this day, and there is little doubt of our following these authorities, strongly founded in the common sense of mankind—(L. 2, sec. 5, ff. de act. empt. Lewen, lib. i. c. 15, sec. 10, Voet. tit. de divort. sec. 15 [Lib. xxiv. tit. ii. sec. 15], Carp. defin. eccles. 193, Deut. xxii. 20 *et seqq.*); and the presumption is, that if the man had

[1] (1876) 3 R. 695, *aff.* 4 R. (H. L.) 56.

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known the condition of the woman, he would not have married her; and, for the most part, it is not in the man's power to discover the matter before marriage, nor has one ordinarly any suspicion of that kind; but, if he cohabit with her in conjugal society, as man and wife, after he knows that circumstance, he is understood to pardon the offence; in the same manner as in the case of adultery, when the innocent party allows the defender the dues of the marriage-bed, after knowledge of the guilt, he or she cannot insist for divorce." Section 36: "But the man's having other women with child to him, at the time of his marriage, gives no ground to the wife for annulling it upon that head; because a breach of chastity in a man, before marriage, is not so hainous or scandalous as in a woman; nor is there a presumption, that the woman would have refused the man on that ground, tho' she had known it." It will be observed that Bankton bases his opinion not upon essential error alone, but upon fraudulent concealment. As a general rule essential error is not in itself enough, according to Scots law, to nullify a contract. It must further be proved that the error was mutual, *i.e.*, common to both parties, or alternatively, that it was induced by misrepresentations, either innocent or fraudulent, made by the other party to the contract, or that it was induced by fraudulent concealment. The facts in the present case raise no question as to mutual error or as to misrepresentation whether innocent or fraudulent. But they do give rise to the inference that the error was induced by fraudulent concealment, and the Lord Ordinary has found that the pursuer would not have married the defender if he had known of the defender's condition. It seems to me to follow that if this case had related to an ordinary contract in which the circumstances or the nature of the contract created a duty of disclosure, the pursuer would have been entitled to relief. While the tendency of modern decisions in Scotland has been to restrict the class of cases in which essential error alone will nullify a contract, the tendency, on the other hand, has been to enlarge the definition of essential error—*Stewart* v. *Kennedy*,[1] *Menzies* v. *Menzies*.[2] In this latter case Lord Watson said (at p. 142): "Error becomes essential whenever it is shown that but for it one of the parties would have declined to contract." Of course this observation was made with reference to a case where the error was induced by the other party.

Lord Stair lays it down that error "in the substantials makes void the consent unless future consent supervene," and he refers to the case of the patriarch Jacob. He adds,—"But errors in qualities or circumstances vitiate not, as if one supposing he had married a maid or a chaste woman had married a whore"—I. iv. 6; see also IV. xl. 24. There is here no conflict with the opinion subsequently expressed by Bankton. In I. ix. 9, Lord Stair, dealing with "circumvention," repeats that a marriage would be void "if one married Sempronia supposing she were Maevia . . . But if he married Sempronia supposing her to be a virgin, rich, or well-natured, which were the inductives to his consent; though he be mistaken therein, seeing it is not in the substantials, the contract is valid. But if the error

[1] (1890) 17 R. (H. L.) 25.

[2] (1893) 20 R. (H. L.) 108.

or mistake which gave the cause to the contract, were by the machination, project or endeavour of any other party than the party errant, it would be circumvention." He concludes that "*errore lapsus* and *dolo circumventus* are distinct defects in deeds." In this passage Stair goes far beyond Bankton, because he seems to say that a mistake as to the bride's fortune would nullify the marriage if it was induced by fraud.

Erskine (I. vi. 2) states that "Marriage is truly a contract, and so requires the consent of parties, of which *infra* III. i. 16." In the later passage he distinguishes between essential error which excludes consent, *e.g.*, error as to the person of the other contracting party, and fraud. He lays it down quite generally that *ubi dolus dedit causam contractui* a person "is justly said not to have contracted but to be deceived." On the other hand, if he had adverted to the point he would doubtless have added that such a contract is not voidable where the rights of *bona fide* third parties would be prejudiced. For this reason I should doubt whether a marriage like the present one could be annulled after a child had been procreated and born of such marriage, even though the husband had from first to last been ignorant of his wife's pregnancy by another man, and of the subsequent birth of an illegitimate child. Equally, Erskine might have added that a marriage induced by fraud must stand valid if the interests of society would be prejudiced by its rescission.

Bell in his Principles (section 1506) insists upon the fundamentally contractual character of marriage, but otherwise does not throw any light upon the present question. We were referred to a decision by Lord Low in the Outer House— *Wilson* v. *Horn*[1]—where in an undefended action he gave decree of nullity on the ground of "false and fraudulent representations and personation used by the defender towards the pursuer." If the facts justified the finding that there had been personation the judgment presents no difficulty; but if the facts amounted simply to fraudulent misrepresentations in regard to the husband's social and financial position the decision goes further than as at present advised I am prepared to follow.

Lord Fraser discusses with his usual learning the subject of error in the constitution of marriage,[2] and also that of fraud,[3] but I cannot agree with him in thinking that there is any conflict between Stair and Bankton. He cites a number of authorities, both American and foreign, and also the Codes of France, Prussia, Austria, and Italy. Unfortunately he does not express any decided opinion of his own upon the question raised in the present case. Though I attach no importance to foreign legislation as regards the present question I shall supplement the information given by Lord Fraser by quoting two sections from the German Civil Code, as translated and annotated by Chung Hui Wang, D.C.L., (1907). Section 1333.—"A marriage may be avoided by a spouse who, at the conclusion of the marriage, was under a mistake as to the identity of the other spouse or as to such personal characteristics (*m*) of the other spouse as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of

[1] (1904) 41 S. L. R. 312.
[2] Husband and Wife, vol. i., pp. 448-456 [3] *Ibid*, 456-463.

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marriage." Note (*m*):—"Other characteristics may be taken into consideration only in the case provided for by 1334." Section 1334.—"A marriage may be avoided by a spouse who has been induced to conclude the marriage by fraud concerning such circumstances as would have deterred him from concluding the marriage with knowledge of the state of affairs and with intelligent appreciation of the nature of marriage. If the other spouse was not guilty of the fraud, the marriage is voidable only if the latter knew of the fraud at the conclusion of the marriage. A marriage may not be avoided on the ground of fraud concerning pecuniary circumstances (*n*)." Note (*n*):—"The majority opinion of the *Reichstags Kommission* was that a marriage should not be degraded into a mere 'business affair' (*Handelsgeschäft*), and so this paragraph has been added, while the words 'or such personal circumstances,' after the words 'personal characteristics,' have been struck out from 1333."

In the absence of legislation, judicial decision, and institutional authority, to the contrary in Scotland, the question as it presents itself to my mind is whether there exists any reason, arising either from the peculiar character of the marriage tie or from considerations of social policy, which makes it imperative to deny to the pursuer the relief to which the ordinary principles of contract law would otherwise entitle him. It is merely begging the question to say that in the case of marriage nothing short of a mistake as to identity can be regarded as essential. The real question is whether a fraud of a peculiarly shocking character must necessarily be successful. The only reasonable way of regarding the matter is, in my opinion, to assume that the ordinary principles of contract law are applicable unless some valid reason can be adduced in any particular case for deciding otherwise. I have already pointed out that the error in the present case is something quite unique and also different both in its nature and in its consequences from any other error which one can figure short of mistake as to identity. Accordingly I am not in the least embarrassed by the question whether a marriage should be annulled if it could be proved that one of the parties had been induced to contract it by fraudulent misrepresentations made by the other party in regard to his or her pecuniary circumstances. The good sense of mankind, as illustrated by section 1334 of the German Code, has answered this question in the negative. Logically there is no reason why a marriage should not be annulled on this ground, but the case is obviously one where the rights of the private individual must yield to the public interest, and logic must give way to common sense. Again it may be asked whether a marriage should be annulled because one of the spouses had fraudulently concealed (*a*) his or her antenuptial unchastity, or (*b*) the birth and existence of a child whether legitimate or illegitimate, or (*c*) a temporary physical incapacity for fruitful intercourse. The fraud in the present case partakes of the nature of all these frauds with many aggravations. Accordingly it does not follow that if relief is given in the present case relief must also be given in any or all of the three cases which I have figured. After carefully considering the only question which we are called upon to decide, I have failed to discover any satisfactory ground for denying to the pursuer the relief which he demands.

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The conclusion at which I have arrived conflicts with the judgment of Sir Francis H. Jeune, President of the Probate Divorce and Admiralty Division, in *Moss* v. *Moss*.[1] He quotes and adopts a *dictum* of Lord Brougham concurred in by Baron Parke and Shadwell, V.C., in a case before the Privy Council in 1835, to the effect that, according to the law of England, a marriage cannot be held void merely on proof that it had been contracted in consequence of false representations; and that no degree of deception would avail unless the party had been deceived as to the person with whom he contracted. In his Principles of Contract, 6th ed., p. 540, note (p), Sir Frederick Pollock referred to this dictum as "one of Lord Brougham's doubtful or more than doubtful generalities." The learned President also founds upon certain dicta of Lord Stowell in cases before the English Ecclesiastical Courts and upon a passage from Ayliffe, an 18th century writer upon Anglican canon law. The rest of his opinion consists of a criticism upon the foreign and American authorities which were quoted in support of the suit for nullity. If the President was right, as I assume him to have been, in holding that "the English law of the validity of marriage is clearly defined," any citations of foreign codes and decisions of American Courts were beside the mark. For my own part I attach no importance to such citations except for the purpose of showing that the view contended for by the pursuer is not in conflict with the idea of marriage as understood in other civilised countries. Nor do I attach much importance to the law of England in view of the differences between the two systems as regards marriage.

I confess, however, that I have had some difficulty in reaching a conclusion which conflicts with the opinions of eminent commentators on the Roman canon law, a system which, in my judgment, is the foundation of the Scottish law of marriage. I refer primarily to the Roman canon law as it stood before the marriage legislation of the present Pope in the year 1908, and as it was administered by the Pontifical Courts in cases which came before them from countries such as England, Scotland, Norway, Sweden, Denmark, Belgium, Holland, Germany, Canada, and most of the United States of America, in which the decrees of the Council of Trent concerning clandestine marriages had never been promulgated or had fallen into desuetude. I cannot accept the theory contended for by Lord Fraser to the effect that the similarity between the Scottish municipal law in regard to the constitution of marriage as it still exists and the Roman canon law in regard to the same subject as it existed until the recent legislation was due to a blunder on the part of an English Judge. Appeals to Rome from the Scottish Ecclesiastical Courts were abolished in the year 1560, and yet the two systems were remarkably similar as regards the constitution of marriage until the year 1908. Although marriage between Christians is a sacrament according to the canon law, it is a sacrament which depends for its validity upon the validity of the contract. The contracting parties are the ministers of this sacrament, and the officiating priest is present merely as a witness and for the purpose of giving the nuptial blessing. While the canon law in regard to the constitution of marriage was altered

[1] [1897] P. 263.

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in regard to certain countries by the Council of Trent, and as regards most countries by the present Pontiff, these changes do not, so far as I know, affect the present question which has reference not to the form but to the essentials of matrimonial consent. The tribunal known as the "Sacra Rota Romana" was re-established in the year 1908, and disposes of a great number of matrimonial cases by way either of opinion or decision. I should have attached importance to an opinion or a decision of a Court composed of lawyers specially conversant with this branch of canon law, but I have been unable to discover any opinion or decision bearing upon the present question either by the Rota or by any earlier tribunal. Undoubtedly, however, the opinions of Sanchez and other canonists are unfavourable to the pursuer. They regard any error which does not in substance affect the identity of the spouse as non-essential and as affording no ground for nullifying a marriage even when induced by fraud. On the other hand, they admit that by agreement the possession of some particular personal quality may lawfully be made a condition of the contract. Possibly at this point there is such a fundamental divergence between the two systems as makes it impossible to argue from the one to the other.

If I am well founded in thinking that as a matter of abstract right no distinction can be drawn in this matter between marriage and any other contract, and that any differences which we are forced to admit must be attributed to expediency, the result at which I have arrived in the present case seems to me unobjectionable from the point of view of good sense and public policy. I accordingly propose to your Lordships that the case should be remitted to the Lord Ordinary with instructions to pronounce decree of declarator as concluded for. The decree will be a decree in absence, and will pass both against the mother, whom I have hitherto called the "defender," and also against her child. The Lord Ordinary appointed a curator *ad litem* to the latter, but the curator, acting apparently on the authority of the case of *Mackenzie's Trustees* v. *Mackenzie*,[1] declined to lodge defences. I do not doubt that he exercised a wise discretion by following this course, because if he had lodged defences on behalf of the child any decree which the Court may pronounce in the present action might have been regarded as a decree *in foro*.

Lord Johnston.—I have had the advantage of perusing Lord Skerrington's opinion, and I desire to adopt it.

Lord Anderson.—I entirely agree, and desire to add only a word or two in explanation of the view I expressed in the opinion I submitted to your Lordships in reporting the case. I there said that the impression I had formed was adverse to the pursuer. The difficulty I had was in basing a judgment for the pursuer on a legal ground which would not open a wide door of attack upon the institution of marriage. It seemed to me that what the pursuer really complained of was the antenuptial unchastity of his wife, and I am unable to hold that recognition can be given to this as a legal principle upon which a marriage may be annulled. Your Lordships are, however, deciding the case on a narrower ground, and are

[1] 1908 S. C. 995.

determining nothing beyond this,—that it is a ground of nullity of marriage if it be proved that, at the time a woman purports to contract marriage with A, she is in a condition of pregnancy caused by B, and fraudulently conceals that circumstance from A. It may be urged that this is a purely arbitrary rule, in the operation of which anomalies may be figured. This may be true, but it is a rule which other nations have seen fit to adopt in order to avoid the perpetuation of injustice. In declaring authoritatively now that this rule is part of the law of Scotland we are providing a basis of decision for cases like the present which obviously call for remedy.

I accordingly readily concur in the judgment proposed by your Lordships, and in the reasons therefor which Lord Skerrington has stated.

LORD PRESIDENT.—I also concur in the judgment of Lord Skerrington.

THE COURT pronounced the following interlocutor:—"The Lords, along with Lord Anderson, the Lord Ordinary in the cause, having considered the cause on the report by the Lord Ordinary and heard counsel for the pursuer, find, declare, and decern against the defenders in terms of the conclusions of the summons.

ISAAC FÜRST, S.S.C., Agent.

No. 105.

July 9, 1914.

Hill v. Black.

ALEXANDER RAMSAY HILL, Pursuer (Respondent).—*Moncrieff, K.C.—D. P. Fleming.*
WILLIAM BLACK AND OTHERS, Defenders (Appellants).—*Sandeman, K.C.—Lippe.*
THE KING'S THEATRE AND HIPPODROME, DUNDEE, LIMITED (in liquidation), AND OTHERS, Defenders.

Company—Winding-up—Action against company without leave of Court—Competency—Waiver of objection by company—Duty of Court—Companies (Consolidation) Act, 1908 (8 *Edw. VII. cap.* 69), *sec.* 142.

The Companies (Consolidation) Act, 1908, enacts, sec. 142, "When a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose."

A pursuer, without having obtained the leave of the Court, brought an action against a company in liquidation, and also against the liquidator and certain secured creditors. Decree in absence was granted against the company and the liquidator. The secured creditors, who were the only compearing defenders, did not plead on record any objection to the competency of the action.

In an appeal at the instance of the secured creditors, *held* that, as the company and the liquidator had waived any objection to the competency, it was not *pars judicis* for the Court to enforce the provisions of the section.

ON 11th March 1913 Alexander Ramsay Hill, residing at 5 Southfield, St Andrews, brought, in the Sheriff Court at Dundee, an action of declarator that he was proprietor of certain debentures of The King's Theatre and Hippodrome, Dundee, Limited, then in liquidation. He called as defenders (1) the Company, (2) the liquidator, (3) the trustees for the first mortgage debenture-holders,

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(4) the trustees for the second mortgage debenture-holders, (5) certain postponed bondholders.

No application was made by the pursuer to the Court under section 142* of the Companies (Consolidation) Act, 1908, for leave to bring the action.

The Company and the liquidator did not lodge defences, and on 5th May 1913 the Sheriff-substitute (Neish) granted decree in absence against them.

The trustees for the second debenture-holders alone defended the action, and they stated no plea on record that the action was incompetent on the ground that the requirements of section 142 had not been complied with.

The Sheriff-substitute having heard parties on the merits, continued the debate in order that the effect of section 142 might be discussed.

On 26th June 1913 he granted decree of declarator as craved, and stated in his note that in his opinion it was not *pars judicis* for him to enforce the provisions of the section, as the Company and the liquidator had deliberately abstained from raising the objection.

The compearing defenders appealed to the Court of Session, and the case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 8th and 9th July 1914.

The appellants drew the attention of the Court to the section, and argued;—The section was imperative, and the Court was bound to dismiss the action as incompetent for non-compliance with the statutory requirements.

Argued for the respondent;—The Court would only intervene where there was some public interest to be protected. The section was conceived solely in the interest of the Company and the liquidator, and they had waived the objection, as they were entitled to do.[1] If the defenders were to be allowed to take the plea, it should only be done by an amendment of the record and on condition that they paid all expenses since the record was closed.[2]

LORD DUNDAS.—The facts in this case are somewhat complicated in detail, but are sufficiently set forth by the Sheriff-substitute, and I need not summarize them. The pursuer called as defenders to his action the Company, the liquidator, the trustees for the first debenture-holders, the trustees for the second debenture-holders, and the postponed bondholders; but the only parties who have lodged defences are the trustees for the second debenture-holders.

I shall notice at the outset a point which is not pleaded on the record, but which occurred to the Sheriff-substitute himself, and is considered by him in his note. He states that he had some doubt in his own mind whether it might not be *pars judicis* for him to give effect to the provision of section 142 of the Companies (Consolidation) Act, 1908, which enacts that where a winding-up order has been made, no action or proceeding shall be proceeded with or commenced against the company except

* The section is quoted in the rubric.

[1] Sinclair v. Thurso Pavement Syndicate, Limited, (1903) 11 S. L. T. 364.

[2] Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, (1905) 7 F. 914.

by leave of the Court, and subject to such terms as the Court may impose. That is a section which may be pleaded by the company and its liquidator in any proceedings taken against them; and the decision of Lord Kyllachy in the case of *Sinclair* v. *Thurso Pavement Syndicate, Limited*,[1] to which we were referred, seems to afford ground for the view that the plea, if taken, may be afterwards waived by the company or its liquidator. In the present case, the Company and the liquidator, though called as defenders, did not appear, and the Sheriff-substitute came to the conclusion, as I think rightly, that it was no part of his duty in these circumstances to put the section into operation. Still less, I think, is it for us to take any notice of the section now that the case is in this Court. [His Lordship then dealt with other points with which this report is not concerned.] I think we should refuse the appeal and affirm the interlocutor of the Sheriff-substitute.

LORD MACKENZIE and LORD CULLEN concurred.

THE COURT refused the appeal and affirmed the interlocutor of the Sheriff-substitute.

SIMPSON & MARWICK, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

ARGYLLS, LIMITED, AND ANOTHER, Petitioners.—*Hamilton.*
RITCHIE & WHITEMAN AND OTHERS, Respondents.—*Sol.-Gen. Morison—D. P. Fleming.*
THE CLYDESDALE BANK, LIMITED, Compearing Creditors.—*Black.*

No. 106.

July 9, 1914.

Argylls, Limited v. Ritchie & Whiteman.

Company—Liquidation—Appointment of liquidators—Nominee of creditors—Neutral liquidator.

A motor manufacturing company, having resolved to go into voluntary liquidation and having appointed its chairman, who was also its managing director, to be liquidator, petitioned the Court for an order, *inter alia*, that the liquidation should be continued under the supervision of the Court, and that the liquidator should be allowed to carry on the business of the company for a certain period. At a meeting of creditors of the company subsequently held it was decided by a majority that application should be made to the Court for the appointment of the auditor of the company to act jointly with the liquidator already appointed, and the petitioners made an application to this effect. The appointment of the auditor as joint liquidator was opposed by certain of the creditors on the ground, *inter alia*, that, as both liquidators proposed were connected with the company, there would be no independent officer to investigate its affairs in the interests of the creditors.

The Court *granted* the prayer of the petition in so far as it craved that the liquidation should proceed under the supervision of the Court, and *appointed* the auditor to be liquidator, but conjoined with him a chartered accountant who had no connection with the company, and *superseded* the appointment of the managing director, *holding* that, while it was desirable that effect should be given to the wishes of the creditors and that one of the liquidators should be versed in the affairs of the company, it was not desirable that both liquidators should be men who had been closely associated with the company.

[1] 11 S. L. T. 364.

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Argylls, Limited, v. Ritchie & Whiteman.

1st Division.

On 19th June 1914 Argylls, Limited, a company carrying on the business of manufacturers and sellers of motor cars and accessories, in voluntary liquidation, and Robert Winthrop Blackwell, the liquidator of the Company, presented a petition under and in terms of the Companies (Consolidation) Act, 1908,* and especially sections 151, 199 to 204, and 213 thereof, in which they asked for an order that the voluntary winding-up of the Company should be continued subject to the supervision of the Court, and that the liquidator should be authorised to carry on the business of the Company for a period not exceeding one year.

It was stated in the petition that, at an extraordinary general meeting of the Company held on 16th June 1914, the following extraordinary resolutions had been passed unanimously, viz.:—(1) "That it has been proved to the satisfaction of this meeting that the Company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the same, and accordingly that the Company be wound up voluntarily"; and (2) "That Robert Winthrop Blackwell, residing at Argyll Works, Alexandria, be and is hereby appointed liquidator for the purposes of such winding up." Mr Blackwell was chairman and also managing director of the Company. In the petition were set forth the circumstances in which it had been considered desirable that the liquidation should proceed subject to the supervision of the Court, and it was stated, *inter alia*:—"The liquidator further desires that he should have an opportunity of realising the business in such a way as not to destroy the goodwill, and he suggests accordingly that he should be authorised to carry on the business for a period not exceeding one year."

Intimation and advertisement of the petition having been made in terms of an interlocutor of the First Division dated 23rd June 1914, and the *inducie* having expired without answers having been lodged, the petitioners, on 9th July, presented a note in which it was set forth that on 3rd July a meeting of creditors of the Company had been held, in terms of section 188 of the Companies (Consolidation) Act, 1908, and that "it was decided by a majority that an application should be made to the Court for the appointment of a liquidator to act jointly along with the said Robert Winthrop Blackwell, and after a poll had been taken it was decided by a majority that Mr John Mackintosh MacLeod, chartered accountant, 149 West George Street, Glasgow, should be recommended for the approval of the Court as joint liquidator along with Mr Blackwell. The said meeting of creditors appointed Mr William Brodie Galbraith, chartered accountant, Glasgow, to report the proceedings to the Court of Session, and his report has been lodged in process." The note concluded with a prayer similar to that contained in the petition, with this addition that it craved the appointment of Mr John Mackintosh MacLeod to act as liquidator jointly with the liquidator appointed by the Company.

On 9th July Ritchie & Whiteman and Stevenson & Company, certain creditors of the Company, lodged a minute in which they objected to the appointment of Mr MacLeod as additional liquidator of the Company. In this minute the following objection was taken, *inter alia*, to the proposed appointment:—"1. That his firm of Kerr,

* 8 Edw. VII. cap. 69.

Andersons, & MacLeod, C.A., Glasgow, are the present auditors of the Company. No proper allowance has been made for depreciation in the annual balance-sheet, and this matter will require to be investigated by the liquidators. There have been many serious complaints with regard to the management of the Company, and these also should be independently investigated. Mr Blackwell, the existing liquidator, is its chairman, and the result of appointing Mr MacLeod as additional liquidator would be that there would be no independent officer to investigate the affairs of the Company in the interests of the creditors, although the creditors would be put to the expense of two liquidators. The shareholders of the Company have no real interest in the liquidation, as the assets will be insufficient to pay the creditors in full." * It was submitted that in the circumstances the Court should appoint not Mr MacLeod but an independent professional gentleman to act jointly with the liquidator appointed by the Company.

At the hearing appearance was made on behalf of the Clydesdale Bank, Limited, creditors of the Company, in support of the petitioners' application.

Counsel were heard upon the petition, note, and minute before the First Division (without Lord Mackenzie) on 8th and 9th July 1914.[1]

Lord President.—With regard to the placing of the liquidation under the supervision of the Court, no objection has been made by either side of the bar and accordingly the usual order will be pronounced.

So far as regards the appointment of liquidators, the Court always desires,—if it can do so consistently with the just administration of this statute,—to give effect to the wishes of creditors, and accordingly we think that Mr MacLeod should be appointed liquidator. But we think that Mr Blackwell should be superseded; and for this reason, that we do not consider it desirable that both liquidators should be men who have been closely associated with the Company in the past, although it is eminently desirable that one of them should be versed in the affairs of the Company. On the whole, we think it preferable that Mr MacLeod should be selected because of his knowledge of the working of this Company, and that the managing director should be superseded; although, of course, parties will understand that that implies no reflection of any kind upon the character and ability of Mr Blackwell.

We shall appoint a neutral liquidator, a gentleman of our own nomina-

* Further objection was taken to the appointment of Mr MacLeod, *inter alia*, on account of his connection with another company which had been formed to finance sales by the petitioners of their motor cabs. It was averred that this transaction had adversely affected the financial position of Argylls, Limited; that the whole circumstances in connection with it ought to receive independent investigation; and that a direct conflict of interest would arise between Mr MacLeod's position as liquidator and his position as one of the managers of this subsidiary company.

[1] Counsel for the petitioners referred particularly to sec. 201 of the Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69). Counsel for the minuters referred to Liquidators of Bruce Peebles & Co., Limited, v. Shiells, 1908 S. C. 692, at p. 696.

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tion, to act along with Mr MacLeod; and we propose that Mr Robert J. Smith, chartered accountant, Glasgow, should be conjoined with him.

LORD JOHNSTON and LORD SKERRINGTON concurred.

THE COURT pronounced the following interlocutor:—"Order that the voluntary winding-up of Argylls, Limited, resolved on by extraordinary resolution passed on 16th June 1914 be continued, but subject to the supervision of the Court in terms of and with the powers conferred by the Companies (Consolidation) Act, 1908: Confirm the appointment of John Mackintosh MacLeod, C.A., Glasgow, as liquidator made at the meeting of creditors held on 3rd July 1914: Conjoin with him as joint liquidator Robert J. Smith, C.A., 163 West George Street, Glasgow: Appoint the said Robert J. Smith to be joint liquidator accordingly, with all the powers conferred by the statute, he finding caution for his actings and intromissions before extract, as joint liquidator, and decern: Further, sanction the joint liquidators of the Company carrying on the business of the same for such time and to such an extent as they may think proper, but not for a period of more than twelve months from this date: . . . Supersede the appointment of Robert Winthrop Blackwell as liquidator . . ."

ROBSON & M'LEAN, W.S.—SMITH & WATT, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

No. 107.

July 12, 1913.

Hepburn v. Law.

JAMES HEPBURN, (Pursuer) Appellant.—*A. M. Stuart.*
WILLIAM LAW, (Minuter) Respondent.—*Lippe.*
THE REVEREND JOHN SYMINGTON WEIR, Defender.

Sale—Right in security—Sale or security—Sale of Goods Act, 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 17 *and* 61 (4).

The Sale of Goods Act, 1893, which provides by sec. 17 that the property in goods sold is transferred to the buyer at such time as the parties to the contract intend it to be transferred, enacts by sec. 61 (4) "The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

A creditor, who was pressing for payment of a debt of £130, obtained from his debtor a receipt for that sum, which bore to be in payment of certain articles of furniture belonging to the debtor and sold to the creditor. A list of these articles signed by the debtor was appended to the receipt. No discharge of his indebtedness was granted to the debtor, no money passed, and the furniture remained in the debtor's house. The creditor subsequently claimed to have the articles of furniture excluded from the execution of a poinding of the debtor's effects in which they had been included, on the ground that they were his, the creditor's, property.

Held that the transaction, though in the form of a contract of sale, was intended by the parties to operate by way of security within the meaning of sec. 61 (4) of the Sale of Goods Act, and, accordingly, that the property had not passed to the creditor; and his claim *dismissed.*

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Hepburn v. Law.

1st Division. Sheriff of Aberdeen, Kincardine, and Banff.

In an action in the Sheriff Court at Aberdeen at the instance of James Hepburn, accountant, Alloa, against the Rev. John Symington Weir, Rayne, the Sheriff, in absence, decerned, on 9th October 1912, against the defender for payment of a certain sum, and granted warrant for all lawful execution on this decree by arrestment and poinding.

On 22nd October 1912 the pursuer obtained extract of the decree and warrant to charge thereon, in virtue of which, on 1st November 1912, a sheriff-officer poinded certain of the effects of the defender. Other creditors holding a decree against the defender compeared and craved to be ranked *pari passu* upon the proceeds of the poinded effects. Another party, William Law, lodged a minute in which he claimed that certain articles of furniture should be excluded from the poinding as being his property. He lodged therewith a receipt by the defender which was in these terms:—

"Manse of Rayne,
"Aberdeenshire, 14th June 1912.

"Received from Mr William W. Law, Kirktown of Rayne, Rayne, the sum of one hundred and thirty pounds sterling, in payment of the following specified articles of furniture belonging to me in the Manse of Rayne, and sold to him at date hereof.

J. S. Weir.
£130.
June 14th, 1912."

Appended to the receipt was a list, signed by the defender, of certain articles of furniture which were among those included in the poinded effects.

On 22nd January 1913 the Sheriff-substitute (Young) allowed the parties a proof of their claims, and after a proof—the effect of which, so far as material to the present report, is set forth in the opinion of Lord Johnston—he found, by interlocutor dated 6th March 1913, that it was not proved that the articles claimed by William Law were his property, and dismissed his claim.*

The minuter, William Law, appealed to the Sheriff (Lorimer) who, by interlocutor dated 24th April 1913, found it proved that the articles in question were sold to the minuter for the sum of £130, and that, according to the intention of the parties to the said sale, the property therein passed to the purchaser. He therefore recalled the Sheriff-substitute's interlocutor and ordered the articles to be withdrawn from the sale.†

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* The judgment of the Sheriff-substitute proceeded on the ground that the transaction, though in form of a sale, was intended to operate as a security in the sense of section 61 (4) of the Sale of Goods Act, 1893 (quoted in rubric), and that neither as a sale nor as a security could it be effectual without delivery. He referred to the following authorities:—*Robertson* v. *Hall's Trustees*, (1896) 24 R. 120; *Rennet* v. *Mathieson*, (1903) 5 F. 591; *Jones & Co.'s Trustee* v. *Allan*, (1901) 4 F. 374.

† The Sheriff's judgment proceeded on the ground that the sale was not intended to operate merely as a pledge, charge, or other security within the meaning of the Sale of Goods Act, 1893, section 61 (4), but that the parties, as shown by their evidence and that of other witnesses, *ex animo* and of set purpose foreswore security, and deliberately entered into a

July 12, 1913.

Hepburn v. Law.

The minuter, William Law, appealed to the Court of Session, and the case was heard before the First Division on 6th June 1913. At the discussion no additional cases to those referred to by the Sheriff and Sheriff-substitute were cited.

At advising on 12th July 1913,—

LORD JOHNSTON.—These proceedings commenced by a decree in absence of date 9th October 1912, at the instance of James Hepburn, accountant Alloa, against the Rev. J. S. Weir, the minister of Rayne, Aberdeenshire. On this decree poinding followed on 1st November, but when it was proposed to sell the poinded effects, another creditor, William Law, Kirkton of Rayne, intervened and craved that certain of the most valuable of the poinded subjects should be withdrawn from the sale, in respect that they were his property. Upon this a litigation ensued, and after a proof the Sheriff-substitute found that it was not proved that the articles claimed by the minuter William Law were his property, and therefore dismissed the claim with expenses. On appeal the Sheriff reversed his substitute's judgment; and the case has been brought by appeal to this Court. After carefully considering the evidence, I have come to the conclusion that the Sheriff-substitute's judgment should be restored, and very much for the reasons clearly stated by him.

The facts are that Mr Weir, in connection with settling himself in the parish, had come under certain obligations to Mr Law, and in June 1912, was due him £130, for which Mr Law held, if I am not mistaken, no document of debt and certainly no security. Now Mr Law was himself overdrawn with the North of Scotland Bank at Insch; and a new agent, Mr Reith, having come to that branch, Mr Law was himself pressed to reduce his overdraft, and in turn pressed Mr Weir for repayment of his advance. Mr Weir offered security over his furniture, along with a policy on his life by way of assignation, but Mr Reith was fully aware that no effectual security could be given over the furniture, and besides had been advised by Mr Shewan, solicitor, Aberdeen, that "the whole difficulty in this matter is that nothing in the form of a sale by way of security would be valid. It must be understood to be an out-and-out sale, and that the property passes to Mr Law. The best will be to take a receipt in the ordinary terms for so much money in respect of certain specified articles. Mr Weir must understand that the articles are no longer his, and that it would be as well to have the insurance policy for the furniture endorsed for Mr Law's interest."

I think I may say that Mr Reith took command of the situation, and, armed with the above letter, he and his accountant, Mr Morrison, and Mr Law went to the manse, and had an interview with Mr Weir. It was carefully explained to Mr Weir that a security over his furniture was

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contract of sale with the intention that it should operate as such, and with the material incidents attaching thereto. In addition to the authorities cited by the Sheriff-substitute, he referred to the following:—Brown on the Sale of Goods Act, 2nd ed., pp. 413-421; *M'Bain* v. *Wallace*, (1881) 8 R. 360, and (H. L.) 106; *Liquidator of West Lothian Oil Co.* v. *Mair*, (1892) 20 R. 64; *Scottish Mercantile Discount Co.* v. *Romanes*, (1905) 13 S. L. T. 169.

a thing which could not be legally effected, and that nothing but an out-and-out sale would do, and after some discussion an inventory was made of certain articles of furniture estimated by Mr Reith to be of the value of £130; and Mr Weir executed this document dated 14th June 1912:—"Received from Mr William W. Law, Kirktown of Rayne, Rayne, the sum of one hundred and thirty pounds sterling, in payment of the following specified articles of furniture belonging to me in the Manse of Rayne, and sold to him at date hereof," and there was appended the inventory of the furniture also signed by Mr Weir.

The further facts are that no discharge of this indebtedness was granted by Mr Law to Mr Weir; that the document of debt, if any existed, was not returned to Mr Weir; that no money passed, and that possession was not taken of the furniture, which was left with Mr Weir. Mr Law explained in his evidence, "I did not want to raise a 'claick' throughout the parish; and I allowed the furniture to remain in the manse." And it remained in the manse in Mr Weir's possession until the poinding. Nor was the policy of insurance transferred.

I have no doubt that Mr Reith intended that an out-and-out sale should be made, and thought that he had effected his object. But it is not his intention that rules, but that of the principal parties to the sale. The Sale of Goods Act, 1893, to comply with the provisions of which the men of business concerned were working, provides (section 17 (1)) "where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred," and (2) "for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Having regard to these three considerations, I think it is impossible to hold that the principal parties to the contract intended the property to be transferred on the signature of the document above quoted, or that as between them there was anything but the form of a contract of sale without the reality, for it was admittedly fully understood between them that Mr Weir was to be entitled to redeem his furniture if he paid the £130; though Mr Law might if he chose take possession, and remove and realise the furniture in the meantime. The reality of the transaction was I think nothing but a security, and a bad security, over the furniture. The transaction is exactly struck at by section 61 (4) of the statute which says:—"The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security."

I refer to the case of *Robertson* v. *Hall's Trustees*,[1] and particularly to the opinion of the late Lord Moncreiff. As in that case, there was perfect *bona fides* on the part of those concerned in this transaction. All concerned intended to take effectual steps to exclude the diligence of Mr Weir's creditors, and thought they had done so. They came nearer to it than did the parties in *Robertson* v. *Hall's Trustees*.[1] But for all that the transaction in substance was not a sale. For these reasons, con-

[1] 24 R. 120.

July 12, 1913. curring with the Sheriff-substitute, I think that Mr Law's claim to have the articles in the inventory withdrawn from the poinding must be refused.

Hepburn v. Law.

The LORD PRESIDENT, LORD KINNEAR, and LORD MACKENZIE concurred.

THE COURT pronounced an interlocutor recalling the interlocutor of the Sheriff dated 24th April 1913; affirming the interlocutor of the Sheriff-substitute dated 6th March 1913; and remitting the cause to him for further procedure.

MACPHERSON & MACKAY, S.S.C.—W. CROFT GRAY, S.S.C.—Agents.

No. 108.

July 10, 1914.

THE BRITISH MOTOR BODY COMPANY, LIMITED, Pursuers (Respondents).—*A. M. Mackay.*

THOMAS SHAW (DUNDEE), LIMITED, Defenders (Appellants).—*Lippe.*

British Motor Body Co., Limited, v. Thomas Shaw (Dundee), Limited.

Compensation—Contract of sale—Time of delivery not specified—Unreasonable delay in delivery—Competency of counter claim of damages for delay in defence to action for price.

In an action for the price of goods sold and delivered under a contract which specified no time for delivery—

Held that it was competent for the defender to plead *ope exceptionis* a claim of damages for failure to deliver within a reasonable time.

Opinion *contra per* Lord President Inglis in *Macbride* v. *Hamilton & Son*, (1875) 2 R. 775, *overruled.*

Decision in *Johnston* v. *Robertson*, (1861) 23 D. 646, *commented on* and *explained.*

1ST DIVISION. Sheriff of Forfarshire.

ON 16th April 1913 The British Motor Body Company, Limited, motor body builders in Dundee, brought an action in the Sheriff Court there against Thomas Shaw (Dundee), Limited, for recovery of a sum of £135, 11s. 6d., in the circumstances disclosed in the following narrative which is quoted from the note of the Sheriff-substitute. "The pursuers in this case built to the defenders' order a motor body and fitted it to the defenders' chassis at an agreed-on price of £135, 10s., which with a small item of 1s. 6d. makes up the sum sued for. The order was given in February 1912 and delivery was made in October 1912. The defenders make no complaint as to workmanship or material, and they admit that the price charged is correct. Their sole complaint is that the car was not delivered within a reasonable time, and they counterclaim for damages on the ground of unreasonable delay in delivery. No specific time for delivery was stipulated." The counter claim was for the sum of £75.

The pursuers pleaded, *inter alia*;—(3) The claim of damages alleged by the defenders being illiquid, they are not entitled to set it off against the pursuers' claim for work done and goods supplied.

The defenders pleaded;—(1) Pursuers, having failed to implement their contract with defenders within a reasonable time, are liable to the defenders in the loss and damage thereby caused. (2) The defenders, being entitled to set off the amount of their counter claim against the sum sued for, and having tendered payment of the balance due by them, should be assoilzied, with expenses.

On 12th June 1913 the Sheriff-substitute (Neish) sustained the

third plea in law for the pursuers, dismissed the defenders' counter claim, and granted decree for the sum sued for.

On 4th July 1913 the Sheriff (Ferguson), on appeal, adhered to the interlocutor of the Sheriff-substitute.*

The defenders appealed to the Court of Session, and the case was heard before the First Division (consisting of the Lord President, Lord Skerrington, and Lord Ormidale) on 4th July 1914.

Argued for the appellants;—This was not a question of setting off an illiquid claim against a liquid one. It was purely a question of a failure to implement a material term of the contract, and damages for such a failure could competently be set off against a claim for the price. It made no difference that no specific time for delivery was stated in the contract—delivery within a reasonable time being implied. The dictum of Lord President Inglis[1] relied on by the Sheriffs was merely *obiter* and was incorrect; and, further, it was not consistently supported by authority.[2] Even if sound at the time it was pronounced, the law was now altered by section 29 (2) of the Sale of Goods Act, 1893,[3] dealing with delivery, and by sections 11 (2) and 53, dealing with the enforcement of such claims. Further, the stating of such a claim in the defences instead of in a substantive action was completely covered by Rule 55 of the First Schedule to the Sheriff Courts Act of 1907.[4]

Argued for the respondents;—The old common law rule that there could be no compensation *ope exceptionis* in defence to an action had been modified only so far as concerned liquid debts instantly verifiable, so as to admit the extinction of two liquid obligations.[5] The defenders' counter claim, however, was not liquid and instantly verifiable, because it was necessary for them to prove what was a reasonable time for delivery, and what was the damage sustained by them. The sum sued for on the other hand was a liquid debt, because the price of the goods delivered was fixed by contract, and receipt of the goods was admitted. Accordingly the defenders' illiquid claim could not be set off against the price.[6] The law was correctly stated by Lord President Inglis in the case of *Macbride*,[1] and had been long established[7]; if the law had been otherwise the decisions of the Court would have been different in the cases of *Christie* v. *Birrells*,[8] *Pegler* v. *Northern Agricultural Implement Company*,[9] and *Fraser* v. *Lang*.[6] Decisions with reference to claims for rent which were apparently inconsistent with this rule[10] were of earlier date than the case of *Macbride*.[11] Further, the appel-

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* In their notes both the Sheriff-substitute and the Sheriff accepted the dictum of Lord President Inglis in *Macbride* v. *Hamilton & Son*, (1875) 2 R. 775, at p. 781, as correctly expressing the law existing at that date; and they further stated their reasons for holding that subsequent legislation had made no alteration on the law there laid down.

[1] Macbride v. Hamilton & Son, (1875) 2 R. 775, at p. 781.

[2] Johnston v. Robertson, (1861) 23 D. 646; Pegler v. Northern Agricultural Implement Co., (1877) 4 R. 435; Dick & Stevenson v. Woodside Steel and Iron Co., (1888) 16 R. 242; Christie v. Birrells, 1910 S. C. 986.

[3] 56 and 57 Vict. cap. 71. [4] 7 Edw. VII. cap. 51.

[5] Act 1592, cap. 143; Stair I. xviii. 6.

[6] Fraser v. Lang, (1831) 9 S. 418.

[7] Cooper v. Green & Chatto, (1791) M. 10,100. [8] 1910 S. C. 986.

[9] 4 R. 435. [10] *E.g.*, Graham v. Gordon, (1843) 5 D. 1207.

[11] 2 R. 775.

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lants were wrong in their contention that recent statutory enactments had effected any change in this department of the law. Rule 55 of the First Schedule to the Sheriff Courts Act, 1907, dealt solely with procedure, and was intended to apply only in the case of such a counter claim as might be the subject of a separate action which could be conjoined with the principal action. The sections of the Sale of Goods Act, 1893, relied on by the appellants, were designed to meet the case of breach of warranty by a seller in the strict sense of warranty, and did not afford any ground for implying that every failure to perform a material part of a contract was a breach of warranty.[1] Had it been intended to disturb the established rule of Scots law, subsection 2 of section 11 of that Act would have been couched in language which put the matter beyond doubt.

At advising on 10th July 1914,—

LORD PRESIDENT.—This is, in substance, an action of damages for breach of a mercantile contract. In form, however, it is not; and the question we have to consider is whether or no, because of the form in which the case is presented to the Court, we are compelled to refuse to entertain it. I should regret if we were so constrained, but I am of opinion that we are not.

The pursuers sue for payment of £135, being the price of a landaulette body which they made for a Wolseley car, and supplied to the defenders, in terms of a contract dated in February 1912. There was no time for delivery stipulated in the contract. Delivery was made in October 1912, and the defenders met the claim for payment of the contract price by a claim of damages for late delivery in respect that the sellers had not delivered within a reasonable time.

Now, according to the law of Scotland, if no time is fixed for delivery in a contract of sale, a reasonable time is implied. And accordingly the pursuers here must be held to have contracted that they would deliver the landaulette body within a reasonable time, and, if they have failed to do so, then they have committed a breach of contract, and it is trite law that a party who is in breach cannot demand implement of a contract. Accordingly the defence here would appear to be sound and based on well-established principles. The pursuers, however, plead that, the claim of damages by the defenders being illiquid, they are not entitled to set it off against the pursuers' claim for work done and goods supplied. That is obviously a bad plea, because, if a time for delivery had been specified in the contract, the claim for damages for delay would equally have been an illiquid claim, and yet it is conceded that it would have formed a good defence to an action for payment of the price. The plea which the pursuers intended to state, but did not state, was that, inasmuch as the delay in delivery was, as alleged, beyond a reasonable time, and not beyond a specified time, a claim of damages in respect of that late delivery was a bad defence to the action. That is the plea which, no doubt, they intended to state, and that was the plea which the learned Sheriffs sustained.

Certainly the Sheriffs were bound, in the existing state of the law, to

[1] 36 and 37 Vict. cap. 71, secs. 11 (2) and 53.

sustain the plea, because the rule rests upon an *obiter dictum* of the late Lord President Inglis to be found in the case of *Macbride* v. *Hamilton*.[1] An *obiter dictum* coming from so eminent an authority is entitled to the very highest respect, especially as, seemingly, it has been accepted as sound law ever since. Stated in very simple language, the rule is this—that if a reasonable time for delivery has been exceeded, then a claim of damages for late delivery is not a good answer to a claim for payment of the contract price; but if a specified time for delivery has been exceeded, then a claim of damages for delay is a good answer to a claim for the contract price. Both pleas arise out of the same contract—whether he has exceeded a reasonable time, or has exceeded a specified time, equally the pursuer is in breach of his contract—but, apparently, it was thought that because, in the one case, the defender had to prove one fact only, to wit, the amount of his damages, and, in the other case, he had to prove two facts (first) what was a reasonable time for delivery, and (second) the amount of damages which he had suffered in consequence of the failure to deliver within a reasonable time, it was in the latter case a bad defence. But that is the only difference between the two—that in the one case the defender has to prove two facts, and in the other one. I cannot think that such a distinction can be supported, having regard to the sound principles of the law of contract, for both pleas arise out of exactly the same contract, and a failure to deliver within a reasonable time is just as much a breach of the particular contract as a failure to deliver within a specified time.

When the dictum of Lord President Inglis in the case of *Macbride* v. *Hamilton*[1] is examined it will be found to rest upon the supposed authority of the case of *Johnston* v. *Robertson*,[2] for here are the Lord President's words[1]:—"In *Johnston* v. *Robertson*[2] the employers were found entitled to set off a claim of damages sustained by reason of delay in the execution against the contract price sued for by the contractor. One distinguishing feature of that case was that the damages were liquidated by the contract; for the Court held that the £5 to be paid by the contractor for every week during which the works should remain unfinished was not meant as a penalty, but a liquidation of the actual loss contemplated as likely to be suffered by the employers in consequence of the delay. But that was only one point in the case, and, although it occupies a conspicuous place in the opinions of the Judges, the judgment of the Court, as I understood it, was that the damages, whether liquidated or illiquid, might be set off against the contract price sued for, provided there was breach of an express condition of the contract in point of time. In that case there was a careful and precise stipulation that the building was to be completed, and the keys delivered over by a specified day. There could be no doubt that there was a breach of contract in point of time. I think it was the opinion of all the Judges that, if there had been no express provision in the contract as to time, and the only complaint of the employers had been that the work was not completed in reasonable time—which is an implied condition in all contracts—that would not have led to the same result,

[1] 2 R. 775, at p. 781. [2] 23 D. 646.

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since there would not have been a breach of the particular contract sued on, and the plea would not have been available in the same way against the contractor, that he had not performed his part of the contract, and therefore could not recover."

Now, I pause here to observe that, if delivery is late because a reasonable time was exceeded, that is just as much a breach of the particular contract as if a specified time had been exceeded. And, when the case of *Johnston* v. *Robertson*[1] is carefully examined, it will be found that it does not decide that any distinction exists. No doubt, in *Johnston* v. *Robertson*,[1] a specified time was fixed for the completion of the contract work, and a claim for damages was held to be a good answer to the claim for the contract price; but that was upon the ground that a party seeking implement of a contract was bound to fulfil his part of the contract. And nothing was said by the learned Judges who decided that case, with the exception of one passage to which I shall later refer, to support the view that, if a reasonable time had been exceeded and not a specified time, the claim of damages could not be set up against a claim for the contract price. Thus, in the opinion of Lord Benholme, it appears that the plea which the Court there sustained as a good answer to the claim for the contract price was based mainly on the rule of the law of Scotland that one party to a mutual contract, in which there are mutual stipulations, cannot have his claim under the contract satisfied unless he is prepared to satisfy the corresponding contemporaneous claims of the other party to the contract. "I think," says Lord Benholme (at p. 652), "the rule of law, that an illiquid claim cannot be set off against a liquid claim, does not apply to such a case"; that is to say, that the plea as we have it before us is a bad plea, "and that, at all events, if the one claim be liquid, and the other partly illiquid, yet contemporaneous, the rule should suffer some qualification or relaxation if the claims arose under one contract. The counter claims must be contemporaneous, for if not the rule would apply. Here it appears to me that the pursuer cannot prove his case without letting in the defence. The question raised by the pursuer is, has the work been performed within the stipulated time? That requires probation, and the circumstance that the defender's claim, on the ground of delay in completing the work, arises out of the same contract, appears to me to be a satisfactory answer to the objection that the damages claimed under the defender's issue have not been constituted by a substantive action." Now, nothing could be clearer than that statement of the ground of judgment by Lord Benholme. It simply lays down and applies the familiar doctrine that a man in breach of contract is not entitled to demand implement from the opposite party. And, in the same way, when we turn to Lord Cowan's opinion we find on this part of the case he says at p. 654: "I concur generally with Lord Benholme as to the competency of pleading this counter claim *ope exceptionis*, and am clear that an action of reduction is not necessary to enable the defender in this way to meet the demand of the pursuer. I also concur in thinking that the statute of 1592, which I hold not to apply to this case, does not raise any difficulty."

[1] 23 D. 646.

"I cannot doubt," says Lord Cowan further on, "that opposing claims, arising out of one mutual contract, may be dealt with in this way. The case of *Dickson* v. *Porteous*[1] is a peculiar case, and does not interfere with the general principle that claims out of mutual contracts may be pleaded against one another. That defence is not properly the defence of compensation, but is rather a defence to the effect that the pursuer is not entitled to what he demands under the contract, until he fulfil his own obligations under it." There is nothing in the opinions of either of these learned Judges to support the view that the defence held good would have been considered bad if the contractor had there exceeded a reasonable time instead of, as he did, exceeding a specified time in the completion of his work. And, in the same way, when we turn to the opinion of the Lord Justice-Clerk (Inglis) we find him saying, at p. 656: "As to this second question"—the one we are now concerned with—"I think the statute does not apply; it applies only to compensation *de liquido in liquidum*, instantly verified by writ or oath of party. The claim by the defender here is not a liquid debt, and it takes no benefit from the statute; and therefore we may discharge from further consideration the question as to whether the decree in absence is any impediment to this defence. . . . The defence arises out of an obligation in a mutual contract, which is to be enforced at the same time as the stipulations in favour of the pursuer. Even that consideration might not be conclusive against the objection that a separate action should be raised to enforce this claim under the contract. . . . Every action on a mutual contract, implies that the pursuer either has performed, or is willing to perform, his part of the contract; and it is, therefore, always open to the defender to say, that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action."

Once more I think there can be nothing plainer than the ground of judgment as thus stated by Lord Justice-Clerk Inglis. But towards the close of his opinion there is to be found one short paragraph in which, unquestionably I think, his Lordship must have had in his mind the distinction which he announced in such explicit terms in the subsequent case of *Macbride* v. *Hamilton*.[2] In one sentence he says (at p. 656): "If the defence had been founded on an allegation of unreasonable delay, the case would at all events have been a very different one from this, and must have been dealt with on different principles." Now, his Lordship does not say in what respect it would have been a different case from the one then before the Court, and he does not say upon what different principle the Court would have treated it. We can only judge what he meant by the dictum subsequently announced in the case of *Macbride* v. *Hamilton*.[2] All I say in regard to this short paragraph is that it was purely *obiter*, that it was not concurred in by the other two members of the Court; and, for the reasons I have given, it appears to me to be antagonistic to the principle upon which, confessedly, the judgment in *Johnston* v. *Robertson*[3] depends, to wit, that claims arising out of a mutual contract may be pled the one against the other; and that the pursuer is as much in breach of

[1] (1852) 15 D. 1. [2] 2 R., at p. 781. [3] 23 D. 646.

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his contract if he exceeds a reasonable time for delivery as if he exceeds a specified time for delivery.

Accordingly, the result I come to is that Lord President Inglis must have been under some misapprehension when he said, in *Macbride* v. *Hamilton*,[1] that the question had been virtually decided in *Johnston* v. *Robertson*.[2] *Johnston* v. *Robertson*,[2] and indeed *Macbride* v. *Hamilton*,[1] are simply other illustrations of the application of the familiar rule, which will be found admirably stated in the judgment of Lord Shand, which was affirmed, in *Macbride* v. *Hamilton*,[3] where his Lordship says: "I think the sound general rule, which may be the subject of exceptions arising from special circumstances, or the special terms of a particular contract, is that in cases of mutual contract a party in defence is entitled to plead and maintain claims in reduction or extinction of a sum due under his obligation where such claims arise from the failure of the pursuer to fulfil his part of the contract." And it was in applying that principle that Lord Shand came to the conclusion that the defence in *Macbride* v. *Hamilton*,[3] against a claim for payment of the contract price, was well founded. The Lord President himself says[4]: "The question whether a claim of this kind can be maintained *ope exceptionis* is always one of nicety. The general proposition is clear, that where a party seeks to enforce a contract he must show that he has performed, or been ready to perform, his part of the contract."

Accordingly, I think it can be shown quite conclusively that there was no support, in the law of Scotland, prior to the case of *Macbride* v. *Hamilton*,[1] for the distinction which was drawn between two illiquid claims of damage —one illiquid claim depending upon exceeding reasonable time for delivery, the other equally illiquid claim depending upon the contractor having exceeded a specified time for delivery. The Sheriffs proceeding upon the rule laid down in *Macbride* v. *Hamilton*,[1] sustained the third plea in law for the pursuers, and have thrown out this action. I am of opinion that, although they were certainly bound to take that course in the existing state of the law, it is now our duty to put the law upon a proper and true foundation and to announce that no such distinction exists, and that no such rule is now to be found in the law of Scotland.

It must not be forgotten however that all the law to which the defender in this case appealed is now to be found codified and defined in the recent Sale of Goods Act of 1893,[5] as thus: By the 29th section, subsection (2), of the statute, it is provided that "Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time." To that provision the defender here appeals. By section 56 it is provided that what is a reasonable time is a question of fact, and that the defender here desires to prove. By section 11 (2) it is provided that "In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated,

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[1] 2 R. 775. [2] 23 D. 646. [3] 2 R., at p. 779, footnote.
[4] 2 R., at p. 780. [5] 56 and 57 Vict. cap. 71.

or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." That is exactly what the buyer has done here. By section 53 (1), where there is a failure to perform a material part of the contract, he may set up against the seller such failure in diminution of the price—exactly what the buyer desires to do here. And lastly, by section 59, when the buyer elects to claim damages for breach of contract instead of rejecting, "he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods"—which may be done here if the Sheriff-substitute in his discretion thinks proper to order consignation.

The code applies, therefore, to every stage of this case and, if I am right in the conclusion I have reached with regard to the law subsequent to and anterior to the date of the Sale of Goods Act, then it is apparent that we do not need here to invoke the 55th Rule appended to the Sheriff Courts Act of 1907,[1] because it always was the law of Scotland that no counter action was needed in order to sustain a defence such as is tendered here, but that it was sufficient to state it in the defence to an action for implement of the contract.

I am, therefore, for recalling the interlocutors of the Sheriffs and remitting to the Sheriff-substitute to proceed with the case.

Lord Skerrington.—The question which we have to decide is whether it is a relevant defence to an action for the price of goods sold and delivered to allege that the pursuer failed in his implied obligation to deliver the goods within a reasonable time, and that the defender thereby incurred damage which he claims to set off *pro tanto* against the contract price. Both the learned Sheriffs have answered this question in the negative, and have decided that such a claim of damages cannot be successfully pleaded *ope exceptionis*, but must be liquidated in a separate action. Their decision is in conformity with the opinion of the Lord President (Inglis) in *Macbride* v. *Hamilton & Son*.[2] That opinion, however, was purely *obiter*, and I am unable to reconcile it with the general principles of contract law. Accordingly, I am prepared to hold that the defender, in an action like the present one, is entitled to establish and set off a claim of damages based upon the ground of the pursuer's failure to deliver within a reasonable time.

While such, however, is my opinion upon the general legal question, I am equally clear that the Court, as the master of its own procedure, has an equitable power to prevent a defender from taking advantage of the rule of law as to mutual contracts merely for the purpose of delay and in order to try to set up a counter claim which could not in all probability be successfully established in a cross action. This power is expressly conferred or recognised by section 59 of the Sale of Goods Act, 1893. Both the Sheriffs refer to the provisions of this statute, but they do not, in my opinion, give to them their due effect. I shall assume that in the present case the time of delivery was not of the essence of the contract within the

[1] 7 Edw. VII. cap. 51, Sched. I.

[2] 2 R. 775.

July 10, 1914.

British Motor Body Co., Limited, v. Thomas Shaw (Dundee), Limited.

Lord Skerrington.

meaning of section 10. In any case the defenders waived this point by taking delivery.—See *Paton & Sons* v. *Payne & Company*.[1] It follows from section 11 (2), section 53, and section 62 that the defenders were entitled to claim "compensation," or in other words to set up against the seller the breach of contract alleged to have been committed by the latter "in diminution or extinction of the price."

The Sheriffs refer to rule 55 of the Sheriff Courts Act, 1907. Seeing that the counter claim in the present case was smaller than the principal claim the defenders did not need to found upon this rule, and their position would have been just as strong if the rule had never been enacted. The effect of the rule, as I read it, is to empower the Sheriff to grant a decree in favour of a defender as if the latter had brought a cross action. In every case, however, the Sheriff will require to consider whether the counter claim is of a kind which entitles the defender to have a judgment upon it before a decree is issued on the principal claim.

LORD ORMIDALE concurred.

THE COURT sustained the appeal, and remitted the cause to the Sheriff-substitute to proceed.

R. C. GRAY & PATON, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

No. 109.

July 16, 1914.

John Macdonald, Limited, v. Lord Blythswood.

JOHN MACDONALD, LIMITED, Pursuers (Respondents).—*Macphail, K.C.—G. C. Steuart.*

THE REVEREND THE RIGHT HONOURABLE SHOLTO DOUGLAS CAMPBELL, BARON BLYTHSWOOD OF BLYTHSWOOD, Defender (Reclaimer).—*A. O. M. Mackenzie, K.C.—D. P. Fleming.*

Reparation—Interdict—Wrongous use of interdict—Interdict not resulting in invasion of any legal right.

A tenant obtained interim interdict against a firm of timber merchants from erecting a sawmill on a site which he alleged to be included in subjects let to him. The interdict was subsequently recalled on the ground, *inter alia*, that the tenant was not in possession of the site, which, by decree of the Land Court, had been declared to form part of a statutory small tenant's holding. The timber merchants thereupon brought an action of damages for wrongful use of interdict against the tenant, in which, while averring that the tenant had no right to exclude them from the site, they did not aver any legal right in themselves to enter on the lands or to erect a sawmill thereon.

The Court (*rev.* judgment of Lord Ormidale) *dismissed* the action as irrelevant, in respect that the pursuers, as they were unable to make such an averment, had failed to disclose the invasion of any legal right resulting in a civil wrong for which they could recover damages.

1st DIVISION. Ld. Ormidale.

ON 26th January 1914 John Macdonald, Limited, timber merchants, brought an action of damages against Lord Blythswood for wrongous use of interdict.

The averments of the pursuers were to the following effect:—

[1] (1897) 35 S. L. R. 112.

Lord Blythswood was tenant under a lease, dated April 1911, of Balmacara House, on Loch Alsh, and the surrounding policies, with the right of cutting and planting timber on any portion of the lands let to him. The estate of Balmacara had been sold in 1911 by Sir Kenneth Matheson to William James Anton (who was the granter of the lease to Lord Blythswood), but Sir Kenneth retained his right in the timber, and in January 1913 the pursuers purchased from him the whole matured timber on the estate. The pursuers thereupon proceeded to erect a sawmill near the public loading-place from which they proposed to ship the timber. In February 1913 Lord Blythswood presented a note of suspension and interdict in which he sought to interdict the pursuers (1) from entering on any of the ground let to him; (2) from felling or otherwise interfering with any of the timber on that ground; and (3) from erecting a sawmill or other buildings on that ground. Interim interdict was granted on 25th February, and the note was passed and the interim interdict continued on 7th March 1913.

On 11th July 1912, by order of the Land Court, Mrs Finlayson, tenant of the farm of Balmacara Mains, had been declared a statutory small tenant of that farm, and (cond. 8) the pursuers, in the erroneous belief, induced by the statements in the note, that the site of the sawmill was on the land let to the defender and not on Mrs Finlayson's holding, acquired from Mrs Finlayson the right to erect their sawmill on another part of her holding. They accordingly moved the sawmill from its original site (site No. 1) to this new site (site No. 2), a distance of 150 yards. The cost of so doing, together with some expenses incurred in making a new road and otherwise, they estimated at £230, 10s.

On 20th March 1913 the First Division, on a reclaiming note, varied the interim interdict by expressly excluding from its operation the ground of which Mrs Finlayson was a statutory small tenant, allowed answers to be received, and remitted to the Lord Ordinary to proceed with the note and answers.

On 31st July 1913 the Lord Ordinary (Skerrington) recalled the interim interdict; granted interdict in terms of head (2) of the prayer (*i.e.*, against felling or interfering with timber); and *quoad ultra* refused the prayer of the note. His Lordship stated as a reason for recalling the interdict and refusing the prayer that the land alleged to be interfered with was part of Mrs Finlayson's holding, in which consequently the tenant of Balmacara House had no possessory interest to protect. However, as his Lordship held that the tenant had an interest in the timber over all the lands, he granted interdict in terms of head (2).

The pursuers, after averring the foregoing facts, stated that they had suffered loss and damage through the wrongous use of interdict by the defender to the extent of the above-mentioned sum of £230, 10s.

The defenders pleaded, *inter alia*;—(1) The pursuers' statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The defender should be assoilzied in respect that (*a*) the loss and injury alleged to have been sustained by the pursuers was entirely due to their own unlawful actings; (*b*) the pursuers were not prevented by any interdict obtained by the defender from doing anything which they had a legal right to do.

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On 5th June 1914 the Lord Ordinary (Ormidale) allowed a proof.*

The defender reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 15th and 16th July 1914.

Argued for the reclaimer;—In order to succeed in their claim the respondents must not only show that the interdict of which they complained had been wrongly obtained, but they must also show that they had suffered a legal wrong in consequence.[1] The pursuers record contained no averment of their having suffered any legal wrong, because there was no averment of any right on their part to erect their saw-mill on the original site, from which they complained they had been wrongfully excluded. They were in fact merely squatters, and what they had been interdicted from doing was something they had no legal right to do.

Argued for the respondents;—There was a presumption in law that an interdict which had been recalled had been wrongfully obtained and was illegal, and the onus was on the party defending the interdict to prove the contrary.[2] Accordingly the respondents had averred a wrong here for which they were entitled to recover damages. Their possession of the site of the sawmill must be assumed to be lawful until challenged by someone having a title to do so, and, on the averments, it was clear that the defenders had no such title. Even a squatter had a right to maintain his possession until ejected by someone having a better title.

Lord President.—This is an action in which the pursuers claim

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* "Opinion.—The defender pleads that the pursuers' averments are irrelevant and that the action ought to be dismissed. I am unable to give effect to this plea. That being so, it is not necessary or desirable at this stage to indicate any opinion on many of the questions discussed at the hearing. It is enough to say that, in my opinion, the pursuers have sufficiently set out that in consequence of an interdict wrongfully obtained against them they have suffered considerable loss and damage.

"With reference to the law ascertained by the case of *Aird* v. *School Board of Tarbert*, 1907 S. C. 305, the facts as disclosed by the pursuers' averments do not warrant its application. The interdict said to have been wrongously obtained has been recalled. That shows that it ought not to have been asked for. That is not sufficient *per se* to found an action of damages. The interdict must have operated a civil wrong. Now the pursuers set out that it did so operate, for it prevented them *inter alia*, from using a portion of ground for the site of their sawmill which they aver they were quite entitled to use; that they were in consequence compelled to change the site of their mill. Further, they aver that they were prevented from using the existing road to their mill, and forced at great cost to make a new road. It is said that the pursuers have not disclosed any title to use either the ground occupied by their mill or the road in question, and that it is enough for the defender to show that, whether he has the right to prevent them so using the ground and road or not, someone else has. It appears to me to be a sufficient ground for repelling that contention that, so far as is disclosed in any proceedings to which I was referred, no one but the defender has challenged the pursuers' right. . . ."

[1] Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, (1906) 8 F. 731; Aird v. School Board of Tarbert, 1907 S. C. 305.

[2] Miller v. Hunter, (1865) 3 Macph. 740; Jack v. Begg, (1875) 3 R. 35; Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, 1907 S. C. (H. L.) 9, *per* Lord Collins, at p. 13.

damages from the defender for loss which they say they have incurred in consequence of an interim interdict having been wrongfully obtained against them at the defender's instance. The Lord Ordinary has allowed a proof before answer.

I am of opinion that the pursuers' averments are irrelevant and ought not to be remitted to probation. The law is clear. A wrongful interdict does not of itself entitle the man who is placed under the interdict to have damages. He must show that there has been an invasion of his legal right and resultant civil wrong done to him. In this case it is clear, I think, on the pursuers' own averments, that the interdict of which they complain did not invade their legal rights and did them no civil wrong of which they are entitled to complain. It was obtained on the 25th February 1913, and on its face bore to interdict the present pursuers from entering upon certain lands leased by the complainer, from cutting timber upon the land, and from erecting a sawmill upon the land. The interim interdict so granted was continued on the 7th March and was modified on the 20th of the same month. But in February or, at all events, early in March, as I gather from the pursuers' averments, they, in the belief that they were precluded by the interdict from retaining a sawmill on what is called site No. 1, changed the site to another a few yards off, called site No. 2, and it is in consequence of the expense to which they were so put that they ask damages in this case. But they do not allege, nor could they allege, that they had any right whatever to erect the sawmill upon site No. 1. It is apparent that they had no right to do so; and, accordingly, that the interdict obtained against them by the complainer deprived them of no right, for they had none. It invaded no right, because they had no right to invade. And, apparently feeling conscious of that, they went to a certain Mrs Finlayson, who is said to be a statutory small tenant under the Small Landholders (Scotland) Act, 1911, of a portion of this property, and obtained from her leave to erect a sawmill upon site No. 2. I do not speculate upon the question whether Mrs Finlayson had any right to give them permission to erect the sawmill upon site No. 2. It is immaterial, because the defender has not sought to interfere with the sawmill, which, I understand, is still on site No. 2.

So far, therefore, as the pursuers' claim of damages rests upon the alleged expense they were put to in removing from the one site to the other, it appears to me to fail, because the interdict which was out against them had no wrongful effect whatever upon the first sawmill they had erected, inasmuch as it was erected without leave asked or given by anybody and, as far as I can judge, without any right whatever. On the short ground, therefore, that the interdict invaded no legal right, and therefore could give rise to no claim for damages, I hold that the averments made in the eighth article of the condescendence are irrelevant. [His Lordship then dealt with another question, with which this report is not concerned.]

Lord Johnston and Lord Skerrington concurred.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

J. C. & A. Steuart, W.S.—Dundas & Wilson, C.S.—Agents.

No. 110.
July 15, 1914.
M'Ilwaine v. Stewart's Trustees.

MRS MARGARET ALLAN OR M'ILWAINE, Pursuer.—*G. Watt K.C.*—*T. D. K. Murray.*

JOHN CHARLES STEWART AND OTHERS (Francis Pott Stewart's Trustees).—*D.-F. Dickson*—*Lippe.*

Reparation—Negligence—Property—Outside stair giving access to premises let—Visitor injured through defect in stair—Liability of landlord—Possession and control.

The only access to premises let to a tenant was by an outside stair and gangway, which formed the access to these premises alone. All the repairs to the stair and gangway were executed by the landlord and not by the tenant. A visitor to the premises having been injured through the defective condition of the stair and gangway brought an action of damages against the landlord.

Held (*dub.* Lord Skerrington) that the landlord was not liable in respect that, in the circumstances, he could not be held to have retained possession and control of the stair and gangway.

Process—Jury Trial—Refusal of bill of exceptions—Motion to apply verdict made before appealing days expired—Jury Trials (Scotland) Act, 1815 (55 *Geo. III. cap.* 42), *sec.* 7.

The Court, having pronounced an interlocutor refusing a bill of exceptions, *granted* a motion to apply the verdict, although the fourteen days had not yet expired within which their interlocutor might be appealed to the House of Lords.

Expenses—Husband and wife—Action by wife with concurrence of husband—Husband taking active part in litigation—Liability of husband.

In an action of damages for personal injuries at the instance of a married woman with the consent of her husband, the husband gave evidence as to the extent to which a business, in which he and his wife were the sole partners, had suffered owing to his wife's absence in consequence of her injuries.

The Court *decerned* against the husband jointly and severally with the wife for the expenses of the action, in respect that he had taken a prominent and active part in the litigation.

1ST DIVISION. Ld. Ormidale.

ON 3rd September 1913, Mrs Margaret Allan or M'Ilwaine, with the consent and concurrence of her husband, Thomas M'Ilwaine, brought an action of damages for personal injuries against the trustees of the late Francis Pott Stewart.

The pursuer's case was that she received the injuries of which she complained while visiting certain premises at 114 Trongate, Glasgow, of which the defenders were the proprietors and Messrs E. W. Powell & Company were the lessees. The premises were situated upon the upper floor of a two storey building and were reached by means of a wooden outside staircase and gangway; and the pursuer sustained her injuries, on 13th January 1913, through certain of the planks forming this gangway giving way beneath her as she was walking along it. She averred:—(Cond. 4) "The said accident was entirely due to the fault of the defenders. The gangway referred to belongs to the defenders, in whose possession and control it all along remained. It forms part of the access to Messrs Powell & Company's premises, but is situated entirely outside of them, and forms no part of the subjects let to Messrs Powell

The gangway is not roofed over, or in any way enclosed or protected from the weather. The defenders knew that the said gangway, being part of the access to property let by them as business premises, was in fact used by members of the public having business with their tenants. It was, accordingly, the duty of the defenders to maintain the said gangway in a safe condition for persons having occasion to traverse it. This duty the defenders negligently failed to perform. On the date of the said accident the gangway was in a grossly unsafe condition, the joists and planks being in some places quite rotten."

The pursuer also averred:—(Cond. 2) "The pursuer and her husband carry on business in partnership as ironmongers and general hardware dealers under the firm name of Thomas M'Ilwaine & Company. The pursuer and her husband are the sole partners of the said firm, and are equally interested therein. Prior to the date of the accident after mentioned the pursuer took full charge of the shop at 16 Bute Terrace, Strathbungo, belonging to the said firm, and also attended to the accounts in connection with the business, while her husband was for the most part engaged outside of the shop in executing plumber work, repairs, &c., and in following his own trade as a locksmith." (Cond. 5) ". . . Since the accident, the pursuer has been unable to resume her former duties in connection with her business, and is only able to attend to the shop for a few hours daily. The profits of the business have in consequence diminished to a considerable extent. It has also been necessary to pay for assistance which was formerly not required. . . ."

In their answers the defenders averred:—(Ans. 4) "Admitted that the gangway referred to forms part of the access to Messrs Powell & Company's premises, and is not roofed over or enclosed, and also that after the accident in question it was repaired upon the instructions of the defenders' factor, and at the defenders' expense. *Quoad ultra* denied. Explained that the said gangway is provided and used solely as a means of access of the said Messrs E. W. Powell & Company, who are tenants of the defenders, and in whose possession and control the said gangway was at the date of the accident, and has been throughout the whole period of their tenancy. Further explained that the said stair and gangway were erected twenty-two years ago, when the said Messrs Powell became tenants of the premises; that in November 1907 the whole stair and gangway were overhauled and practically renewed, and that, in particular, the gangway, the bearers, and the spars, were entirely renewed. The defenders employ a competent carpenter to act for them as factor for the said property, and to inspect the said property from time to time, and to do whatever repairs such inspection discloses to be necessary to put the property into a safe condition. These instructions were carried out by the said factor. An inspection in November 1911 revealed some defects on the steps of the stair, and these steps were then renewed. No further defect was observed or brought to the notice of the defenders in the said stair or gangway until the occasion of the accident in question, and it was inspected on defenders' behalf a short time before."

The Lord Ordinary (Ormidale) allowed an issue in ordinary form, and the case was tried before him and a jury on 19th May 1914.

The evidence showed that the building in question was situated in a back court or close and was approached from the street through

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another close. A wooden outside staircase led from the court or close to an outside gangway from which access was gained to Messrs Powell's premises by a door. The premises were used as a workshop and office. The stair and gangway were not roofed, and there was no gate or other means of excluding from them the public who had access to the close. On the occasion of the accident the pursuer had visited Messrs Powell's premises in order to pay an account. The only evidence as to the possession and control of the stair and gangway was that of Mr E. W. Powell, the sole partner of Messrs E. W. Powell & Company. His evidence was that when he originally leased the premises, more than twenty years ago, the only access to them was by an inside stair from premises below occupied by another party; that the landlord had provided him with the stair and gangway in question, which was now the only access to his premises, and gave access to these premises alone, and that he would not have taken the premises unless this stair and gangway had been erected. Mr Powell gave it as his evidence that he had not the custody and control of the stair and gangway, and had no authority to exclude the public from them. He also testified that he never repaired them, and had no duty to repair them, but that all the repairs to them were done by the landlord, on whom lay the duty of inspection and repair.

The pursuer called her husband as a witness, and he gave evidence as to the extent to which the business in which he and his wife were jointly engaged had suffered owing to his wife's absence therefrom in consequence of her accident.

Upon the conclusion of the evidence led for the pursuer counsel for the defenders moved the Court to direct the jury that the pursuer had adduced no evidence to maintain and prove her contention under the issue, and in particular no evidence of a duty on the part of the defenders towards the pursuer to maintain the wooden gangway in a safe condition, and that the jury should return a verdict for the defenders.

Counsel for the pursuer objected, and contended (1) that facts had been proved from which the jury might reasonably infer a duty on the part of the defenders towards the pursuer as a member of the public to maintain the said gangway in a safe condition; (2) that evidence had been adduced showing that the defenders in fact recognised such a duty to maintain the said gangway in a safe condition, and employed a factor to discharge the said duty on their behalf; and (3) that it was admitted by the defenders in their written pleadings that a factor was employed by them to inspect, *inter alia*, the said gangway from time to time on their behalf, and to effect whatever repairs such inspection disclosed to be necessary.

The Lord Ordinary repelled the objections of the pursuer's counsel, and directed the jury that the pursuer had adduced no evidence in law sufficient to maintain and prove her contention under the issue, and that they should return a verdict for the defenders.

Counsel for the pursuer excepted to this direction.

The jury returned a unanimous verdict for the defenders as directed.

On 28th May 1914 a bill of exceptions, which set forth the circumstances narrated above was presented to the First Division for the pursuer, and a rule was granted on the defenders to show cause why the verdict should not be set aside and a new trial granted.

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The case was heard before the First Division (without Lord Mackenzie) on 9th July 1914, Lord Ormidale being also present.

Argued for the defenders;—The test of the landlord's liability was whether he retained possession and control of the premises. The stair and gangway in question here gave the only access to the subjects let, and could not be used for any other purpose than as an access to these premises. In these circumstances it was an inference in law that the stair and gangway were part of the subjects let to the tenant, and that consequently possession and control did not remain with the landlord.[1] This situation was in no way altered by the fact that the landlord had, in a question between himself and his tenant, accepted the duty of inspection and repair.[2] In any event, the onus was upon the pursuer of proving that possession and control lay with the landlord, and she had entirely failed to discharge that onus.[3]

Argued for the pursuer;—It was a question of fact whether the landlord retained possession and control. There was here such evidence as would entitle the jury to hold that the landlord had retained such possession and control,[4] or, in any event, to transfer the onus of proof on this question to the defenders. It was not necessary to show that the stair was common to others as well as Powell in order to fix liability on the landlord; indeed, the fact that a stair was a common stair was not *per se* evidence that its possession and control remained with the landlord, it was only an element of proof on this question. In any case the possession and control which the landlord retained over a common stair were not different in quality to the control exercised over this stair and gangway by the defenders. The stair was as much open to the public as any common stair; indeed, it was more so than many, in respect that there was no door to exclude the public. The test was whether the stair was part of the subjects let, and there was sufficient evidence upon this point to show that it was not. It was as much retained by the landlord and under his control as was the roof of the building.[5] Further, the defenders had made the admission on record that they had undertaken the duty of inspection and repair of the gangway, and it was competent for the Court, in dealing with a bill of exceptions, to consider this admission.[6]

Lord President.—It appears to me that the course taken by the presiding Judge at the trial was not only formally, but in substance, correct,

[1] Cavalier v. Pope, [1905] 2 K. B. 757, [1906] A. C. 428; Robbins v. Jones, (1863) 15 C. B. (N. S.) 221; Kennedy v. Shotts Iron Co., 1913 S. C. 1143; Mathieson's Tutor v. Aikman's Trustees, 1910 S. C. 11. Grant v. John Fleming & Co., Limited, *supra*, p. 228, was also referred to.

[2] Cavalier v. Pope, [1906] A. C., *per* Lord Atkinson, at pp. 432-3, and Lord Macnaghten, at p. 430.

[3] Cameron v. Young, 1907 S. C. 475, 1908 S. C. (H. L.) 7; Cavalier v. Pope, [1905] 2 K. B. 757, [1906] A. C. 428; Cook v. Paxton, (1910) 48 S. L. R. 7.

[4] Cleghorn v. Taylor, (1856) 18 D. 664; M'Martin v. Hannay, (1872) 10 Macph. 411; Miller v. Hancock, [1893] 2 Q. B. 177.

[5] Deans v. Grove, referred to by Lord Hunter (Ordinary) in Mellon v. Henderson, 1913 S. C. 1207, at p. 1210.

[6] Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 35.

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and that the verdict of the jury given under his direction was sound and unassailable.

The question which we have to consider is whether or no their unanimous verdict in favour of the defenders is contrary to evidence? Now, the only evidence given was that adduced on behalf of the pursuer herself. An accident befell her on the 13th January 1913 when she was on a lawful errand (I assume) to the workshop owned by the defenders and in the tenancy of a person named Powell. The gangway from which she fell, in consequence of its dilapidated condition, formed the sole access to Powell's premises, but, what is more to the purpose, to nowhere else. Powell depones not only to these two facts but also to the fact that he would not have taken the premises unless this access had been given to him by the proprietors when he effected his lease.

It appears to me, therefore, to be the legitimate inference from Powell's evidence, that the staircase and the gangway were as much let to him as the workshop itself, and that the whole premises for which he paid rent included staircase, gangway, and workshop. No doubt he says that he had no right to exclude members of the public from the gangway and the staircase. I think he understated his rights in law when he said so, and that he was entitled, at any time he pleased, to exclude anybody he pleased from the use of that staircase and gangway. He could have put up a gateway; he could have prevented anybody from using it, and he could have regulated its use exactly as he thought fit. If that is a correct statement of Powell's rights, then unquestionably he was—to use the words of the pursuer's record, words that have been repeated so often in cases of this description—"in the possession and control of these premises"; for I take that phrase to mean simply this, that the premises have been let to the tenant, and that he has the right to exclude therefrom anybody he pleases and to regulate their use as he pleases. That was the sole evidence, then, given in the case on this vital topic, because your Lordships will see at a glance that this record would have been held irrelevant, and the action would have been thrown out, unless the pursuer had averred that the owner was in the possession and control of the staircase, and necessarily would have failed at the trial if she did not succeed in proving that averment. Now, it appears to me that the evidence was all one way upon that one vital point.

It is said by Mr King Murray—and he has referred us to evidence in support of his statement—that the gangway was in a dilapidated condition, and I assume that it was so for the purposes of my judgment. But then it is well-settled law—and has been well-settled law since the days of *Robbins* v. *Jones*[1]—that a landlord who lets a house, including the access to the house, if it is the access to that house alone, is not liable to the tenant's customers or guests for accidents happening, owing to its dangerous state, during the term of the lease. And accordingly, however dilapidated the condition of this staircase was at the time when the accident befell the pursuer, it appears to me that the owner of the property, at all events, was not responsible to her for any mischief which might befall her.

[1] 15 C. B. (N. S.) 221.

Our attention has been directed to the fact that, in the fourth answer to the condescendence, the defenders expressly state that they employed a competent man to inspect the premises, that he did inspect, and that repairs were made whenever repairs were found to be necessary. And Mr King Murray strongly founded upon that statement as indicating clearly that in this case, differing from the ordinary case, the owner had undertaken an express duty to inspect and repair. That may have been so, and I assume that it was so, but that was a duty that was undertaken to the tenant and not to the tenant's guests and customers. And accordingly, if that duty was undertaken, and if there was a failure to perform that duty, it might be, for aught that I know, that if an action were brought against the tenant he might claim relief from his landlord. But that does not, in any degree, affect the relationship between the tenant's customer and the owner of the property, when an accident has occurred in consequence of the dilapidated state of the property. Lord Atkinson, in the case of *Cavalier* v. *Pope*,[1] alludes to such a case as we have before us, where a landlord has undertaken such a duty of repair and inspection. He says: "The control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than a right or liability to repair the premises. It implies the right and the power to admit people to the premises and to exclude people from them." In my opinion, Powell alone had the right to admit people to the premises and to this staircase and gangway, and to exclude people from them, and the landlord had no such right. And accordingly I attach no importance in this case to the averment made in the fourth article of the defences.

The authorities seem to me to be plain. *Kennedy* v. *Shotts Iron Company*[2] appears to me almost completely to cover the present case, which I hold to be distinguished in a vital particular from all the common stair cases that have been cited, because I think the answer of the common stair cases is remarkably well put in the judgment of Lord Justice Bowen in the case which Mr King Murray cited to us, the case of *Miller* v. *Hancock*,[3]— "The defendant let the flats to tenants; but it seems to me plain, upon the facts, that the staircase" which gave access to the flats "remained in his occupation and control. The tenants could only use their flats by using the staircase. The defendant, therefore, when he let the flats impliedly granted to the tenants an easement over the staircase, which he retained in his own occupation, for the purpose of the enjoyment of the flats so let."

The phrase "possession and control" may be liable to criticism and qualification, but it appears to me that it means neither more nor less than this—that the man who has possession and control has the right to exclude from and to regulate the use of the staircase. That right Powell, on his own evidence, possessed in this case. And, therefore, the all-essential point in the pursuer's case—that the owner was in possession and control—fails. Accordingly I move your Lordships that this bill of exceptions be refused, and the rule discharged.

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[1] [1905] 2 K. B. 757, [1906] A. C. 428.
[2] 1913 S. C. 1143.
[3] [1893] 2 Q. B. 177.

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LORD JOHNSTON.—I think that this case is covered by the case of *Kennedy*.[1] The fallacy in the argument of the pursuer seems to me to be in not giving proper force to the fact that you must distinguish between cases founded on contract and cases founded upon the doctrine which is usually termed invitation. As between the tenant and the landlord there may be—I do not say there is, but, putting it at the highest for the pursuer, there may be—an obligation to repair the stair as required. Failure in that obligation might give a right of action to the tenant, but failure in that obligation would not give a right of action to any third party. The third party must found his claim upon the holding out of this access as a proper access to the premises of the occupant. So long as the landlord is in personal occupation, of course it is he who holds out the access; but as soon as he has given over, as he has done here, the exclusive right to the use of his stair to the sole tenant of the premises, he ceases to be in a position to give that invitation, and the only person in a position to give that invitation is the tenant.

On these grounds I not only think that the case of *Kennedy*[1] was well decided, but that this case is governed by the case of *Kennedy*.[1]

LORD SKERRINGTON.—I confess that I have felt great difficulty in this case, and that my difficulties have not been removed by what has fallen from your Lordships. At the same time, I am not sufficiently confident of any contrary opinion to justify me in dissenting from the judgment which is proposed. My first difficulty arises from the circumstance that the gangway was external to the shop and house, and that no means had been provided by the landlord for preventing the public from having access thereto. If we assume that the gangway was in a dangerous condition in the month of May 1912, when the last yearly let commenced, I am not prepared to say that the landlord discharged himself of his duty towards the public by simply continuing the lease. Further, I am not prepared to hold as matter of law that the possession and control of the gangway were with the tenant because it formed an access to his premises and to no others.

LORD ORMIDALE.—I remain of the same opinion as I formed at the trial, against the pursuer's case, and I agree with your Lordship.

THE COURT refused the bill of exceptions, and discharged the rule.

On 11th July 1914 counsel for the defenders moved the Court (consisting of the Lord President, Lord Johnston, and Lord Guthrie) to apply the verdict. The motion was opposed by counsel for the pursuer.

Argued for the pursuer;—The motion was premature. It should not properly be granted until after the expiry of the fourteen days within which the interlocutor refusing the bill of exceptions might be appealed to the House of Lords.[2] It was true that the interlocutor applying the verdict might also be appealed to the

[1] 1913 S. C. 1143.

[2] Jury Trials (Scotland) Act, 1815 (55 Geo. III. cap. 42), sec. 7.

House of Lords, but only on a question of law.[1] The anomalous position might arise of the interlocutor applying the verdict having to be allowed to stand, while the pursuer might have obtained an order for a new trial from the House of Lords upon appeal against the interlocutor refusing the bill of exceptions. The practice in the Outer House was not to apply a verdict until the period had expired during which proceedings might be taken to disturb the verdict either by a bill of exceptions or by a motion for a rule.

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Argued for the defenders;—There was no substance in the objection. The pursuer was not deprived of the right of appeal against either interlocutor. Notice of appeal would have its usual effect of staying further proceedings, and, should the pursuer successfully appeal against the interlocutor refusing the bill of exceptions, all subsequent administrative interlocutors would be cut down.

On 15th July 1914 the Court applied the verdict, and assoilzied the defenders.

Counsel for the defenders then moved the Court to find the pursuer's husband liable, jointly and severally with her, in the expenses of the action.

Argued for the defenders;—The husband had not confined himself to consenting to the action, he had closely allied himself with its conduct and with his wife's claim. He had given evidence as to the effect of his wife's disablement upon their joint business, and had so qualified a patrimonial interest in her claim.[2]

Argued for the pursuer;—The motion should be refused. The husband had no controlling voice in the litigation; he had not made himself *dominus litis*. The only part which he had taken, beyond giving his consent, was to give such evidence as he might have been compelled to give, and this was not a sufficient reason for finding him liable in expenses.[3] The case of *Picken*[4] was no authority for finding the husband liable in such a case as the present. The circumstances of that case were very special. It was found there that the husband was a party to what was practically a plot to put forward an unsubstantial claim which should never have been made.

Lord President.—We think, on the authorities that have been cited, it is clear that the husband must be made jointly and severally liable with his wife in the expenses of this action. That is not on the ground merely that he has given his consent and concurrence, for it is well-settled law that to give consent and concurrence will not make a husband liable for the wife's expenses. The ground of judgment is that the husband here has taken a prominent and active part in the litigation, for he and his wife seem to have been partners in business together, and, therefore, he was interested in a peculiar and exceptional way in the issue of this suit and, indeed, as we see from the notes of evidence before us, appeared as a witness on his wife's behalf.

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[1] Jury Trials (Scotland) Act, 1815 (55 Geo. III. cap. 42), sec. 9.

[2] M'Gown v. Cramb, (1898) 25 R. 634; Maxwell v. Young, (1901) 3 F. 638; Picken v. Caledonian Railway Co., (1901) 4 F. 39; Schmidt v. Caledonian Railway Co., (1903) 5 F. 648.

[3] Currie v. Cowan & Co., 1911, 2 S. L. T. 467.

[4] 4 F. 39.

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I am glad to say that we do not require to base our decision in this case on the ground taken by the Court in the case of *Picken* v. *Caledonian Railway Company* [1] but upon the ground stated in the other case [2]—that the husband had taken a prominent and active part in the litigation. Therefore we think that the husband here must be liable in expenses jointly and severally with his wife.

THE COURT found the husband liable for the expenses of the action jointly and severally with his wife.

D. MACLEAN, Solicitor—MACPHERSON & MACKAY, S.S.C.—Agents.

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JAMES ANDERSON AND OTHERS (Henry Anderson's Trustees), Pursuers and Real Raisers.

THE REVEREND WILLIAM SCOTT AND OTHERS, Claimants (Reclaimers).—*Christie, K.C.—Fenton.*

THE REVEREND JAMES PATRICK AND ANOTHER, Claimants.—*Macphail, K.C.—Normand.*

THE LORD ADVOCATE, as representing His Majesty as *Ultimus Hæres*, Claimant (Respondent).—*Sol.-Gen. Morison.—J. Smith Clark.*

Charitable Trust—Failure of object—Dissenting Church—Dispersal of congregation—Cy près—Crown—Bona vacantia.

A church and a manse were held by trustees "for the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown." Adherence to the principles contained in a document known as the "Testimony" was declared in the trust-deed to be a condition of the right of any individual to remain a member of the congregation. The congregation had seceded on a question of doctrine from the Synod of the United Original Secession Church. In 1878 the congregation (which had become reduced to fourteen individuals) ceased to worship together and the trustees let the property and accumulated the rents. In 1912 the last of the trustees died, and his testamentary trustees brought an action of multiplepoinding for the disposal of the property and the accumulations of rent.

The Lord Ordinary (Cullen), holding that the property had become *bona vacantia*, sustained a claim for the Crown as *ultimus hæres*.

Held (*rev.* that judgment) that, failing the establishment of a right to the property by any congregation of the United Original Seceders, the trust, being a trust for public purposes, fell to be administered *cy près*; and claim for Crown *repelled*.

Observations on the application of *cy près* administration to trusts for public purposes, whether "charitable" in the narrow sense of the word or not.

Observations on the distinction, in regard to *cy près* administration, between trusts which have taken effect but have lapsed through failure of the beneficiary, and trusts which have never taken effect through non-existence of the beneficiary.

1st DIVISION. Lord Cullen.

(SEE *Thomson* v. *Anderson*, (1887) 14 R. 1026.)

This was an action of multiplepoinding with regard to certain property held by trustees for behoof of the congregation of a dissenting church.

[1] 4 F. 39.

[2] Schmidt v. Caledonian Railway Co., 5 F. 648.

In 1857 a congregation of the United Original Secession Church worshipped in a church in Adam Square, Edinburgh, under the pastoral charge of the Rev. Archibald Brown. The church was held by trustees for the use and behoof of the "congregation or of those members thereof who continue to adhere to and maintain the principles . . . exhibited in the Testimony emitted by the United Associate Synod of Original Seceders." In 1857 a controversy arose between Mr Brown and the Synod of the United Original Secession Church, who, Mr Brown maintained, had deviated from the Testimony. The majority of Mr Brown's congregation supported him as against the Synod and remained in occupation of the church in Adam Square. Those members who supported the views of the Synod formed a new congregation of Original Seceders in Victoria Terrace; and in 1867 the Victoria Terrace congregation for a payment of £50 renounced all right to the Adam Square buildings and delivered up the titles to the congregation in possession, which thereafter continued to worship there under the pastoral charge of Mr Brown, and maintained that they were abiding by the Testimony, and that the Synod and those congregations which adhered to it had departed from the Testimony.

In 1870 the Edinburgh Improvement Commissioners acquired the church in Adam Square, and the congregation, with the money obtained from the Commissioners, purchased and fitted up a hall and house in South Clerk Street as a new church and as a manse for Mr Brown. The title was taken to and in favour of "Charles Lyon, Thomas Dickson, Henry Anderson, and Charles Frater Lyon, and the survivors or survivor of them, and to such other person or persons as may be named by the male members of the congregation at a general meeting called for that purpose by intimation from the precentor's desk on the Sabbath before such meeting, as trustees and managers for the Congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown, any three of said trustees while more than three survive, and the majority while three only survive, being a quorum, and any four being a quorum of a meeting of the male members of the congregation, and under the condition that any trustee or member of the congregation leaving it and worshipping elsewhere not in harmony with the principles contained in the Testimony (United Original Secession) shall thereby be disqualified from acting as a trustee under this present conveyance and from voting at meetings or of having any say in the affairs of the Congregation, and to the assignees and disponees whomsoever of the said trustees, heritably and irredeemably."

In 1876, Mr Brown became incapacitated by ill health from officiating as minster, but certain services were for sometime thereafter continued by the elders and other lay members of the congregation. On 29th July 1878 a meeting of the male members of the congregation was held, at which it was resolved that the trustees should have power to sell the church and house and to invest the proceeds "in such way and for such terms and for such period as they may deem proper," and after that date no services of the congregation were held in the church. The property was once exposed but did not sell; and it was then let to another congregation of Original Seceders.

At the date of the meeting in July 1878 the whole members of

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the congregation, male and female, numbered about 14. After that time they never worshipped together as a congregation. The Rev. Archibald Brown died on 5th February 1879, and no other minister was appointed in his place.

On 22nd October 1886 four persons who had been members of Mr Brown's congregation, brought an action against the then surviving trustees for declarator that the church and house were held by them in trust for behoof of the pursuers and other remanent members of the congregation, for an accounting of their intromissions as trustees, and also for a decree ordaining them to convey the subjects and the rents to the "minister and elders forming the kirk-session of the church of United Original Seceders in Victoria Terrace, Edinburgh . . . in trust for behoof of the congregation . . . or to the Synod of the United Original Secession denomination, or to such other persons or for such other purposes" as the Court might consider most in accordance with the purposes of the trust. In this action the trustees lodged defences, in which they denied that the congregation was ever dissolved, stated that they still hoped to get a minister for it, and that the pursuers, by joining the Victoria Terrace congregation, which the defenders averred did not adhere to the "Testimony" in sundry particulars, had deprived themselves of the right of having any say in the affairs of the congregation, and pleaded that the pursuers had no title to sue. The Lord Ordinary sustained that plea. The pursuers reclaimed, and before the reclaiming note was heard the Synod of the United Original Seceders, with the consent and concurrence of the pursuers, presented a petition to the Inner House, craving the Court in the exercise of its *nobile officium*, on the ground that it had become impossible, in consequence of the dissolution of the congregation, to carry out the trust in the original manner, to direct the property and rents to be placed at the disposal of the Synod of the Original Secession Church. Answers were lodged by the trustees, in which they took up the same position as in the defences to the action. The reclaiming note and petition were heard together, and on 19th June 1887 the Court held that it had not been proved that the purpose of the trust had failed, and refused the reclaiming note and dismissed the petition.[1]

For twenty-five years after that decision the property remained on lease and the rents were accumulated, but no steps were taken to reconstitute the original congregation. On 7th May 1912 the last of the trustees died, and his testamentary trustees brought the present action of multiplepoinding for the disposal of this trust property, the fund *in medio* consisting of the church and house and the accumulations of rent.

Claims were lodged by (1) the Reverend James Patrick, Carnoustie, Moderator, and the Reverend James Young, Ayr, Clerk, as representing the Synod of the United Original Secession Church, with the concurrence of the Victoria Terrace, Edinburgh, congregation of that church; (2) the Reverend William Scott, minister, and David Harley, session-clerk, as representing the Associate Congregation of Original Seceders worshipping in South Clerk Street, Edinburgh; (3) James Edward and others, members of kirk-session, as representing the Lauriston Street, Edinburgh, congregation of

[1] Reported 14 R. 1026.

the Original Secession Church; and (4) the Lord Advocate, as representing the Crown as *ultimus hæres*.

The Synod of the United Original Secession Church, who claimed the whole fund *in medio*, pleaded;—(1) These claimants being the Synod of the churches which accept the Testimony of 1842, to which Testimony the said Archibald Brown and his congregation also adhered, are entitled to be ranked in terms of their claim. (2) Alternatively, the trust purposes affecting the fund *in medio* have become impossible of fulfilment, and the trust being a charitable one, the funds should be applied on the principle of *cy près*, and these claimants being the object most nearly approximate to that of the original trust, these claimants ought to be ranked and preferred in terms of their claim.

The Associate Congregation of Original Seceders worshipping in South Clerk Street, Edinburgh, who claimed the whole fund *in medio*, or alternatively such part of it as the Court might determine to be proper, pleaded;—(1) The trust purposes affecting the fund *in medio* having, in the circumstances set forth, become impossible of fulfilment, and the trust being a charitable one, the fund should be applied on the principle of *cy près;* and the claimants' congregation being the object most nearly approximate to that of the original trust, the claimants ought to be ranked and preferred on the fund *in medio*, in terms of one or other branch of their claim.

The Lauriston Street, Edinburgh, congregation of the Original Secession Church, who also claimed the whole fund *in medio*, or alternatively such part of it as the Court might determine to be proper, pleaded *inter alia;*—(1) The purposes of the said charitable trust having failed, the funds thereof fall to be applied on the principle of *cy près*, and the claimants are entitled to be ranked and preferred in terms of their claim. (2) The Lauriston Street congregation of Original Seceders being the congregation in fullest accord with the doctrines and principles of the late congregation of the Rev. Archibald Brown, the claimants, as representing the said congregation, are entitled to be ranked and preferred in terms of one or other branch of their claim. (5) The said trust being a charitable one, the funds thereof cannot fall to the Crown as *ultimus hæres*, and the claim for His Majesty's Advocate should be repelled.

The Lord Advocate claimed the whole fund *in medio*, and pleaded, *inter alia;*—(1) The said congregation having ceased to exist, and there being no other person entitled to the said trust-estate claiming in this process, the claimant ought to be ranked and preferred in terms of his claim. (4) The said trust not being a charitable trust, *et separatim* not being a trust to which the doctrine of *cy près* is applicable, the claims of the other claimants should be repelled.

On 24th June 1913 the Lord Ordinary (Cullen) pronounced an interlocutor sustaining the claim for the Lord Advocate and ranking and preferring him accordingly.*

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* "OPINION.—The fund *in medio* in this action of multiplepoinding and exoneration consists of (1) a heritable property at 36 South Clerk Street, Edinburgh, used as a church hall, &c., and (2) certain monies forming accumulations of the rents of it. The heritable property was the subject of a trust, as declared in the disposition of 1871 mentioned on record 'for the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald

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The claimants the Associate Congregation of Original Seceders, South Clerk Street, Edinburgh, reclaimed, and the case was heard before the First Division (without Lord Mackenzie) on 25th June and 7th and 8th July 1914.

Argued for the reclaimers;—The judgment of the Lord Ordinary in favour of the Crown should be recalled. The circumstances of the case called for the application of the doctrine of *cy près*, and the reclaimers' congregation being the object nearest to that of the original trust, the fund *in medio* should be given to them. The doctrine of *cy près* was not limited in its application to trusts which were charitable in the strict sense of being for the relief of poverty; it had been applied in the case of trusts for religious and educational purposes.[1] The definition of charity by Lord President Inglis in the case of *Baird's Trustees* v. *Lord Advocate*[2] as relief of poverty was too narrow, and had been disapproved of by the House of Lords

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Brown.' The price paid for it was £1100. It is common ground that it is not now practicable to ascertain the sources from which this money came, though it is a probable enough assumption that it represented donations and subscriptions from members of the said congregation.

"The congregation in question stood in a very peculiar position in relation to the United Original Secession Church. It appears that in or about the year 1857, the Reverend Archibald Brown had certain differences with the Synod of that Church relating to the 'Testimony' or fundamental document setting forth the principles of the Church. These differences were serious, as they resulted in the Synod suspending Mr Brown, although they did not depose him from his ministerial office. A majority of his congregation supported Mr Brown against the Synod, and after his suspension adhered to him, forming the congregation mentioned in the disposition of 1871. It would appear that the differences between Mr Brown and his said congregation on the one hand, and the Synod on the other hand, were never healed, and the suspension of Mr Brown was never removed. The congregation, till it died out, remained in the position of isolation necessarily arising from these conditions. In 1878 the members of the congregation had dwindled to fourteen, and at that period the congregational existence ceased. The Reverend Mr Brown died in February 1879.

"Of the trustees named in the disposition of 1871 only one, Mr Henry Anderson, survived and continued qualified to act after the dissolution of the congregation in 1878. He continued to administer the heritable property, which he let to another congregation of Original Seceders. He received the rents and accumulated the amount thereof in bank. Matters continued on this footing until Mr Anderson died in May 1912. He then stood vested in trust with the heritable property under the disposition of 1871, while the monies representing the accumulated rents were lodged in

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[1] Burnett v. St Andrew's Episcopal Church, Brechin, (1888) 15 R. 723; Grant v. Macqueen, (1877) 4 R. 734; M'Dougall, (1878) 5 R. 1014; Kirk-Session of Prestonpans v. School Board of Prestonpans, (1891) 19 R. 193; Old Monkland School Board v. Bargeddie Kirk-Session, (1893) 21 R. 122; Thomson v. Anderson, (1887) 14 R. 1026, *per* Lord Justice-Clerk Moncreiff, at p. 1033; Attorney-General v. Bunce, (1868) L. R., 6 Eq. 563; Attorney-General v. Stewart, (1872) L. R., 14 Eq. 17; Rodwell v. Attorney-General, (1886) 2 T. L. R. 712. Stuart's Executors v. Colclough, (1900) 8 S. L. T. 236; Association of English Episcopalians in Scotland v. Lindsay, (1910) 2 S. L. T. 404, and Peake v. The Association of English Episcopalians in Scotland, (1884) 22 S. L. R. 3, were also referred to.

[2] (1888) 15 R. 682, at p. 688.

in the case of *Commissioners for Special Purposes of Income-Tax* v. *Pemsel*.[1] No distinction was recognised in Scotland in questions of administration between trusts for charitable purposes properly so called and trusts for purposes of public utility. The true distinction was between private trusts, in which only named individuals could claim an interest, and trusts intended to benefit a section of the public.[2] The object of the present trust was to benefit that section of the public which adhered to the principles contained in the Testimony of the United Original Secession Church, and it fell within the class of trusts to which *cy près* applied.[3] Cases like *Burgess's Trustees* v. *Crawford*,[4] in which, there being no general charitable intention, there was initial failure of the object of a trust before the trust had taken effect, were distinguishable from the present case where the trust had taken effect but the object of it had subsequently failed.[5] As negativing the claim of the Lord

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bank on deposit-receipts taken in his name for behoof of the said former congregation which had worshipped under the Reverend Mr Brown.

"In the present competition the claimants are, on the one hand, the Crown whose claim is for the property and funds as *bona vacantia*, and, on the other hand, the Synod of the United Original Secession Church and two congregations of that Church, none of whom have any existing legal right to the fund *in medio*, but who appear to oppose the claim of the Crown and maintain that the Court should make a *cy près* application of the fund in favour of them respectively or in favour of the Original Secession Church in some way.

"It would seem to be an anomalous result if this trust property, provided as it was for the benefit and support of Mr Brown's congregation in the position of alienation from the United Original Secession Church which it occupied, should now be applied for the benefit of that Church from which it differed on questions deemed so fundamental as to justify the Synod, in their judgment, in suspending Mr Brown, and to bring about a split in his original congregation. Assuming that the trust falls within the class of charitable trusts where the *cy près* principle finds place, it is necessary that there should be in the terms of the trust as constituted some express or implied general dedication of the trust funds to charity in order to justify their application by the Court to a new object when the original object specifically named has failed. Now in the terms of this trust as embodied in the deed of 1871 I confess that I am unable to discern any intention on the part of the makers of it other than that of providing

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[1] [1891] A. C. 531, *per* Lord Watson at pp. 560, 561; See also Blair v. Duncan, (1901) 4 F. (H. L.) 1, *per* Lord Davey, at p. 3.

[2] M'Laren on Wills and Succession, (3rd. ed.) p. 917.

[3] Trustees of Falkirk Certified Industrial School v. Ferguson Bequest Fund, (1899) 1 F. 1175; Glasgow Royal Infirmary, (1877) 14 R. 680; Clephane v. Magistrates of Edinburgh, (1869) 7 Macph. (H. L.) 7, *per* Lord Westbury, at p. 15; Carnegie Park Orphanage, (1892) 19 R. 605, *per* Lord M'Laren, at p. 608; *In re* Slevin, [1891] 2 Ch. 236; Bruty v. Mackey, [1896] 2 Ch. 727; Attorney-General v. The Ironmongers Company, (1834) 2 M. & K. 576, *per* Lord Brougham, L.C., at p. 588; Moggridge v. Thackwell, (1802) 7 Vesey, 36; Da Costa v. De Pas, (1754) Amb. 228; Tudor on Charities and Mortmain, (4th ed.) p. 205. *Cf.* Bannerman v. Bannerman's Trustee, (1896) 23 R. 959, and Grigor Medical Bursary Fund Trustees, (1903) 5 F. 1143.

[4] 1912 S. C. 387. See also Rymer v. Stanfield, [1895] 1 Ch. 19.

[5] *In re* Slevin, [1891] 2 Ch. 236; Bruty v. Mackey, [1896] 2 Ch. 727, *per* Kekewich, J., at p. 735; Tudor on Charities and Mortmain, (4th ed.) p. 109.

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Advocate reference was made to a dictum of Lord Cairns in the case of *Magistrates of Aberdeen* v. *University of Aberdeen*,[1] and to a dictum of Lord Deas in the case of *Mitchell* v. *Burness*.[2]

Argued for the claimants the Synod of the United Original Secession Church;—These claimants were entitled to the fund *in medio* as a matter of legal right, and should be allowed a proof. The present trust had not failed; it was a trust not for the benefit of a particular congregation, but for the benefit of all persons who adhered to certain religious principles, and there were still persons in existence who were qualified to benefit. These claimants represented all such persons. Even if it should be decided that the original trust purpose had failed the trust property did not, upon such failure, become *bona vacantia* and fall to the Crown.[3] There was no authority for the contention of the Lord Advocate that it did. When the Attorney-General intervened in cases like the present in England it was not to claim the property but to protect the trust.[4] Once a charitable trust had taken effect the trust property could never become *bona vacantia* on the subsequent failure

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benefit to the particular congregation named. Nor do the peculiar circumstances which characterised the history and status of that congregation point in any way to any wider intention. They emphasise the limitation in the expression of the object contained in the trust-deed.

"I was favoured with a citation of numerous cases where the *cy près* principle has been applied. The principle itself is well defined, and the question that arises in any particular case is whether the terms of the trust or bequest under consideration contain the element of general dedication required to give room for the application of the principle. Each case must be considered by itself as it arises, and supposed analogies to previous cases may easily prove misleading. In the present case, as I have said, I do not perceive the element of general dedication in the terms of the trust purpose of 1871. And, if one considers how real and vital such differences in belief or opinion as marked Mr Brown's isolated congregation are to the persons who share them, it seems to me manifest that now to devote the funds raised by that congregation for their support to the benefit of those from whom they differed and by whom they were ostracised would be doing signal violence to the intentions of the makers of the trust.

"If I am right in the views which I have expressed, the only purpose for which the trust was constituted has been fulfilled, so far as it could be fulfilled, and the trust is spent. In legal right the trust property, being freed of the trust, should revert to the persons who provided it. It is common ground, so far as the compearing claimants are concerned, that it is not now practicable to ascertain these persons. The usual publicity by intimation has been given to the dependence of the process, and no one alleging right to any part of the fund *in medio* as a maker of the trust has compeared to claim. In these circumstances the trust funds, for the purposes of the present process, appear to me to be derelict property. And if that be so I do not see any answer to the claim of the Crown to them as being *bona vacantia*. I shall accordingly sustain the Crown's claim."

[1] (1877) 4 R. (H. L.) 48, at p. 52.

[2] (1878) 5 R. 954, at p. 959. See also Cairncross v. Lorimer, (1860) 3 Macq. 827; Lewin on Trusts, (12th ed.) p. 1202.

[3] Sands v. Bell and Balfour, 22nd May 1810, F. C.

[4] Attorney-General v. Magdalen College, Oxford, (1854) 18 Beav. 223, *per* Romilly, M.R. at p. 241; Tudor on Charities and Mortmain, (4th ed.) pp. 362 and 393. See also the Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 16.

of the object of the trust,[1] and in the present case the trust had taken effect. Cases in which there was initial failure of the object of a trust were in a different position.[2] In the event of its being decided that the original trust purpose had failed, the property should be administered *cy près*. The present trust was a "charitable" trust in the sense in which that term was used in England, and therefore the doctrine of *cy près* was applicable to it.[3] That doctrine had been applied in cases similar to the present in Scotland.[4] While in the present trust there was a general dedication of the property to religious purposes, such general dedication was not necessary to the application of *cy près*.[5] On the principle of *cy près* the trust property in this case should be given to these claimants as representing the object most nearly approximate to that of the original trust.

Argued for the respondent (the Lord Advocate);—This was not a case for the application of the doctrine of *cy près*. That doctrine only applied in the case of charitable trusts,[6] and the trust here was not a charitable trust. The technical meaning imputed to the word "charitable" in England had never been adopted in Scotland. In Scotland charity meant relief of poverty,[7] and that was not the object of the present trust. The decision in the case of *Commissioners for Special Purposes of Income-Tax* v. *Pemsel*[8] was a decision on a taxing statute, and had no application in the present case. Even if this were a charitable trust the doctrine of *cy près* would not be applicable. That doctrine only applied where in a charitable trust there was a *general* charitable intention,[9] and here the intention was to benefit a particular congregation. With the failure of that congregation the property held in trust for its behoof had become *bona vacantia*, and fell to the Crown.[10]

No appearance was made at the hearing in the Inner House on behalf of the claimants the Lauriston Street Congregation, of the Original Seceders.

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[1] Tudor on Charities and Mortmain, (4th ed.) p. 109; Tyssen on Charitable Bequests, pp. 440 *et seq.*; *In re* Templemoyle School, (1869) Ir. R., 4 Eq. 295; *In re* Slevin, [1891] 2 Ch. 236; Trustees of Falkirk Certified Industrial School v. Ferguson Bequest Fund, 1 F. 1175.

[2] Tudor on Charities and Mortmain, (4th ed.) p. 107; Burgess's Trustees v. Crawford, 1912 S. C. 387.

[3] Tudor on Charities and Mortmain, (4th ed.) pp. 97 and 99.

[4] See cases cited in note 1 on p. 946 *supra*; M'Laren, Wills and Succession, (3rd ed.) p. 930.

[5] Burnett v. St Andrew's Episcopal Church, Brechin, 15 R. 723, *per* Lord President Inglis, at p. 733; Old Monkland School Board v. Bargeddie Kirk-Session, 21 R. 122; Attorney-General v. Bunce, L. R., 6 Eq. 563; Clephane v. Magistrates of Edinburgh, 7 Macph. (H. L.) 7, *per* Lord Westbury, at p. 15; Craigie v. Marshall, (1850) 12 D. 523.

[6] Tudor on Charities and Mortmain, (4th ed.) p. 146.

[7] Baird's Trustees v. Lord Advocate, 15 R. 682, *per* Lord President Inglis, at p. 688; Macintyre v. Grimond's Trustees, (1904) 6 F. 285, *per* Lord Moncreiff, at p. 293, *rev.* 7 F. (H. L.) 90.

[8] [1891] A. C. 531.

[9] Burgess's Trustees v. Crawford, 1912 S. C. 387.

[10] Stair, III. iii. 47, and IV. xiii.; Tudor on Charities and Mortmain, (4th ed.) pp. 362 and 363; Cunnack v. Edwards, [1896] 2 Ch. 679; Smith v. Lord Advocate, (1899) 1 F. 741.

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At advising on 15th July 1914 the opinion of the Court was delivered by

LORD SKERRINGTON.—The chief item of the fund *in medio* consists of a hall, used as a church, and of a house in South Clerk Street, Edinburgh, which were bought in 1871 and were vested in trustees for behoof of "the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown." The price of the property was £1100, as appears from the disposition by the seller in favour of the trustees, which was dated and recorded in September 1871. It was, I think, implied, though not actually expressed, in this disposition that adherence to the principles contained in a document known as "the Testimony" was a condition of the congregation's right to the property; but the point becomes quite clear when we refer (as we may and must) to the title of the property in Adam Square. The occasion for the purchase of new premises for the congregation and its minister was the acquisition of the church in Adam Square by the Edinburgh Improvement Commissioners in 1870. The price of the new church and manse was provided out of the price received from these Commissioners. The instrument of sasine of the Adam Square property, which was recorded in the Burgh Register of Sasines on 20th September 1844, bears that the subjects were bought conform to contract of ground-annual entered into between the sellers and certain persons designed as "trustees of the congregation of United Original Seceders presently meeting in the Merchants' Hall, Hunter's Square, Edinburgh, under the pastoral charge of the Reverend Archibald Brown." The consideration was a sum of £250 paid "by the said congregation of United Original Seceders," and also a ground-annual. The trust purposes were described as follows:—"In trust for the use and behoof of the said congregation, or of those members thereof who continue to adhere to and maintain the principles presently exhibited in the Testimony emitted by the United Associate Synod of Original Seceders for the Covenanted Reformation attained to by the Reformed Church of Scotland between 1638 and 1650, and against the several steps of defection therefrom in former and present times." It will be seen that the primary beneficiary of the trust now in question was a particular congregation of United Original Seceders. Though it was described and identified firstly by its successive meeting places and secondly by the name of its minister, the congregation might remain the same notwithstanding that it changed both its meeting place and its minister. On the other hand, adherence to the Testimony was clearly made a condition of the congregation's right to the property. The alternative trust for behoof of such members of the congregation as continued to adhere to the Testimony was obviously not intended to create any beneficial right of a private kind in the persons of such members, but merely to secure the orthodoxy of the congregation. The trust, in my opinion, was a permanent and public trust as distinguished from a private trust. By providing Mr Brown's congregation with a hall in which they might assemble for public worship and a manse in which they might house their minister, a benefit was at the same time conferred upon a

section of the public who would be entitled in all time coming to join this congregation provided such adherents maintained the principles of the Testimony. A minor part of the fund *in medio* consists of the accumulated rents of the heritable property. The Lord Ordinary has awarded the whole fund *in medio* to the Crown as being derelict property and *bona vacantia*.

From the opinion of the Lord Ordinary, though not from his interlocutor, it appears that he has in substance decided three questions. He has decided, in the first place, that none of the compearing claimants have any legal right to the fund *in medio* as representing Mr Brown's congregation. This finding records what is apparent on the face of the claims, Nos. 6, 10, and 9 of process, viz., that neither the United Original Secession Synod nor the Associate Congregation of Original Seceders worshipping at No. 52 South Clerk Street, Edinburgh, nor the congregation of the Original Secession Church, Lauriston Street, Edinburgh, can identify themselves with the congregation which was the beneficial owner of the trust property forming the fund *in medio* in the present action. It appeared, however, in the course of the debate before us that there does exist a congregation of United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh, which may possibly be able to show that it is the legitimate successor of the congregation which was the original beneficiary. For some reason the Victoria Terrace congregation made no claim in the present action on its own account, but concurred in the claim at the instance of the Synod. It is, in my opinion, necessary that the members of this congregation should have an opportunity of considering whether they can establish a legal right to the fund *in medio*, though if they desire to lodge such a claim it will be for the Lord Ordiuary (to whom the case will be remitted) to decide upon what terms it should be received at this late stage in the litigation.

I do not doubt, however, that, as the case was presented to him, the Lord Ordinary was well entitled to hold (as he did in the second place) that no one representing the original beneficiary was likely to appear, and that the case must be disposed of on the assumption that no such beneficiary existed. In so deciding, the Lord Ordinary probably had in view the litigation with reference to this same congregational property which took place in the year 1887, and which is reported in 14 R. 1026. In that case it was proved that the congregation had ceased to worship together in the year 1878 in consequence of their minister, Mr Brown, having fallen into bad health, and that it had authorised the trustees to sell the church and house and to invest the proceeds. The property was not sold but was let to another congregation of Seceders, which happens to be one of the claimants in the present case, but does not claim to be identical with Mr Brown's congregation. In October 1886 four members of the original congregation brought an action in which they averred that the congregation had been finally dissolved, and concluded that its property should be conveyed to the congregation in Victoria Terrace, or to the Synod of the United Original Secession denomination, or otherwise as the Court might consider most in accordance with the purposes of the trust. A petition was also presented to the Inner House

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at the instance of the Synod. The trustees in their defences, and in their answers, denied that the congregation had been dissolved, and stated that they still hoped to get a minister for it. The Court held that it had not been proved that the purposes of the trust had failed.

During the twenty-seven years which have elapsed since that decision the property has remained under lease, and no steps have been taken to reconstitute the original congregation. But the debt on the property has been paid off and nearly £600 of rents have been accumulated. All the trustees have meanwhile died, and the present action of multiplepoinding and exoneration was brought by the testamentary trustees of the last surviving trustee. Having decided rightly and legitimately, as I think, upon the materials before him that no congregation existed which could claim as of right to be the beneficiary in the trust, the Lord Ordinary went on to decide in the third place that the heritable property and accumulated rents had fallen and belonged to the Crown as *bona vacantia*.

No authority was quoted to us as supporting the view that property held in trust for a particular congregation of dissenters falls to the Crown when the congregation has been dissolved without any prospect of its being reconstituted. On the contrary, in the former litigation the Lord Justice-Clerk (Moncreiff) gave a tolerably clear indication to the contrary. He stated that the Court was asked "to find that the property of the congregation ought to be applied for the benefit of the denomination as the purpose nearest to that of the original trust. In the end we may be obliged to do that, but as matters stand at present I am of opinion that the purpose of the trust has not failed."[1] Lord Young[2] expressed himself to much the same effect. I have no doubt that the Lord Ordinary would have gone on to prepare a scheme for the administration of the trust-estate in the manner pointed out by section 16 of the Trusts (Scotland) Act, 1867, if he had not misunderstood (as I venture to think he did misunderstand) a recent decision of this Division of the Court, which in my view had no application to the case before him. Though he does not cite the case of *Burgess's Trustees* v. *Crawford*,[3] it is, I think, clear from the language used in his opinion that he proceeded upon the supposed authority of that decision. He states that "The principle itself [of *cy près*] is well defined, and the question that arises in any particular case is whether the terms of the trust or bequest under consideration contain the element of general dedication [to charity] required to give room for the application of the principle. Each case must be considered by itself as it arises, and supposed analogies to previous cases may easily prove misleading. In the present case, as I have said, I do not perceive the element of general dedication in the terms of the trust purpose of 1871." In this passage his Lordship has, in my view, confounded two entirely different matters, viz., a testamentary trust or bequest which has not yet taken effect, and the efficacy of which is disputed by reason of the alleged non-existence of the beneficiary pointed out in the will, and a trust or bequest which has taken effect but which has subsequently failed. I shall assume that if a succession had opened in the year 1912 under which a

[1] 14 R., at p. 1033. [2] 14 R., at p. 1034. [3] 1912 S. C. 387.

congregation as described in the titles of 1871 and 1844 was left a legacy the bequest would have lapsed, because no such congregation then existed, and because the terms of the will did not disclose any intention to benefit the Seceders' denomination as distinguished from Mr Brown's congregation. In that case the legacy would have fallen to the residuary legatee named in the will or into intestacy. The rule of construction which the Court applied to the will of Mr Burgess affords no argument in favour of the view that property which actually belonged to a particular congregation must go the Crown in the event of the congregation being afterwards permanently dissolved. In such a case it is irrelevant to inquire whether the congregation acquired its property, or the price which it paid for its property, by bequest, or by donation, or by means of subscriptions, unless it can be predicated of any particular money or property that it was given on such terms as created a resulting trust, express or implied, in favour of the testator, donor, or subscriber—*Trustees of Falkirk Certified Industrial School* v. *Ferguson Bequest Fund*,[1] *Young's Trustees* v. *Deacons of the Eight Incorporated Trades of Perth*,[2] *Bannerman* v. *Bannerman's Trustee*,[3] *Bain* v. *Black*.[4]

The cases are numerous in Scotland where a trust duly constituted for purposes either eleemosynary, or educational, or religious, either failed completely, or at any rate required to be reconstituted owing to a change of circumstances, and where the Court of Session sanctioned a scheme for the application of its property to a purpose different from, but *ejusdem generis* with, the purpose for which the property was previously held. The classical example is that of the Edinburgh Trinity Hospital, and the classical statement of the law was made by Lord Westbury in that case—*Clephane* v. *Magistrates of Edinburgh*.[5] I refrain from quoting it. Lord Westbury there carefully distinguished a class of cases peculiar to England where a charity having failed by reason of its illegality, it fell to the Crown to declare what form of administration should be adopted. Trinity Hospital was an example of an eleemosynary trust. In the case of the *Falkirk Industrial School*,[1] the trustees had power under the constitution to alter the destination of the funds, but the Court nevertheless approved of a scheme not for permanent administration such as is contemplated in section 16 of the Trusts Act, 1867, but for the distribution of the funds. I refer to the case of *Trustees of Carnegie Park Orphanage*[6] for a general statement by Lord M'Laren as to the principles of *cy près* administration. The case of the Drum Bursaries was an example of a purely educational trust, but the Court of Session acting under the directions of the House of Lords exercised the same jurisdiction as in the case of an ordinary charity—*University of Aberdeen* v. *Irvine*.[7] The cases of *Kirk-Session of Prestonpans* v. *School Board of Prestonpans*[8] and *Old Monkland School Board* v. *Bargeddie Kirk-Session*[9] are examples of trusts which were not eleemosynary but educational and religious. The same was true of the Rothiemurchus Endowment—*Grant* v.

[1] 1 F. 1175. [2] (1893) 20 R. 778. [3] 23 R. 959.
[4] (1849) 11 D. 1286. [5] 7 Macph. (H. L.) 7, p. 15.
[6] 19 R. 605, at p. 608. [7] (1869) 7 Macph. 1087.
[8] 19 R. 193. [9] 21 R. 122.

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Macqueen.[1] The Lord President (Inglis) indicated that in the case of such a trust the Court had the same jurisdiction "in framing schemes" as in the case of "a charitable bequest." The failure here was only temporary and so also was the scheme subsequently approved by the Court—*M'Dougall*.[2] It does not seem to have occured to anyone that the *interim* revenues should be paid to the Crown. Perhaps the nearest case to the present one is that of the Episcopal Chapel at Brechin—a purely congregational and religious trust which had admittedly failed owing to the dissolution of the Licensed Episcopal Congregation in Brechin. The Court gave the property to the Scottish Episcopal Church in Brechin.[3] The Lord President (Inglis) said "The short ground of judgment seems to be that the chapel was built in the year 1743 by and for the use of the Episcopalians in Brechin, and that the monies arising from the sale of the chapel in consequence of its disuse and the failure of the trust on which it was held ought to be given to the only parties who now represent the Episcopalians of Brechin." And yet the trust in question was not a "charitable" one within the meaning of his definition of that word in the case of *Baird's Trustees* v. *Lord Advocate*.[4] He there said "It appears to me that 'charity' and 'charitable' have one sense, and one only, in ordinary familiar and popular use. Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity' as it occurs in this statute. The Court of Chancery, as we know, has extended the use of the word 'charity' to very different purposes—to purposes of general benevolence and of public utility—but I think it is quite impossible, where we are applying the proper rule of construction of a taxing Act, to give it any such meaning here." The House of Lords in the case of *Commissioners for Special Purposes of the Income-Tax* v. *Pemsel*,[5] disapproved of this definition so far as applying to the Income-Tax Acts; but it humbly appears to me that it is equally unsound as an exposition of the popular meaning of the word "charity." Infirmaries and hospitals for the sick were originally founded primarily as a charity to the poor and destitute, a class of persons who are now entitled to medical relief from the parish council. At the present day the main purpose of such institutions is not to relieve poverty, but to provide the most skilful medical and surgical treatment for large sections of the population consisting of persons who, though self-supporting and well-to-do in their own rank of life, could not pay for such treatment in the event of sickness or accident, if they had to rely entirely on their own resources. In exactly the same way philanthropic persons provide bursaries and educational foundations for the benefit of young gentlemen who are not objects of charity in the narrow sense of the word, but who could not obtain the advantages of a public school or university education without such assistance. Again, the establishment of a convalescent home for fever patients is in a popular sense a charity and was so regarded by the Court—*Glasgow*

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[1] 4 R. 734. [2] 5 R. 1014.
[3] Burnett v. St Andrew's Episcopal Church, Brechin, 15 R. 723.
[4] 15 R. 682, at p. 688. [5] [1891] A. C. 531.

Royal Infirmary,[1] *Glasgow Royal Infirmary* v. *Magistrates of Glasgow*[2]— but I cannot regard such an institution as in any sense eleemosynary. I see no difference between helping a self-supporting working man to obtain the services of the greatest surgeon of the day during his illness, or to obtain the enjoyment of a country residence during his convalescence, and helping a professional man of small means to provide his children with something equally beyond his pecuniary resources, viz., the very best education obtainable at a public school and a university. All these objects are philanthropic and are in no sense eleemosynary. They are charitable inasmuch as the pious donor acted charitably, but the party benefitted is not a recipient of "charity" within the meaning of the Lord President's definition of that word.

I am not concerned with the question whether the trust with which we have to do in the present case is charitable in the sense that its property should be exempted from income-tax, or is charitable in the sense that testamentary trustees who were authorised to expend money on charitable purposes could lawfully have given pecuniary assistance to Mr Brown's congregation of Seceders, if they had found such a congregation in existence and contributing to the spiritual welfare of a section of the citizens of Edinburgh. Whether charitable or not, this congregational trust must, in my opinion, be administered as a trust which was intended to benefit a section of the public in all time coming, and in which the public possesses an interest which did not terminate with the permanent dissolution of the congregation which was the primary beneficiary. In the case of *Pemsel*,[3] Lord Watson stated that "Scotch trusts, which are *ejusdem generis* with trusts falling within the statute of Elizabeth, are charitable in this sense, that they are all governed by the same rules which are applicable to charitable trusts in England." The Trusts Act, 1867, section 16, assumes that the jurisdiction of the Court of Session to settle a scheme of administration is not limited to charities. In the last edition of his book on Wills and Succession, ii., p. 917, Lord M'Laren went considerably further in the way of denying the existence in Scotland of any distinction between trusts for charitable purposes and trusts for purposes of public utility. I respectfully adopt the following statement of the law of Scotland which was published in the year 1894 as still substantially accurate. "The term 'charitable trust' is a convenient general name, but it must be kept in view that the law of Scotland (as hitherto understood and administered) recognises no distinction either as to construction or principles of administration between gifts to charitable uses properly so called, and gifts to purposes which, though not charitable, are lawful and useful. The true distinction is between private trusts or bequests, in which only individuals named or designed can claim an interest, and those which are intended for the benefit of a section of the public, and which may be enforced by *popularis actio*. A gift to a community of a public park, library, or place of recreation would not, according to the ordinary use of language, be described as a charity, while a

[1] 14 R. 680. [2] (1888) 15 R. 264.
[3] [1891] A. C. 531, at p. 561.

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hospital or an asylum would be so described; but the law which governs the trust intended to promote the healthy exercise of the mind and body is (in the absence of artificial limiting rules) necessarily the same law which applies to the trust for the restoration of mind or body when injured or diseased." Lord M'Laren's statement requires modification where a question arises whether a particular trust has been validly constituted. A gift for charitable purposes may be held to be sufficiently definite and therefore valid, whereas a trust for public, religious or philanthropic purposes may be held to be indefinite and invalid—*Blair* v. *Duncan*[1]; *Grimond or Macintyre* v. *Grimond's Trustees*[2]; *In re Macduff*.[3]

Assuming, however, that a trust has once been validly constituted in which the public have an interest, there seems to be no reason why we should adopt the English rule that only a charitable trust can be administered *cy près*. The law of charities in England bristles with technicalities for which no analogies exist in our law. Thus in some cases the validity of a trust depends on its being non-charitable and so outside the law of mortmain; in other cases its validity depends on its being charitable and so outside the law of perpetuities; in other cases its validity depends on whether the donee is free to spend the money or is directed to hold it in perpetuity. Some of these subtleties are illustrated in the recent case of *In re Drummond*.[4] As Lord Watson pointed out in *Pemsel's* case[5] there has been no occasion in Scotland to draw a hard and fast line between charitable and other public trusts, and I must decline the invitation which was made to us by the counsel for the Crown to introduce such a distinction in the present case.

The following authorities were cited at the debate as bearing on the position of the Lord Advocate in regard to charities, viz., a dictum of the Lord Chancellor (Cairns) in *Magistrates of Aberdeen* v. *University of Aberdeen*,[6] and a dictum of Lord Deas in *Mitchell* v. *Burness*.[7] We were also favoured with a copious citation of English decisions, but I do not think it necessary to allude to more than two of them. The case of *In re Macduff*[8] already cited is interesting as showing that however wide may be the legal conception of a charitable purpose in the law of England there may yet, in the opinion of eminent English Judges, be philanthropic purposes which are not charitable. Again, the case of *In re Slevin*[8] seems to be very similar to the present one, except that the Attorney-General there appeared for the purpose of supporting, and not, as does the Lord Advocate in the present case, for the purpose of defeating, the charity. In the concluding passage of his opinion Kay, L.J., made it clear that he did not proceed upon the ground of any supposed "general charitable intention." I understand (though I do not profess to be sure) that his statement that the "property falls to be administered by the Crown, who will apply it according to custom for some analogous purpose of charity," does not imply that such application of the funds was a mere act of grace

[1] (1900) 3 F. 274, *aff.* 4 F. (H. L.) 1.
[2] (1904) 6 F. 285, *rev.* 7 F. (H. L.) 90.
[3] [1896] 2 Ch. 451.
[4] [1914] 2 Ch. 90.
[5] [1891] A. C. 531, at p. 561.
[6] 4 R. (H. L.) 48, at p. 52.
[7] 5 R. 954, at p. 959.
[8] [1891] 2 Ch. 236.

on the part of the Sovereign who, but for a contrary custom, might have appropriated them as *bona vacantia*.

In order to avoid misapprehension I may say that I have looked through the long series of cases in which the property of dissenting churches and congregations, and more particularly the property of congregations of the Secession Church, has formed the subject of litigation in our Courts. I have found nothing in the way either of decision or of judicial dicta which goes to support the judgment of the Lord Ordinary. On the other hand, I have found nothing in any of these cases which I can usefully cite in support of the judgment which I advise your Lordships to pronounce, and which is as follows:—[His Lordship then read the terms of the interlocutor *infra*].

THE COURT pronounced the following interlocutor:—". . . Recall said interlocutor [of Lord Cullen, dated 24th June 1913], and repel the claim for the Lord Advocate: Remit the cause to the Lord Ordinary in order that he may give to the defenders fourth called, viz., the Reverend Ebenezer A. Davidson, 12 Argyle Place, Edinburgh, minister, and John Youngson, 76 Marchmont Crescent, Edinburgh, clerk of kirk-session of the congregation of United Original Seceders worshipping at 7 Victoria Terrace, Edinburgh, as representing said congregation, an opportunity to tender, if so advised, a condescendence and claim in the present action claiming the fund *in medio* as of right, and in order that he may receive such claim, if tendered, on such terms as he thinks fit, and may thereafter dispose thereof, all as to the Lord Ordinary shall seem just; with further instruction to him to prepare a scheme for the administration of the fund *in medio* in the event of his deciding that the trust purposes for which the said fund was originally held have failed."

RONALD & RITCHIE, S.S.C.—SIMPSON & MARWICK, W.S.—TRAQUAIR, DICKSON, & MACLAREN, W.S.—JAMES ROSS SMITH, S.S.C.—Agents.

JAMES COUSIN STEVENS, Pursuer (Respondent).—*M. P. Fraser.* MOTHERWELL ENTERTAINMENTS, LIMITED, AND ANOTHER, Defenders (Reclaimers).—*M'Lennan, K.C.—J. R. Christie.*

No. 112.

July 16, 1914.

Stevens v. Motherwell Entertainments, Limited.

Process—Amendment of record—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29—*Reclaiming note—Competency—Failure to print proof—Amendment superseding proof—Expenses.*

Decree in favour of the pursuer having been granted after a proof, the defenders reclaimed and boxed prints of the reclaiming note and the record, but did not print the notes of evidence. At the calling of the reclaiming note they tendered a minute of amendment, disclosing a new ground of defence which, they contended, entirely superseded the proof that had been taken.

The respondent moved the Court to disallow the amendment and to refuse the reclaiming note, on the ground that the reclaimers had failed to lodge prints of the proof, and that this failure prevented the Court from judging of the expediency of the amendments which, he alleged, would be useless in view of the facts established at the proof.

The Court *allowed* the amendment, but only on condition of payment to the respondent of his whole expenses since the closing of the record.

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EXTRA DIVISION. Ld. Anderson.

ON 17th March 1914 James Cousin Stevens, S.S.C., Edinburgh, brought an action for payment of a certain sum of money against Motherwell Entertainments, Limited, and Robert Colburn Buchanan, one of the directors of the Company.

On 12th June 1914 the Lord Ordinary (Anderson) after a proof decerned against the defenders in terms of the conclusion of the summons.

The defenders reclaimed, and boxed prints of the reclaiming note and of the record, but did not print the notes of evidence taken at the proof.

The case was called for hearing before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen), on 16th July 1914, when the reclaimers tendered a minute of amendment containing averments and pleas in law founded on *res noviter veniens ad notitiam*, which, they contended, would supersede the proof.

The respondent opposed the motion, and moved the Court to refuse the reclaiming note, on the ground that the reclaimers had failed to lodge prints of the proof, which would have shown that this was not in fact a true case of *res noviter*.

Argued for the reclaimers;—The minute of amendment raised a question of relevancy depending solely on the record and the reclaiming note, which were both before the Court, and were all that a reclaimer was required to print under section 18 of the Judicature Act, 1825.[1] The proof would not have to be referred to, and would be entirely superseded if the amendment were allowed; and the Court always looked with disfavour upon unnecessary printing.[2] If the amendment was necessary for determining the real question in controversy, the Court was bound under section 29 of the Court of Session Act, 1868,* to allow it,[3] under such conditions as they thought fit. Averments of *res noviter*, if relevant, could always be added to the record[4]; in the present case the averments were of such weight that they would be a sufficient ground for an action of reduction; *a fortiori* they should be sufficient to justify an amendment of record. The amendments should be allowed and the case remitted to the Lord Ordinary for further proof.[5]

Argued for the respondent;—The Court could not judge of the propriety of the amendment—however relevant it might *ex facie* appear to be—without having the proof before them, and the reclaimers, having failed to print the material necessary for the

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[1] 6 Geo. IV. cap. 120.

[2] Cranston v. Mallow and Lien, 1912 S. C. 112.

* The Court of Session (Scotland) Act, 1868 (31 and 32 Vict. cap. 100), enacts:—Sec. 29. "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made . . ."

[3] Gelot v. Stewart, (1870) 8 Macph. 649, *per* Lord Neaves, at p. 656; Guinness, Mahon, & Co. v. Coats Iron and Steel Co., (1891) 18 R. 441.

[4] Johnston v. Johnston, (1903) 5 F. 659.

[5] Muir & Son, Limited, v. Edinburgh and Leith Corporations Gas Commissioners, (1906) 8 F. 810.

understanding of the case, ought not to be allowed to proceed.[1] If the proof were before the Court the respondent could show that, even with the record amended, the defenders could not succeed in face of the facts already proved. Further, if the amendment were allowed the reclaimers would gain a delay extending over the whole long vacation.

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THE COURT pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the minute of proposed amendment . . . allow the same to be received on condition that the defenders pay to the pursuer within one month from this date the taxed amount of the expenses incurred by him since closing the record, and remit the account thereof to the Auditor to tax and to report, and on payment of such expenses allow the pursuer if so advised to answer the said amendment."

ERSKINE DODS & RHIND, S.S.C.—MACKENZIE & FORTUNE, S.S.C.—Agents.

No. 113.

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PATRICK KEENAN, Pursuer.—*G. Watt, K.C.—T. G. Robertson.*
THE SCOTTISH WHOLESALE CO-OPERATIVE SOCIETY, LIMITED, Defenders.—*Constable, K.C.—Lippe.*

Keenan v. Scottish Wholesale Co-operative Society, Limited.

Process—Jury trial—Verdict contrary to evidence—Essential part of pursuer's case contradicted by defenders' witnesses—Defenders' witnesses not cross-examined for pursuer on this point—Jury Trials (Scotland) Act, 1815 (55 *Geo. III. cap.* 42), *sec.* 6.

In an action of damages for personal injuries caused to a child, who had been run over by a motor car, the pursuer averred fault against the driver of the car in respect that, at the moment of the accident, he was talking to another man who was sitting beside him on the front seat of the car and failed to keep a look-out. The pursuer's evidence on the question of fault was that of three witnesses whose evidence testified to the truth of this averment. This evidence was directly contradicted by all the witnesses for the defenders who spoke to this point. They stated that the driver was alone on the front seat of the car, and none of them were cross-examined for the pursuer with regard to this statement. The jury having returned a verdict for the pursuer,—

Circumstances in which *held* that the pursuer, by failing to cross-examine the defenders' witnesses on this essential point, had in substance admitted that the evidence of his three witnesses had been discredited, and that he had accordingly failed to prove the cardinal fact in his case; and new trial *granted*, *per* the Lord President and Lord Johnston, on the ground that the verdict was contrary to evidence, *per* Lord Skerrington on the ground that this course was "essential to the justice of the case," as provided by sec. 6 of the Jury Trials (Scotland) Act, 1815.

1ST DIVISION. Ld. President and a Jury.

ON 11th November 1913 Patrick Keenan, as tutor and administrator-in-law for his pupil daughter, brought an action of damages against the Scottish Wholesale Co-operative Society, Limited, to

[1] Muir v. Mackenzie, (1881) 9 R. 10; Penney v. Sawers, (1890) 27 S. L. R. 988.

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recover damages for personal injuries sustained by this daughter, who had been run over by a motor car belonging to the defenders.

The averment of fault, to the proving of which the pursuer's proof was almost entirely confined, was in the following terms:—(Cond. 3) "The said accident was due to the fault of the defenders' said servant [the driver of the car] . . . Immediately before and at the time of the accident he was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any look-out."*

The case was tried before the Lord President and a jury on 23rd and 24th March 1914, and the jury returned a verdict for the pursuer.

At the trial three witnesses for the pursuer positively affirmed, both in their evidence in chief and in cross-examination, the statement from the pursuer's record quoted above as to the presence of another man on the seat beside the driver of the car. This evidence was directly contradicted by the man who was alleged to have been there, viz., Mr Mackintosh, the defenders' accountant, and by all the other witnesses for the defenders upon this part of the case. They swore that Mr Mackintosh was seated inside the car (which was a closed one), and that the driver of the car was alone on the front seat. They were not subjected to cross-examination by the pursuer's counsel upon this point. The effect of the evidence is further dealt with in the opinion of Lord Johnston, *infra*.

On 4th June 1914 the Court granted a rule on the pursuer to show cause why the verdict should not be set aside as being contrary to the evidence, and a new trial granted.

The case was heard before the First Division (without Lord Mackenzie) on 14th July 1914.

Argued for the pursuer;—The verdict of the jury had not been contrary to the evidence. There was ample evidence to entitle them to come to a conclusion in favour of the pursuer. It was true there had been a conflict of evidence as to whether another man had been seated beside the driver of the car, but it was the province of the jury, not of the Court, to balance this conflicting evidence and to decide upon the credibility of the witnesses.[1]

Argued for the defenders;—There was, in effect, no evidence of

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* Cond. 3 (from which the above passage is taken) was as follows:—"The said accident was due to the fault of the defenders' said servant Robert Dykes. It was the duty of the said Robert Dykes to drive at reasonable speed, to keep a good look-out, and to give warning of his approach, but he failed in his said duty in every particular, and the accident resulted from his said failure. Govan Road at the time and place of the accident was busy both with passengers and vehicular traffic, and the said Robert Dykes should have driven his motor car slowly and carefully. In point of fact, he drove at a rapid and dangerous speed. Further, immediately before and at the time of the accident, he was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any look-out. Further, he gave no warning whatever of his approach, and that although the pursuer's said daughter's back was turned partly towards him. If the said Robert Dykes had fulfilled his said duty as above stated the accident to the pursuer's said daughter would not have occurred."

[1] Campbell v. Scottish Educational News Co., Limited, (1906) 8 F. 691, *per* Lord Kinnear, at p. 698.

fault before the jury. It was an essential part of the pursuer's case, as averred in cond. 3, that the driver of the car had been engaged in conversation with a man seated beside him, and had failed to keep any look-out. It was true that evidence to this effect had been led, but the only inference that could be drawn from the conduct of the pursuer's counsel, in failing to cross-examine the defenders' witnesses who told a different story, was that this part of the case had been abandoned, and that he tacitly admitted that the evidence of the pursuer's three witnesses was false. In these circumstances, the jury had no evidence of fault before them on which they could return a verdict for the pursuer.

At advising on 17th July 1914,—

Lord Johnston.—I fully accept all that was said by the counsel for the pursuer in regard to the function of the Court in dealing with a motion for a new trial. It is the province of the jury to determine the issue of fact, and it is not the function of the Court to review their verdict, or to order a new trial, merely because, on consideration of the evidence, the Court disagree with their finding. But it is the duty of the jury to apply their minds to the evidence before them as reasonable men of ordinary intelligence, and in the term "reasonable" I include fair-minded, and in the term "ordinary intelligence" I include ordinary capacity to appreciate the manner in which cases are presented to a jury. If it can be said that the jury in their verdict have come to a conclusion to which reasonable men of ordinary intelligence would not have come, it is the duty of the Court to quash their verdict.

But it is frequently maintained that a verdict is contrary to or against the weight of the evidence. I consider that to be a misleading expression, as it may mean anything between a case where a jury have merely gone wrong, in a conflict of evidence, in determining which scale tips the beam, and a case where the evidence against the verdict is so preponderating that no reasonable man of ordinary intelligence would have come to their conclusion.

Now the present is an exceptional case. Setting aside the medical evidence, and dealing only with the question of liability, there is about as much evidence in favour of the pursuer's case for liability as for the defenders' case in defence; and, if all that the jury had to do was to count heads and measure the evidence in matter of quantity merely, it would have been open to them to find either way, and their determination must have stood. But they were bound to regard the evidence with that measure of intelligence and discrimination which I have already indicated. And the first thing it was their duty to keep in view was the case for liability which the pursuer set out to establish. A motor car is alleged to have run over and injured a child; the accident is attributed to the fault of the driver, who is said to have been driving at a dangerous speed and without keeping any look-out. The latter ground of fault is based in fact upon this express and categorical averment, viz., that "immediately before and at the time of the accident he" the driver "was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any look-out." Were this

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proved the inference of fault and the consequence of liability would be difficult to controvert. But if this were not proved, still more if it were disproved, it would be difficult to reach the pursuer's conclusion.

Now, What do we find in the evidence? Three witnesses for the pursuer speak in the most emphatic way, and in almost identical terms, of an old man being seated beside the chauffeur (the car being a closed car of design similar to a taxi-cab), and of these two men having their heads turned to one another and being engaged in conversation at the moment of the accident. This assertion is stoutly maintained in face of a careful and strict cross-examination in such terms as this: "The driver and an older man were sitting in the front of the motor car together. (Shown Robert Mackintosh)—I recognise this gentleman as the gentleman in question. I solemnly swear that he was sitting beside the driver and speaking to the driver. (Q.) You are sure of that as you are sure of anything else you have told us to-day? (A.) Quite certain." This cross-examination clearly disclosed that the evidence for the defenders was to be that there was no one sitting beside the driver, in which case he could not have been in conversation with anyone. When the defenders' evidence was opened Mr Mackintosh, the accountant of the defenders' Company, was first called and he explained: "I got into the car at the gatehouse of the Shieldhall Works; I went into the inside of the car. There was no one beside the driver. I remained inside the car until the accident happened. It is not the case that I was sitting beside the motor-driver and talking to him just before the accident happened When I got in at Shieldhall I had no communication at all with the driver until we reached Govan Cross. If I had had to communicate with him I believe that in the car there is a speaking-tube, but I did not use the speaking-tube. I had no occasion to do so." Seeing what Mr Mackintosh was, and his purpose in entering the motor, which belonged to his Company and was being used merely to take him from one office of the Company to another in the same town, it is not to be wondered at if this evidence somewhat staggered the counsel for the pursuer, who, instead of facing the evidence, endeavoured to explain it away and to account for the evidence of his own witnesses by the suggestion that notwithstanding that Mr Mackintosh had been inside the car he might still have been bending forward and either speaking to or appearing to speak to the driver. Mr Mackintosh is directly corroborated by George Brown, the police-constable on the beat, by Robert Dykes, the chauffeur, and by Mrs Isabella Bunten, and not one of these three was cross-examined on the subject at all.

The result was that the jury were bound to note that the pursuer accepted the position that he had failed to prove the cardinal fact in his case, and that this failure not only negatived the case he set out on record, but absolutely discredited in its other details the evidence of the three witnesses to whose statements I have adverted. I think that this ought also to have drawn their attention to the class of witness with which they were dealing. Two of them, at least, were street corner men who had been hanging about Govan Cross most of the afternoon—the third, a woman who, though out shopping, was also for no

intelligible reason standing at the Cross; and there is such a painful similarity, if not identity, in their evidence that I regret to say I am satisfied that it was concocted in concert. Besides these three there is only one other witness to fact for the pursuer, Martin O'Connor, whose evidence I am far from characterising in the same way, but which really comes to nothing conclusive. On the other hand there are at least four witnesses for the defenders who speak distinctly in support of the defenders' explanation of the accident, viz., that instead of going too fast the driver had been brought up almost to a standstill by a stopping tramway car just in front of him going in the same direction, and that just as he was starting again the injured girl ran out from behind another tramway car going in the opposite direction, and so close in front of his motor car that she was either knocked down, or tripped and fell, before he could stop again. The nature of the injuries rather indicated the latter.

In these circumstances, although there was evidence pretty nearly equal in quantity on either side, I do not think that fair-minded men of ordinary intelligence could have come to the conclusion at which this jury arrived, imputing fault to the driver and imposing liability upon the defenders. Accordingly I think that a new trial must be granted.

Lord Skerrington.—I agree with your Lordship, but I think it right to say that I regard the present case as one which is wholly exceptional, and I hope that the circumstances upon which your Lordship has felt constrained to comment are not likely to recur, or, at any rate, to recur often.

The case is exceptional in three respects. In the first place, I regard the presence of the second man on the front seat of the motor car as something which was essential to the pursuer's case as presented, first of all, in his pleadings, and, in the second place, in his evidence. In the next place, it is quite certain that this essential fact was not proved, or rather was disproved. But the case does not stop there, because the disproof of this fact was in substance admitted by the pursuer's counsel, as appears from the line he took in cross-examining Mr Mackintosh, the second passenger in the motor car. He deponed that he was sitting not on the front seat but inside the car, and counsel for the pursuer cross-examined him upon the footing that he was a truthful and honest witness. The third peculiarity in the case is that it is impossible upon any theory of mistake to reconcile the testimony of the three leading witnesses for the pursuer, who professed to be eye-witnesses of the accident, and that of the four or five similar witnesses for the defence. It is, I think, clear that the pursuer's three witnesses were telling a story which they had concocted, and which was untrue. There remains another witness for the pursuer, a Mr O'Connor, against whose veracity nothing has been suggested. He says nothing, one way or the other, about the presence or the absence of a second man on the front seat; but he does say, as I read his evidence, that the tramway car, which it is suggested obscured the view of the driver of the motor car, had already passed away to the westward, and that, therefore, there was nothing to prevent the driver of the motor car from seeing the little girl if he had been keeping a proper look-out.

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I do not think it necessary to consider whether the evidence of Mr O'Connor, if it had stood alone, was sufficiently corroborated by circumstances to have entitled the jury to have returned a verdict upon it. That is a purely hypothetical question. I do not regard this case as one where a verdict is attacked merely on the ground of defective testimony. It is a case which stands by itself, and the Court, as your Lordships know, has power to grant a new trial for such other cause—that is, over and above the familiar and enumerated causes—such other cause as is essential to the justice of the case. The Court has always been slow to extend the grounds upon which they would interfere with the verdict of a jury. But if the groundwork of a case is fraudulent, it would not be right for the Court to take the remainder of the evidence and see whether an entirely different case can be built up out of the fragments.

Accordingly I concur with your Lordship in the result which you have reached. While I have thought it right to comment, in plain language, upon the testimony of these three witnesses, I do not cast the slightest reflection upon any of the parties who had to do with the getting up of this case.

Lord President.—I agree in the judgment proposed by Lord Johnston. I am glad, as the Judge who presided at the trial, to know that your Lordships see your way to reach that conclusion, for I am sure it is a just conclusion.

I, at the time the verdict was returned, considered that it was contrary to evidence in the sense Lord Johnston has explained, and I think so still. I was not asked by counsel for the defenders to withdraw the case from the jury after senior counsel for the pursuer had addressed them. I was not asked to direct the jury, in the course of my charge, that there was no evidence adequate in law to support a verdict for the pursuer. What course I should have taken, had I been so moved, I cannot at this moment say; but I did not think it my duty, as I was not moved, to withdraw the case from the jury or to direct them that there was no legal evidence which could support a verdict for the pursuer. But, as your Lordships are well aware, there are many cases in which this Court has set verdicts aside, as contrary to evidence, where there was legal evidence sufficient to support a verdict for the pursuers, where, in other words, the Judge was not asked to direct the jury to find a verdict in favour of the defenders.

I pointed out to the jury, however, and I thought it my duty to do so, the prominent place taken in the pursuer's averments by the allegation that there were two persons sitting in front of the motor car, and in conversation with one another at the time when the accident took place. I drew their attention very specially to the fact that the pursuer had averred it to be of the essence of his case that, before and at the time of the accident, the driver of the motor car was engaged in conversation with a man who sat beside him in the motor car, and that he failed to keep any look-out. I pointed out to the jury that the case would scarcely have been a credible one except upon that footing. I reminded them that the junior counsel for the pursuer, in opening the case, had founded upon

that statement, and I pointed out that the course which had been taken in the conduct of the case by the pursuer's senior counsel, not only in his cross-examination of Mr Mackintosh, but in his abstention from cross-examination of the other witnesses upon this vital point, led necessarily to the conclusion that those who were responsible for the conduct of the case impliedly admitted that the statement made by these three witnesses was a deliberate invention. For I drew the jury's attention especially to the fact that the discrepancy between the evidence for the pursuer and the evidence for the defenders upon this point could not be accounted for either by inaccuracy of recollection or by inaccuracy of observation. Accordingly, if they disbelieved the evidence given for the pursuer, it must be on the ground that it was a deliberate invention. And, of course, if, in the view of those responsible for the conduct of this case, it appeared that the evidence of three important witnesses upon a vital point was a deliberate invention, it appears to me that their evidence was entirely destroyed.

I did not so direct the jury. I was not asked so to direct the jury, and I did not consider it my duty so to direct the jury. What I did say was that this fact made a serious inroad not only upon the pursuer's case but upon the credibility of the three witnesses upon whom he must necessarily rely to support his case. And if that conclusion is right, as I think it is, then clearly your Lordships are entitled here to regard this verdict as contrary to evidence, in the sense which Lord Johnston has explained, and in the sense in which we understand that phrase. I therefore agree with your Lordships that we should make the rule absolute, and grant the motion for a new trial.

THE COURT set aside the verdict and granted a new trial.

D. MACLEAN, Solicitor—J. MILLER THOMSON & Co., W.S.—Agents.

WILLIAM BAIRD & COMPANY, LIMITED, Appellants.—*Cooper, K.C.*—*Carmont.*
THE ANCIENT ORDER OF FORESTERS, Respondents.—*A. O. M. Mackenzie, K.C.*—*C. H. Brown.*

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Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *Second Schedule* (9)—*C. A. S.*, 1913, *L. xiii.* 12—*Recording of memorandum—Procedure—Insurance—National Insurance—National Insurance Act*, 1911 (1 *and* 2 *Geo. V. cap.* 55), *sec.* 11 (1) (*c*)—*Workman member of approved society—Approved society objecting to recording of memorandum.*

An injured workman, who was an insured person with an approved society under the National Insurance Act, 1911, agreed to accept from his employers a lump sum in full of all his claims for compensation under the Workmen's Compensation Act, 1906, and lodged a memorandum of this agreement with the Sheriff-clerk for registration. The approved society thereupon lodged with the Sheriff-clerk a minute in which they stated that they objected to the recording of the memorandum on the ground that the lump sum was inadequate. The minute contained no averments in support of this objection. The Sheriff-clerk put the memorandum and minute before the Sheriff, who found that the Sheriff-clerk had in effect, though not by formal minute as required by C. A. S., 1913, L. xiii., sec. 12, referred the

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question in dispute to him, and accordingly that the matter fell to be dealt with by him as arbitrator.

Held that the procedure followed had been irregular, and case *remitted* to the Sheriff Court in order that the Sheriff-clerk might discharge the duty, imposed on him by par. (9) (*d*) of the Second Schedule to the Workmen's Compensation Act, and by sec. 12 of the Act of Sederunt, of considering any information, including that of the approved society, relating to the objection to recording the memorandum, and of laying before the Sheriff, if so advised, a minute setting forth his grounds for refusing to record the memorandum.

Burns v. *William Baird & Co., Limited*, 1913 S. C. 358, *commented on.*

Held further that the Sheriff, before disposing of the question raised, would be entitled to hear the approved society.

Workmen's Compensation Act, 1906 (6 *Edw. VII. cap.* 58), *Second Schedule* (9)—"*Party interested*"—*National Insurance Act*, 1911 (1 *and* 2 *Geo. V. cap.* 55)—*Approved Society.*

Question whether an approved society under the National Insurance Act, 1911, is a "party interested" who, in terms of the Workmen's Compensation Act, 1906, Second Schedule (9), may apply for registration of a memorandum of an agreement regarding the payment of compensation to one of its members.

1st Division. Sheriff of Stirling, Dumbarton, and Clackmannan.

IN an arbitration under the Workmen's Compensation Act, 1906, with regard to the recording of a memorandum of agreement between Andrew Rankine and William Baird & Company, Limited, which was objected to by the Ancient Order of Foresters, the Sheriff-substitute at Dumbarton (Macdiarmid) pronounced certain findings, and, at the request of the employers, stated a case for appeal.

The case set forth:—

"On 28th June 1913 Andrew Rankine, repairer, Barrhill, Twechar, lodged a memorandum of agreement (signed by himself) with the Sheriff-clerk of Dumbarton.

"The memorandum was in these terms:—

"'The claimant, whilst in the employment of the respondents (appellants), sustained personal injury, consisting of fractured left arm, contused hand, and injury to back caused by accident at their No. 2 Pit, Gartshore Colliery, on 27th December 1912.

"'An agreement was made on 26th June 1913, and was as follows:—

"'That a lump sum payment amounting to one hundred pounds sterling, in addition to the weekly compensation already paid, was accepted by the claimant in full satisfaction and discharge of all claims past and future in respect of said accident.

"'It is requested that this memorandum be recorded in the special register of the Sheriff Court of Stirling, Dumbarton, and Clackmannan, at Dumbarton.

"'(Signed) Andrew Rankine, claimant, 26/6/1913.

"'To the Sheriff-clerk, Court House, Dumbarton.'

"On said 28th June 1913 the Sheriff-clerk sent the usual notice to the appellants intimating that the agreement had been lodged, and inquiring if they consented to its being recorded, and on 4th July he received a letter from the Scottish Mine Owners' Defence and Mutual Assurance Association, Limited, consenting on behalf of the appellants to the recording thereof.

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"On said 4th July a minute was lodged by the Ancient Order of Foresters in the following terms:—'The minuters being an approved society under the National Insurance Act, 1911, and the claimant being one of their members as an insured person under the said Act, object to the recording of the memorandum of agreement lodged with the Sheriff-clerk at Dumbarton on 28th June 1913, and crave that the said memorandum of agreement be not recorded in respect that the sum agreed upon, namely, £100 as a lump sum in redemption of the weekly payments by the respondents to the claimant is inadequate.'

"Prior to the lodging of said minute (after receipt of appellants' intimation of consent to the registration of said memorandum of agreement) the Sheriff-clerk had no information upon which he could have objected to the registration of said memorandum of agreement on the ground of inadequacy of the amount or otherwise.

"The Sheriff-clerk immediately put the documents before me, and intimated to the appellants and the respondents that they would be heard by me on them.

"At the hearing it was admitted that the said Ancient Order of Foresters was an approved society under the National Insurance Act, 1911, and that the said Andrew Rankine was an insured person within the meaning of the said Act, and as such, a member of the said Approved Society.

"Having heard parties' procurators for the appellants and respondents, by interlocutor dated 18th August 1913, I found in law (*a*) that the said Approved Society was a party interested for the purposes of paragraph 9 of the Second Schedule of the Workmen's Compensation Act, 1906;* (*b*) that section 11 (1) (*c*) of the National Insurance Act, 1911,† extended the discretion of the Sheriff-clerk

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* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule (9) (as applied to Scotland), enacts:—"Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] . . . by any party interested to the [sheriff-clerk], who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral]: Provided that . . . (*d*) where it appears to the [sheriff-clerk], on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the [Sheriff], who shall, in accordance with [Act of Sederunt], make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; . . ."

† The National Insurance Act, 1911 (1 and 2 Geo. V. cap. 55), sec. 11, subsec. (1) (as applied to Scotland), enacts:—"Where an insured person has received or recovered, or is entitled to receive or recover, whether from his employer or any other person, any compensation or damages under the Workmen's Compensation Act, 1906, or any scheme certified thereunder, or under the Employers Liability Act, 1880, or at common

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under paragraph 9 (*d*) of the said Second Schedule to include the matter of weekly payments and lump sum payments in the case of insured persons within the meaning of the National Insurance Act; (*c*) that the said Approved Society was entitled to communicate to the Sheriff-clerk information which might assist him in the exercise of his discretion under said paragraph of the said Second Schedule as extended by section 11 (1) (*c*) of the National Insurance Act, 1911; (*d*) that the Sheriff-clerk, having in effect, although not by formal minute as provided by Rule XII. of the Act of Sederunt of 26th June 1907,* referred the question in dispute to me, the case of *Burns* v. *William Baird & Company, Limited*, 1913 S. C. 358, applied, and the memorandum and minute fell to be dealt with as provided by said Rule XII.; (*e*) that the said Approved Society was entitled to appear in the arbitration proceedings, and to lead evidence in support of its objection. I therefore appointed the case to be enrolled at the first convenient Court day for further procedure. Thereafter a stated case was asked by the appellants. The case was duly prepared by the Sheriff-clerk and adjusted by the parties, but I was asked by them to delay stating the same pending the decision of the First Division of the Court of Session in the case of *Muir* v. *Flemington Coal Company, Limited, and Others.*"

The questions of law for the opinion of the Court were:—"(1) Was I right in holding that the said Approved Society was a party

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law, in respect of any injury or disease, the following provisions shall apply:—(*c*) Where an agreement is made as to the amount of such compensation as aforesaid, and the amount so agreed is less than ten shillings a week, or as to the redemption of a weekly payment by a lump sum under the Workmen's Compensation Act, 1906, the employer shall within three days thereafter, or such longer time as may be prescribed, send to the Insurance Commissioners, or to the society or committee concerned, notice in writing of such agreement giving the prescribed particulars thereof, and proviso (*d*) to paragraph (9) of the Second Schedule of the Workmen's Compensation Act, 1906 (which relates to the powers of [Sheriff-clerks] to refuse to record memoranda of agreements and to refer the matter to the [Sheriff]), shall, in cases where the workman is an insured person, apply to agreements as to the amount of compensation in like manner as to agreements as to the redemption of weekly payments by lump sums." Subsec. (2) "Where an insured person appears to be entitled to any such compensation or damages as aforesaid, and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either—(*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society or committee as trustee for the insured person. . . ."

* The Codifying Act of Sederunt, 1913, L. xiii., sec. 12 (superseding Act of Sederunt of 26th June 1907, rule 12), enacts:—"When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum under subsection (*b*) of said paragraph, or the Sheriff-clerk refuses under subsection (*d*) of said paragraph to record such memorandum, the person disputing the genuineness, or the employer, or the Sheriff-clerk, as the case may be, shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute."

interested for the purposes of paragraph 9 of the Second Schedule of the Workmen's Compensation Act, 1906? (2) Was said Society entitled to lodge said minute in said proceedings, and to appear in support of same? (3) In the circumstances stated was there any competent objection to the registration of said memorandum of agreement which fell to be dealt with by me?"

The case was heard before the First Division (without Lord Mackenzie) on 10th July 1914.

Argued for the appellants;—The first question should be answered in the negative. It had been expressly and rightly decided that an approved society was not a "party interested" within the meaning of paragraph (9) of the Second Schedule to the Workmen's Compensation Act.[1] The expression could only refer to the employer on the one hand and to the workman or his dependants on the other. It could not properly be extended to embrace approved societies, whose existence was not contemplated at the time when the Act was passed. Further, section 11 (1) of the National Insurance Act, 1911, did not confer upon such a Society the right to appear as a party to arbitration proceedings. This section, which provided that notice of an agreement as to the amount of compensation or as to the redemption of weekly payments by a lump sum should be given, in the case of insured persons, to the Society concerned, enacted that thereafter proviso (*d*), paragraph (9), of the Second Schedule should apply. But the only effect of this enactment was to extend the operation of paragraph (9) (*d*) to insured persons, not under disability, who had agreed as to the amount of compensation. It did not affect the operation of paragraph (9) (*d*) with regard to redemption for a lump sum, which remained exactly as it was before. The proviso to paragraph 9 (*d*) put the duty of referring the matter in dispute upon the Sheriff-clerk, and directed him, in the first place, to satisfy himself on evidence which he considered sufficient of the soundness of the objection, and, in the second place, if so satisfied, to proceed in terms of the Act of Sederunt. The latter directed him to institute the proceedings by lodging a minute stating clearly the grounds of his action. The Sheriff-clerk might satisfy himself upon any evidence he considered sufficient, including that of the Approved Society, but he had an express duty, which in this case he had not performed, of himself presenting a minute to the Sheriff. The case of *Burns* v. *William Baird & Company*[2] (even if it was rightly decided which was doubtful), was no authority for the contention that an approved society might be made a party to the proceedings, nor was it an authority for the regularity of the procedure which had been followed here. In that case the Court had allowed the Sheriff to determine a similar question upon a minute lodged by the workman, and sent by the Sheriff-clerk to the Sheriff. But the essential distinction of the case of *Burns*[2] from the present was that the workman whose minute was considered was already a party to the proceedings. That case, accordingly, was no authority for the contention here put forward that the Sheriff-clerk might discharge his statutory duty by handing on a minute by one who was no party to the proceedings; although the Sheriff would no doubt be entitled—he might possibly be bound—to hear the

[1] Bonney v. Joshua Hoyle & Sons, Limited, [1914] 2 K. B. 257.
[2] 1913 S. C. 358.

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Society before deciding upon the merits of the application. In view of this distinction between *Burns*[1] and the present case, it was unnecessary in these proceedings to consider whether *Burns*[1] was rightly decided. Further, the appellants could not call in aid the provision of section 11 (2) of the National Insurance Act. That provision dealt with the case of an insured person who unreasonably refused or neglected to take proceedings to enforce his claim.[2] It could not be said that there had been any such unreasonable refusal or neglect in the present case; indeed, the case was *a fortiori* of *Rushton's* case,[2] for here the workman had in fact made, and succeeded in, his claim.

Argued for the respondents;—It was not necessary to find an answer to the first question in order to decide whether the procedure followed in this case had been regular. The first question, however, should be answered in the affirmative. The interest of the Approved Society in the questions raised by this application to record and the objections thereto could not be denied. The extent of the Society's liability to insured persons who were entitled to compensation under the Workmen's Compensation Act depended directly upon the amount of compensation which was recovered from the employer.[3] It was in respect of this interest that provision was made that notice of such agreements should be given to approved societies,[4] and that authority was given to them, in certain cases, to institute proceedings in the workman's name to enforce his claim.[5] Indeed, the circumstances contemplated in section 11 (2) were present here. The workman in accepting an inadequate sum had neglected to enforce his claim; his "claim" being, not for any sum which he might chose to accept, but for the full amount he was entitled to exact. Unless the Approved Society were allowed, in these proceedings, to challenge the settlement made by the workman they had no means of exercising efficiently their statutory right of restricting their liability. As to the conduct of the Sheriff-clerk, the decision in the case of *Burns* v. *William Baird & Company*[1] was direct authority for the regularity of the procedure he had followed. If proceedings might competently be initiated by a minute of the workman referred to the Sheriff by the Sheriff-clerk, they might as competently be initiated by a minute of the Approved Society, which represented the workman's interest. The appellants sought to put too narrow a construction on the terms of the Act of Sederunt. The Sheriff-clerk had complied with its directions in effect by adopting as his own the minute of the Society. He had raised the question as completely by this procedure as it could have been raised by a minute written by himself. He had in effect shown that he was satisfied that there was ground for the objections of the Society, and left the decision upon the merits to the Sheriff, who alone could dispose of the application, and who would be bound, before doing so, to hear the Society.[6]

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[1] 1913 S. C. 358.

[2] Rushton v. George Skey & Co., (1914) 30 T. L. R. 601.

[3] National Insurance Act, 1911, sec. 11.

[4] Sec. 11 (1).

[5] Sec. 11 (2).

[6] Reference was also made to M'Vie v. George Taylor & Co., *supra*, p. 533.

At advising on 17th July 1914,— July 17, 1914.

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LORD PRESIDENT.—This stated case raises an important and novel question under the Workmen's Compensation Act, 1906, as viewed in relation to the National Insurance Act of 1911.

A workman in the employment of the appellants, Messrs Baird & Company, sustained personal injury, in December 1912, in consequence of an accident which befell him, arising out of and in the course of his employment. Messrs Baird & Company admitted liability and paid compensation for a time, and then, on 26th June 1913, they made an agreement with the workman that they should pay and that he should accept £100 sterling in full of his claim. A memorandum of agreement to that effect was prepared, was signed by the workman, and was lodged with the Sheriff-clerk at Dumbarton to be recorded. Now, as it so chanced, this workman was an insured person under the National Insurance Act, 1911, which provides, by section 11 (1) (*c*), that where an agreement is made as to the redemption (I am reading it short) of a weekly payment by a lump sum under the Workmen's Compensation Act, 1906, the employer shall, within three days thereafter, give notice in writing of such agreement, giving the prescribed particulars therein to the society concerned, and proviso (*d*) to paragraph 9 of the Second Schedule to the Workmen's Compensation Act, 1906, shall, in cases where the workman is an insured person, apply.

I presume that notice was given to the appellants in terms of the statutory provision which I have just read, because on the 4th July they intimated to the Sheriff-clerk that they challenged the adequacy of the sum which the workman had agreed to accept. They did so by the medium of a minute which they handed to the Sheriff-clerk, which he in turn handed to the arbitrator, who proceeded to consider the case, holding that the approved society was entitled to appear in the arbitration proceedings and to lead evidence in support of the objection. Now, I think that procedure was incorrect, because, by paragraph 9 (*d*) of the Second Schedule appended to the Workmen's Compensation Act, the duty is thrown upon the Sheriff-clerk, in such circumstances, to receive such information as is tendered to him, relative to the adequacy of the sum which the workman has agreed to accept; and, if he in his discretion thinks that information is sufficient, it is his duty to lay it before the arbitrator in order that the arbitrator may perform his statutory duty, that is, pronounce such order as in the circumstances he shall think just. And, by Act of Sederunt, dated 26th June 1907,[1] this Court has enjoined the Sheriff-clerk, where he thinks the information tendered to him is sufficient, to lodge a minute stating clearly all the grounds for his action, and thereupon the memorandum of agreement, which has been handed in to be recorded, shall be dealt with as if it were an application to the Sheriff for settlement by arbitration of questions raised by the Sheriff-clerk's minute. That is the procedure which is prescribed by the

[1] C. A. S. 1913, L. xiii. 12 (quoted *supra*, p. 968).

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statute and by the Act of Sederunt. That procedure was disregarded in the present case.

I am of opinion, therefore, that the case must go back to the Sheriff-clerk in order that he may receive and consider any information which is tendered to him by the approved society, the Ancient Order of Foresters. If he in his discretion thinks the information so tendered is sufficient, then he himself must prepare a minute setting forth the grounds of his action, and lay that minute before the arbitrator, whose duty it will then be to proceed exactly as if the memorandum of agreement were an arbitration, and consider the question raised in the Sheriff's-clerk's minute, and pronounce such order as in the circumstances he shall think just. And if the arbitrator thinks it necessary or desirable, in order to enable him to discharge his statutory duty, to hear the Approved Society and to hear evidence tendered by the Approved Society, he is well entitled to do so, because he is master of the procedure before him, and it is his duty to receive any information which he thinks necessary or desirable to enable him to discharge the duty which is laid upon him of pronouncing such order as he thinks just. It will be for him, therefore, to determine whether or no it is expedient to hear the Society and to hear the evidence which is tendered by the Society.

Now, it was urged before us that, while the Society was entitled to tender information to the Sheriff-clerk challenging the adequacy of the award, they were powerless to take any further step; that having given the initial impetus to the procedure, they were then denied the right to follow forth the procedure which they had initiated. The result might be to deprive the arbitrator of, it may be, the only means by which he could discharge his statutory duty. The approved society might be—and we can easily see in many cases would be—the only person interested to render aid to the arbitrator in the performance of his statutory duty. Nevertheless—so it was argued—the approved society, having given information, must then retire. It signifies nothing that the Society is deeply interested in the result of the proceedings, that it may be the only party interested in the result of the proceedings, that it is entitled by statute to receive notice of the memorandum of agreement and to initiate proceedings if the workman himself neglects to do so. And it is said that the arbitrator is not only entitled but bound not to avail himself of what may be the one and only means of enabling him to discharge his statutory duty. I cannot think so. No clause in the Act of Parliament, and no clause in the Act of Sederunt was cited to us which would constrain us so to hold. In my view, therefore, the whole procedure here must be commenced anew.

It was argued very forcibly to us, on the authority of a recent decision in the Appeal Court in England in the case of *Bonney* v. *Hoyle & Sons, Limited*,[1] that an approved society could not be considered as a party interested in the sense of paragraph 9 in the Second Schedule appended to the Workmen's Compensation Act. That may be so. It is unnecessary to consider and decide that question, because I do not find the phrase

[1] [1914] 2 K. B. 257.

"party interested" either in paragraph 9 (*d*) of the Schedule or in section 12 of the Act of Sederunt, which, in my opinion, combine to regulate the procedure which ought to be adopted here. I desire, for my own part, to reserve my opinion upon the question whether or no an approved society is a "party interested" in the sense of paragraph 9 of the Second Schedule. My present view is that it is a party interested, is deeply interested, and may be the only party interested in these proceedings, because, if the amount of compensation which is awarded to the workman is equal to, or greater than, the weekly benefit which he is to receive from the approved society, then he has no claim against the approved society under the National Insurance Act, and if the amount which is given to the workman under the Workmen's Compensation Act is less than the benefit which he is entitled to receive, then the approved society is bound by statute only to pay the difference.

Turning now to the points of law upon which the arbitrator has pronounced an opinion:—As regards the first, "(*a*) that the said approved society was a party interested for the purposes of paragraph 9 of the Second Schedule of the Workmen's Compensation Act, 1906," I find it unnecessary to pronounce any opinion. As regards the second, "(*b*) that section 11 (1) (*c*) of the National Insurance Act, 1911, extended the discretion of the Sheriff-clerk under paragraph 9 (*d*) of the said Second Schedule to include the matter of weekly payments and lump sum payments in the case of insured persons within the meaning of the National Insurance Act"—again I find it unnecessary to express an opinion, because that is merely, I think, a repetition of the words of the Act. As regards the third, "(*c*) that the said approved society was entitled to communicate to the Sheriff-clerk information which might assist him in the exercise of his discretion under said paragraph of the said Second Schedule as extended by section 11 (1) (*c*) of the National Insurance Act, 1911"—I think the approved society was entitled to do so. As regards the fourth, "(*d*) that the Sheriff-clerk, having in effect, although not by formal minute as provided by Rule XII. of the Act of Sederunt of 26th June 1907, referred the question in dispute to me, the case of *Burns* v. *William Baird & Company, Limited*,[1] applied and the memorandum and minute fell to be dealt with as provided by said Rule XII."—I dissent from that finding. I do not think that the minute given in by the approved society can be considered as equivalent to the minute of the Sheriff-clerk. So to regard it would be to dispense with the duty thrown upon the Sheriff-clerk, both by the statute and by the Act of Sederunt, which affords, as I think, a legitimate protection to the parties to an agreement, when that agreement, to which they are still adhering, is challenged for some other and outside reason.

With regard to the case of *Burns* v. *Baird*,[1] all I have to say is this—I agree, if I may respectfully say so, with the conclusion at which the learned Judges of the Second Division arrived; but I do not agree with the method of procedure followed and accepted by them by which that conclusion was reached. But I do not understand that the Second Divi-

[1] 1913 S. C. 358.

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sion intended to lay down a general rule that the Act of Sederunt and the statute might in all cases be brushed aside, and that the procedure might be the shorthand, and as I think incorrect, procedure which was sanctioned in the case of *Burns*,[1] where the minute given in by the workman was treated as the minute of the Sheriff-clerk. I do not regard the Sheriff-clerk's intervention as a technicality—I think it is a reality, and that the procedure which is prescribed by paragraph 9, taken in conjunction with the Act of Sederunt of 26th June 1907, ought to be followed in every case similar to the present.

I should, for my own part, be quite ready to answer the second question put to us in the affirmative; but, on the whole, I think it would be safer to return no answer to any of the three questions submitted to us and to remit the case *simpliciter* to the Sheriff Court in order that the Sheriff-clerk may proceed to discharge his statutory duty by receiving any information which is tendered to him relative to the inadequacy of the sum in the memorandum of agreement, by considering the sufficiency of that information, and, if he considers it adequate, by framing a minute in terms of the Act of Sederunt and laying that minute before the arbitrator who shall then, as I have said, be entitled to judge for himself whether he shall hear the Approved Society and receive from them any evidence which they may choose to tender. He must decide for himself. If he thinks it necessary or desirable to enable him to discharge his statutory duty, then I think he will not only be entitled, but bound, to hear the Society and to hear the evidence which they think it right to tender.

Lord Johnston.—I agree with your Lordship, and I would not add anything, but that I take a rather different view from your Lordship upon one point, namely, whether or no the approved society is a party interested. That the approved society is a party having a pecuniary interest I fully appreciate, but I do not think the approved society is a "party interested" in the sense of the preamble to paragraph (9) of the Second Schedule to the statute.

Of course approved societies are not expressly provided for in the statute, as it was passed before the project of the Insurance Act was disclosed or the approved societies created, but they may none the less come under the terms of the Act already passed and its incorporated schedule. Nevertheless I find nothing in the enactment which entitles them to claim the position of a party interested with an initiative as such, or gives them any initiative at all, except that which the schedule allows to anyone, namely, of laying information before the Sheriff-clerk under section 9, subsection (*d*), of the schedule. It seems to me that it is open to them, as it is open to anyone else, to lay such information; but that that does not entitle them—as they have attempted and been allowed to do here—to initiate proceedings by lodging a minute as if they were parties, or even to make themselves parties to a proceeding already pending in the Court. In the present case there was no such proceeding pending, and it is only at a later stage, after the Sheriff-clerk has done his duty in the way which

[1] 1913 S. C. 358.

your Lordship has explained, and the Sheriff is called upon to act in his statutory position of arbitrator, that there can be said to be a proceeding. I think it is desirable to keep in mind that the Sheriff, as arbitrator under the statute, must not be regarded as a person to whom, under an ordinary submission, a reference is made by two parties. He is called "arbitrator," not "arbiter," in the statute. Not knowing whether arbitrator has any technical meaning in England, I do not know whether the use of the term indicates any distinction. But he is clearly not an arbiter in the sense of a "referee." He is a statutory official, and his functions arise from the statute and not from a deed of submission. He is called upon by paragraph 9 (*d*) of the schedule, at a certain stage, in accordance with rules of Court, to deal with a matter which, not parties to a reference, but the Sheriff-clerk may refer to him. When the Sheriff-clerk makes that reference the Sheriff has then to dispose of it, as he has to dispose of a great many other matters under the statute, and it is then in his power to call on such parties as he thinks it necessary or desirable to hear before determining the matter so referred to him, and an approved society may be one of them. But he will do so in his own discretion, not because they are parties interested in the sense of the statute and entitled either to initiate or appear, but because he thinks that, to enable him to perform his statutory duty, it is desirable that he should hear what they have to say, or what information they have to give.

Accordingly, for my part, I think that we should in this case refuse to answer any of the questions, and send the case back in order that it may be started again on the lines which the statute contemplated.

Lord Skerrington.—The principal question in regard to which we heard argument was the first question of law put in the special case, namely, whether the Sheriff-substitute was right in holding that the approved society was a party interested for the purposes of paragraph 9 of the Second Schedule to the Workmen's Compensation Act, 1906? When one turns to paragraph 9 of the Second Schedule one finds that this question has really no bearing one way or the other upon the only matter which we have to decide, because the phrase "interested party," as used in paragraph 9, has reference to the persons who are to receive intimation of an application to record a memorandum, presumably with the object that persons receiving such intimation may come forward and object to the genuineness of the memorandum. In the present case, no question of genuineness arises. Both the workman and the employer state that the memorandum is a genuine record of the agreement, and they both wish it to be registered.

I express no opinion upon the question whether an approved society may not, in certain circumstances, be a "party interested" who is entitled to come forward and impugn the genuineness of a memorandum. I can figure one case at least in which it would be difficult to deny the title and interest of an approved society. I refer to the case where they had initiated proceedings on behalf of the workman for getting compensation assessed, as they are entitled to do in certain exceptional cases, by the National Insurance Act. If by way of defence an employer tabled a

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memorandum of agreement and then made application to have that memorandum recorded, it would be very strange if the approved society which had initiated the whole proceeding was not entitled to show that the memorandum was not a genuine record of an agreement between the employer and the workman.

However, as I said before, no question of that kind arises, because the approved society intervened in the present case for the purpose of stating that the lump sum of £100, which had been agreed upon in redemption of the weekly payments, was inadequate. Now, a very cursory examination of paragraph 9 shows that this procedure was entirely irregular, because paragraph 9 shows that nobody, not even the workman, is entitled to come forward and object to the recording of the memorandum on the ground that the redemption money was inadequate. No one can do that except the Sheriff-clerk, and he must act upon information; and anyone, whether with an interest or without an interest, is entitled to lay information before the Sheriff-clerk. On this point I beg respectfully to say that I should have been prepared to answer the second question in the negative, because I think it was utterly irregular for the Sheriff-clerk to allow that minute by the approved society to be lodged in process. On the other hand, he was quite entitled, when the minute was brought to him, to say "I will read your minute to see whether there is any useful information to be found in it." And I think the only reasonable comment one could make on this minute is that it contained no useful information at all. But I am far from dissenting from the practical course which your Lordship suggests, namely, that this approved society, presumably acting in good faith and having some information, should have an opportunity of laying that information before the Sheriff-clerk. But I think that the Sheriff-clerk ought to be extremely careful to see that the power of laying information is not abused by approved societies, and that they are not allowed to get a *locus standi* by giving vague general information such as they tendered in this particular case. I should expect that the Sheriff-clerk, as a reasonable man, would say, "You must tell me why the £100 was too little. You must tell me what the true sum, in your view, ought to have been; and you must further give me the names and addresses of the witnesses whom you are prepared to adduce to prove your case." I merely express these views, but I have no right to say anything which could hamper the Sheriff-clerk to whom Parliament has entrusted this discretion, and still less the Sheriff who will have to exercise his discretion if and when the matter comes before him on information from the clerk.

The statute says nothing to guide or to hamper the Sheriff in regard to what he is to do except that he is to dispose of the matter as he thinks just. Obviously he must act judicially in the matter. He must not hear the informants behind the back either of the workman or of the employer, because both these parties are interested in the validity of the agreement. Whether, as a matter of process, the Sheriff ought to sist the approved society in order that they might be made liable for the expenses of a litigation which they had practically initiated in their own interest is a question which the Sheriff will have to consider in due time.

I understand that your Lordships propose to give no answers to these three questions, and I do not dissent from that course being taken. July 17, 1914.

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THE COURT recalled the determination of the Sheriff-substitute as arbitrator; found the procedure not in accordance with the statute and Act of Sederunt, and remitted the case to the Sheriff Court to commence *de novo*.

W. & J. BURNESS, W.S.—W. & W. FINLAY, W.S.—Agents.

MRS ELISABETH M. FRIIS OR WESTERGAARD, Petitioner.—*Constable, K.C.—Wilton.*
REGINALD L. A. E. WESTERGAARD, Respondent.—*Murray, K.C.—A. M. Mackay.*

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Westergaard v. Westergaard.

Jurisdiction—Foreign—Husband and Wife—Parent and Child—Access to child—Jurisdiction to entertain petition for access—Foreign parents divorced abroad—Decree of foreign Court regulating access.

The marriage of two domiciled Danes was dissolved by decree under the law of Denmark. By this decree the custody of a son of the marriage was awarded to the father and access to the child by the mother was refused. Thereafter, both parents being resident in Scotland, the mother presented a petition to the Scottish Courts for access to the child "in respect of her natural rights as his mother."

Held that, the question of access having been determined by the Court of the parents' domicile, the Scottish Courts had no jurisdiction to entertain an application based on such grounds, and petition *dismissed*.

Opinions that the Scottish Courts had power to protect the children of foreign parents resident in Scotland and might for this purpose intervene in an application brought in the interests of the children.

ON 4th May 1914 Mrs Elisabeth Margrethe Friis or Westergaard, residing at 3 Albyn Terrace, Aberdeen, presented a petition to the Second Division in which she craved the Court to find her entitled to access to her pupil son, Reginald Westergaard. This child was, with another child, a daughter, the issue of her marriage with Reginald Ludvig Andreas Emil Westergaard, from whom she was divorced by a decree of divorce under the law of Denmark. At the time when the petition was lodged the child was residing with its father at Liberton, Midlothian. Answers to the petition were lodged by Mr Westergaard. 2D DIVISION.

The facts stated in the petition and answers are set forth in the following passage from the opinion of Lord Salvesen:—"The parties to this case are Danes; and although the respondent has been for many years resident in this country, it is not disputed that he retains his domicile of origin. They were married in 1900, and two children, a girl and a boy, were born of the marriage. On 13th September 1909 the parties entered into a deed of separation, which was obviously intended to be the preliminary to a divorce of consent. Under the deed the parties agreed that the petitioner should have the custody of the daughter, and the respondent that of the son; and the respondent agreed to pay her a yearly aliment for herself and

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daughter.* After the lapse of three years without the parties having become reconciled, it is according to Danish law that either may obtain a dissolution of the marriage. Such an application was duly made, and, notwithstanding a protest at the instance of the petitioner, in which, *inter alia*, she urged that as a condition of her husband obtaining divorce she should have access to the boy in his custody, a royal warrant or authority was issued on 4th October 1912 dissolving the marriage. Under this document, which has the effect of a decree of a competent Court, the custody of the female child was awarded to the petitioner, and that of the male child to the respondent in terms of their prior agreement to that effect. It is matter of admission that the rights of parties, in the matter of custody and access to the said children, are thereby regulated so far as the law of their domicile is concerned, and that neither can obtain access to the child in the other's custody without consent of the parent to whom the custody was awarded. Whether the Courts in Denmark would entertain an application such as the present, without an allegation of a change of circumstances, we do not know, but it may be assumed that the petitioner does not have much hope of inducing them to do so. The petitioner herself, for the most part, resides in Denmark, but for some six or eight months she has been living in Aberdeen, where, we are told, she is studying for a degree. While in this country she naturally desires to have access to her boy, and before the petition was brought, a long correspondence had taken place between her agent and those of the respondent with the view to her obtaining access under an amicable arrangement. In the end the respondent intimated that he was not prepared in the meantime to allow any access; and while his reasons are not stated, we are not at liberty to assume that they do not appear to him to be adequate." The petitioner claimed that access to the child "ought to be granted to her in respect of her natural rights as his mother." She made no allegations against the conduct of the respondent as custodier of the child.

In his answers the respondent submitted that the Court had no jurisdiction in the subject of the application and that the matter was foreclosed by the final decree of a competent foreign tribunal, and could only be reopened, if at all, in that tribunal and according to Danish law.

The case was heard before the Second Division (without Lord Dundas) on 15th July 1914.

Argued for the respondent;—The Court had no jurisdiction to regulate the custody of the children, and, in any case, the application was open to the objection of *forum non conveniens*. It was decided in *Barkworth* v. *Barkworth*[1] that it was for the Courts of the spouses' domicile to decide as to the custody of the children; and the domicile of both parties here was Danish. It was not dis-

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* The deed of separation contained the following clause:—"We have settled that, of our two common children, Elisabeth Westergaard and Reginald Erik Westergaard, the mother shall keep the daughter and the father the son, and that the parents' power over the daughter shall belong to the mother and the father shall have the parents' power over the son."

By the decree of divorce the marriage was dissolved "on the conditions stipulated at the separation."

[1] 1913 S. C. 759.

puted that the Scottish Courts might, in the exercise of their prætorian powers, interpose to prevent injury to the children; and *Johnstone* v. *Beattie*[1] and *Stuart* v. *Marquis of Bute*[2] were instances in which the English Courts, although the children were not domiciled in England, had taken action in the interests of the children. But the present application was not founded on the interests of the children, and could not, therefore, be entertained on that ground. As matters stood, the custody of the children was regulated by the decision of the competent Court, viz., the Danish Court. The Scottish Court could review any decision pronounced by itself as to the custody of children[3]; and it was inconceivable that the Danish Courts had not the same power. If so, it was open to the petitioner to apply to the Danish Courts in the matter, and this was the only competent procedure. There was nothing to warrant the Court in holding that the existing decree of the Danish Court was *contra bonos mores* or repugnant to Scots law. The English decisions founded on by the petitioner applied to cases where parents had sought to surrender their parental powers and duties; they did not apply where the exercise of these powers and duties was regulated, not by private agreement, but by the decree of a Court of competent jurisdiction.[4] The Guardianship of Infants Act, 1886,[5] applied only where the Court had jurisdiction, and, in any case, merely gave the Court a discretion in making orders as to the custody of children.

Argued for the petitioner;—The decree of the Danish Court was contrary to the policy of Scots law and could not, therefore, be recognised by the Scottish Courts.[6] A parent could not renounce his duty of caring for and educating his child; and any provision to this effect, either in a contract or in a decree, was void.[6] But in any case the fact that the parties were domiciled in Denmark would not exclude an application as to the children made to the Court of the country in which the parties were resident.[7] In Dicey's Conflict of Laws[8] it was laid down that "the authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England." Under section 5 of the Guardianship of Infants Act, 1886, the Court had power to pronounce an order in this petition. There was nothing in the section to limit its application to the case of Scottish parents. Access by an innocent spouse to a child was never refused in Scotland unless such access was shown to be injurious to the child[9]; and there was no ground for holding in the present case that access by the petitioner would be harmful to the child.

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[1] (1843) 10 Cl. & Fin. 42. [2] (1861) 9 (Clark) H. L. 440.

[3] Beedie v. Beedie, (1889) 16 R. 648.

[4] Hamilton v. Hector, (1871) L. R., 6 Ch. 701, *per* Lord Hatherley, L.C., at p. 705.

[5] 49 and 50 Vict. cap. 27.

[6] Addison's Law of Contract, (11th ed.) 77; Vansittart v. Vansittart, (1858) 4 K. & J. 62; Hamilton v. Hector, L. R., 6 Ch. 701.

[7] De Manneville v. De Manneville, (1804) 10 Ves. 52; Johnstone v. Beattie, 10 Cl. & Fin. 42; Stuart v. Marquis of Bute, 9 (Clark) H. L. 440.

[8] 2nd ed., Rule 131, p. 472.

[9] M'Iver v. M'Iver, (1859) 21 D. 1103.

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At advising on 17th July 1914,—

LORD JUSTICE-CLERK.—The petitioner and the respondent in the present proceedings are Danes, and their relations are at present regulated by a judgment given by the King of Denmark under advice of his Minister of Justice, and this judgment is equivalent in its authority to a judgment of the Supreme Court in the case of Scottish litigants. The parties having disagreed, they separated under a deed of separation and remained separate for three years. No reconciliation being effected and the respondent desiring divorce, his claim under Danish law to obtain it was effectual, and accordingly judgment of divorce was given.

The deed of separation contained the following clause regarding the two children of the marriage:—"We have settled that, of our two common children, Elisabeth Westergaard and Reginald Erik Westergaard, the mother shall keep the daughter and the father the son, and that the parents' power over the daughter shall belong to the mother and the father shall have the parents' power over the son." This clause was imported into the decree of divorce, a proposal by the petitioner for a modification of its terms having been refused. Accordingly the position of the parties as regards the children is as expressed in the above quotation.

The petitioner now desires that this Court should, contrary to the terms of the Danish decree, pronounce a finding in this petition giving her free access to her son at such times as this Court may consider reasonable. I am of opinion that we cannot do what the petitioner asks. We have no power to review or alter what has been judicially done in Denmark. As long as no action is taken by the respondent which is contrary to that judgment, we have no jurisdiction to interfere. We may be called on to assist to make the decree of a foreign Court effectual against a party resident in this country, but we cannot be called upon to review it or to give to any person authority to do what is contrary to its terms. In other words, we can aid the enforcement of the foreign decree, but we cannot set it aside or authorise any one who is under its order to act contrary to it. If, for example, a person in the position of the respondent here were to take his daughter from the custody of the mother, who has that custody by lawful judgment obtained in Denmark, I do not doubt that we would have power to interpose, and give aid to the carrying out of the Danish judgment following on the agreement of parties.

The position of the matter is either that the judgment in Denmark is not final, in which case the Danish tribunal would be the proper place in which to apply for an order altering it, or that the judgment is final, in which case no foreign Court can have any right to interfere. It is of course certain that, if a judgment in any Court of another country violates the moral code that obtains in this country, the Court here might refuse to assist in making it effectual. But whatever duty the Court may have in such a case when it arises, it is certain that there is no such case here. The divorce law in Denmark may be different from our own as regards what is necessary to justify divorce and as regards its consequences on the custody of and access to children, but it cannot be said that there is any-

thing in it which can, in the legal sense, be declared *contra bonos mores*, and be treated in our Courts as a nullity.

I would only add that the opinion I have expressed does not involve the exclusion of the jurisdiction of this Court if an application were brought before it based on some special ground relating to the way in which the child was being treated by the spouse in whose custody it was. The Court might, in such a case, be entitled to intervene to prevent injury, physical or moral, to the child, but there is no such case here, for the petitioner does not allege anything against the conduct of the respondent in regard to the child.

On these grounds, I am of opinion that this petition cannot be entertained and would move your Lordships accordingly.

Lord Salvesen.—[After the narrative of facts, quoted *supra*]—The respondent asked us to dismiss the application on the ground that the Court has no jurisdiction to entertain it, and he referred to the case of *Barkworth*.[1] I do not think that in that case it was held that the jurisdiction of this Court is absolutely excluded with regard to a parent's custody of or access to a child where the application is presented in the interest of the child. This Court, I apprehend, has the power to protect the children of foreign parents who are resident here, and no doubt will intervene if adequate cause be shown. The present application is, however, presented primarily in the interests of the mother, and it is only remotely, if at all, that the interests of the child are affected. He was only three years of age when, by agreement between the parties, the respondent became his exclusive custodier, and it may be assumed he has no recollection of the petitioner or of his own sister, neither of whom he has seen for five years.

The petitioner's desire to see her son is natural and legitimate; but in the circumstances of this case I am afraid we cannot give effect to it. In the case of *Barkworth*,[1] where the marriage had not been dissolved but where the spouses were living apart, the Court declined to entertain a petition at the instance of the wife for access to her children, who were living with their father in Scotland where he had a permanent residence. The reason of the decision was that he was a domiciled Englishman; and that, just as the Courts in England were alone competent to decree separation or divorce, so they were the proper forum in which to adjudicate on matters of custody and access to the children of the marriage. Lord Dunedin indicated that this Court would lend its aid to executing the decree of an English Court by which custody or access was regulated, and I apprehend it follows that if a Court in England had given the sole custody of a child to one parent, without right of access to the other, we would not interfere or examine the grounds upon which the order had been pronounced. The present case appears to me to be *a fortiori*. The parties here have obtained a divorce in Denmark, which, although granted upon grounds which are not recognised in our jurisprudence, we are bound to treat as valid. How then can we refuse to give effect to the

[1] 1913 S. C. 759.

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order, which, incidentally to the dissolution of the marriage, has settled the rights of the spouses in the children of the marriage? It is true that where no moral fault can be imputed to either parent, our Courts are not in the habit of giving the custody of the child to the one without allowing access to the other, as we consider that, in the general case, the interests of the child require that it should know both its parents. This does not appear to be the view upon which the Danish Courts act, although it may be assumed that the interests of the children, as well as those of the parents, are considered by them in any order for custody which they pronounce. It is open to question whether the interests of a child, whose parents have been divorced, especially when one of them has remarried, are best served by constantly keeping before its mind the fact that it has two parents who have now become permanently estranged. Be this as it may, it appears to me out of the question for us to add to the rights which the petitioner has obtained from the Courts of her own domicile certain rights, derived from our own law, which were abandoned by her in the very contract on which the dissolution of her marriage proceeded. The civil rights of the spouses have been adjudicated on in the country to which they owe allegiance, and by the Courts which alone were competent to regulate their status. I am, therefore, of opinion, with your Lordship, that we must refuse the petition.

LORD GUTHRIE.—I concur. Even if we had been willing to entertain this petition on its merits, it would not have been possible without inquiry to determine the merits of the unfortunate dispute between Dr Westergaard and Mrs Westergaard as to the access desired by Mrs Westergaard to her son, now in his father's custody. But I am free to say that, in deciding against Mrs Westergaard's petition on grounds not involving the merits of the dispute between her and Dr Westergaard, I am by no means unsympathetic with her natural desire to keep in touch with her son, and to secure the maintenance of affectionate relations between the two children of the now dissolved marriage. At the same time I do not ignore the fact that Dr Westergaard, as appears from the correspondence laid before us, while he denies Mrs Westergaard's legal right to obtain access to her son, does not fail to recognise his obligation, if not from the point of view of morals at least from that of humanity and good feeling, to afford such access. In such circumstances, it is regrettable that the parties should not have left the adjustment of terms of access in the hands of some mutual friend. I have a strong impression that, if Dr Westergaard could now see his way to accept the offer made by the petitioner at the bar, namely, to leave the adjustment of terms and conditions to the senior counsel of the parties, such adjustments to embrace what raises the same question, Dr Westergaard's access to his daughter, all occasion for further friction would be happily ended.

The respondent pointed out that no averment is made by the petitioner against him as a fit custodier of her son. In her petition she claims that "access ought to be granted to her in respect of her natural rights as his mother." It was not disputed that, if it were relevantly averred that the interests of the child demanded either a change of cus-

tody or an arrangement for access, the Court would have power to interfere in order thus to safeguard and secure the child's interests. I think the respondent is right in his contention that no relevant case is averred for interference in order to preserve the child's interests. But Mr Constable maintained that, by the law of Scotland, the only case in which an innocent parent, whether native or foreign, if resident in Scotland, will be refused access to his or her legitimate pupil child is where it is proved to the satisfaction of the Court, by the other parent or other interested person, that such refusal is necessary in the interests of the child. As a general proposition this was not disputed. But the circumstances here are so special as to make the ordinary rule inapplicable. It appears to me, as the result of the whole papers in the proceedings in the Danish Courts, that the parties agreed to abide by the decision of the Danish Courts not only in the matter of divorce, but in all questions incident thereto, including questions of custody and access. It is noticeable that, in the protest lodged by the petitioner in the Danish Court, the question of access was raised for decision by that Court, although, even according to that protest, the terms of access were left to be adjusted by the parties, without any provision as to what was to happen if the parties failed to agree. Now, it appears that the Danish Court will give effect to such an arrangement and will not decree access in such a case to the innocent spouse. It was argued that such an arrangement would not be held binding in Scotland. It does not appear to me that any of the cases quoted establish the petitioner's contention on this point. They were cases in which the marriage stood undissolved, and in which, moreover, there was nothing of the nature of a mutual arrangement relating to more than one child. I may add that, in my view, no question of a private agreement between spouses, or of a decree of Court following on such an agreement, involving an arrangement which is *contra bonos mores* arises in this case. Our law may not countenance such arrangements or even allow them, but I see nothing in its nature immoral in spouses agreeing that, in the event of separation temporary or final, the husband shall obtain exclusive charge of the boys, and the wife exclusive charge of the girls, of the marriage.

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THE COURT dismissed the petition.

DAVIDSON & SYME, W.S.—J. & R. A. ROBERTSON, W.S.—Agents.

MALCOLM FERGUSON AND OTHERS (John M'Leod's Trustees), First Parties.—*R. C. Henderson.*
MRS ELIZABETH SCOTT OR M'LEOD, Second Party.—*J. G. Jameson.*
MRS MARY M'LEOD OR LOVE AND OTHERS, Third Parties.—*A. M. Stuart.*

No. 116.
July 15, 1914.
M'Leod v. Love.

Succession—Legitim—Effect on legitim fund of testamentary provision for widow—Election—Equitable compensation.

A testator, who had married without entering into a marriage-contract, executed a testamentary deed of appointment directing his trustees to pay the income of three-fifths of his estate to his widow for her liferent alimentary use, and to pay the income of the remain-

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ing two-fifths to his children equally during her life, and after her death to divide the whole trust fund equally among his children then surviving and the issue of those who might predecease her. These provisions were declared to be in satisfaction of *jus relictæ* and legitim. Owing to the character of the investments the legitim fund extended to one-half of the trust-estate.

The children having claimed legitim, *held* (1) that the provision in favour of the widow, being testamentary, had not the effect of postponing payment of any part of the legitim fund; (2) that the trustees were not entitled to encroach annually upon the capital of the half of the estate remaining in their hands to the extent required to pay to the widow a sum equal to the income of three-fifths of the whole estate; (3) that the question whether her representatives could claim to be compensated from capital for her loss of income, due to the claim for legitim, would not arise until her death.

EXTRA DIVISION.

ON 13th July 1914 a special case (as amended) was presented for the opinion and judgment of the Court as to the effect of certain deeds executed by the late John M'Leod, who died on 22nd July 1912.

The trustees acting under his trust-disposition and assignation after mentioned were the *first parties* to the case; his second wife, Mrs Elizabeth Scott or M'Leod, who survived him, was the *second party;* and his children of both his first and second marriages, along with the husbands of the married daughters and a curator *ad litem* to a minor son, were the *third parties.*

On 18th January 1893 Mr M'Leod (who had entered into no marriage-contract) executed a trust-disposition and assignation (recorded in the Books of Council and Session on 20th October 1908) whereby he disponed his whole estate to trustees, who were directed to apply the income in maintaining him and the children residing in family with him, and after his decease to hold the trust funds, so far as undisposed of, for behoof of such persons as he might appoint by any deed or writing under his hand. The trust-disposition and assignation was duly intimated to the trustees, and they assumed office.

In exercise of the power reserved in this trust-disposition and assignation the truster on 18th March 1912 executed a deed of appointment in the following terms:—". . . I hereby appoint and direct that after my decease the trustees acting under the said trust-disposition and assignation shall hold the trust funds conveyed thereby, so far as undisposed of, so that the whole free annual income and produce thereof may be held, applied, and disposed of (*a*) as to three-fifths for the benefit of my wife in liferent for her liferent alimentary use only, paying the same to her half-yearly, quarterly, or at such other times and in such proportions and instalments as the trustees acting under the said trust-disposition and assignation may consider suitable or may find most convenient; and (*b*) as to two-fifths thereof for behoof of my whole children of my present and former marriage, and the survivors and survivor of them equally among them if more than one, and that for their liferent alimentary use only during the lifetime of my wife, the same to be payable to my said children half-yearly, quarterly, and by such shares and instalments as the trustees acting under the said trust-disposition and assignation may find most suitable or convenient, and in the case of any of my children being in pupillarity or minority at or after my death it shall be within the power and

right of the said trustees in paying their shares of revenue to expend the same for their behoof as the said trustees may think most desirable; and subject to the above written provisions I direct the said trustees, on the death of my wife, to hold the capital of the trust funds under their charge for the benefit of my whole lawful children then surviving, jointly with the whole lawful issue of such of them as may have died leaving issue, the division being always *per stirpes* or the issue taking equally among them, if more than one, the share which their parent would have taken on survivance. And I provide that the provision in favour of my said wife and children respectively shall be in full satisfaction to them of all terce, *jus relictæ*, and legitim, and generally of all claims legally competent to them on my decease, and I declare that these presents shall supersede, so far as inconsistent therewith, the said trust-disposition and assignation, which, however, in all other respects shall receive full force and effect: and I consent to registration hereof for preservation."

On the truster's death the children claimed legitim.

In answer to the first three questions submitted to the Court (with which this report is not more particularly concerned) it was held (1) that both deeds were testamentary in character; (2) that, as the trust funds consisted of redeemable debenture stock which was heritable *quoad jus relictæ*, the legitim fund extended to one-half of the trust-estate.

Question 4 of the special case was as follows:—"(*a*) Is the second party entitled to a liferent of three-fifths of the undivided trust-estate, to the effect of postponing any payment of legitim out of the said three-fifths until her death? or (*b*) Are the first parties bound or entitled during the lifetime of the second party, to encroach annually on the capital of the said estate destined under the said deeds of the truster to the children electing to take legitim, to the extent necessary in each year to provide to the second party a sum equivalent in amount to three-fifths of the whole free annual income and produce of the total trust-estate? or (*c*) Will the representatives of the second party at her death be entitled to payment out of the said capital of a sum equal to the total amount by which her income from the trust-estate has, in consequence of legitim being claimed, fallen short of what she would have received if three-fifths of the whole free annual income and produce of the trust-estate had been paid to her?"

The case was heard before the Extra Division (consisting of Lord Dundas, Lord Mackenzie, and Lord Cullen) on 15th July 1914.

Argued for the second party;—There was a special obligation on a husband to provide for the support of his widow, and the provision in question, being in implement of that obligation and being reasonable in amount, could not be prejudiced by the children's claim for legitim.[1] In any event, the children on electing to take legitim were bound to make good out of the share of the estate destined to them any loss thereby occasioned to the widow, and accordingly the first parties were bound or entitled to encroach upon the capital of the estate remaining in their hands so as to

[1] Fraser, Husband and Wife, pp. 1009, 1011; Lawrie v. Edmond's Trustees, (1816) Hume, 291; Balmain v. Graham, (1721) M. 8199; Johnston v. Johnston, (1697) M. 8198, Ersk. Inst. III. ix. 16.

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bring the widow's annuity up to an amount equivalent to the income of three-fifths of the whole estate. If this were not so, then, at all events, the widow's representatives would have a claim after her death to have the total amount of the annual deficiencies repaid out of capital.[1]

Argued for the third parties;—A father could not by a *mortis causa* deed defeat his children's right to legitim.[2] In *Lawrie's* case[3] the deed under consideration was onerous, and *Balmain's* case[4] was qualified by the later case of *Henderson*.[5] The doctrine of equitable compensation was inapplicable here, because the shares did not vest till the widow's death, and, as the children had not got and might never get any share of the capital of the trust-estate, there was no estate from which they could make compensation to the widow. It was premature to consider the question whether the widow's representatives would be entitled after her death to any repayment out of capital.

Lord Dundas.—The truster died on 22nd July 1912. He had during his lifetime executed two instruments. The first was a trust-disposition and assignation dated in 1893, duly delivered to the trustees under it, and registered in the books of Council and Session in 1908. The second was a so-called deed of appointment dated in 1912, and registered in the books of Council and Session after the testator's death in that year. The truster was survived by his widow, who is the second party to this case, and by four children of the first marriage and two of the second. The third parties to the case are those children, the husbands of such of them as are married consenting and concurring; and there is a curator *ad litem* appointed by the Court to one at least of those children.

The first matter we have to consider is whether the import and effect of the two deeds I have mentioned were irrevocably to divest the truster of his whole estate *inter vivos;* or whether the deeds were truly testamentary in character. I entertain no doubt that the latter is the true view. [After dealing with the first three questions in the case, his Lordship proceeded]—

The fourth question presents to us three alternatives for solution. The first branch (*a*) asks—Is the second party entitled to a liferent of three-fifths of the undivided trust-estate to the effect of postponing any payment of legitim out of the said three-fifths until her death? I am for answering that question in the negative. Mr Jameson referred us to some authority to show that a reasonable provision to a widow may exclude legitim *pro tanto* if in the form of a disposition *inter vivos*. But that cannot be properly affirmed of the instrument here, and I think it sufficient to say that I am not aware of any case, and none has been cited, where the Court have affirmed the doctrine relied upon in relation to a deed which was regarded by the Court as of a purely testamentary character.

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[1] Anderson v. Grant, (1899) 1 F. 484; Scott v. Graham, 1913 S. C. 467.
[2] Fraser, Husband and Wife, p. 1005; More's Note to Stair, ccclxiii.
[3] Hume, 291. [4] M. 8199.
[5] Henderson v. Henderson, (1728) M. 8199.

Then we come to branch (*b*), and I think it must be also answered in the negative; because I do not see how the trustees can properly encroach, as the question would have us authorize them to do, upon the capital for the benefit of the widow, seeing that until her death no one can tell to whom that capital belongs or who will form the *stirpes* who will then be entitled to it. It follows, therefore, that the determination of the question in the third branch (*c*) must be postponed until the death of the widow.

LORD MACKENZIE and LORD CULLEN concurred.

THE COURT answered branches (*a*) and (*b*) of question 4 in the negative, and found that the question in the third alternative did not fall to be determined until the death of the second party.

SCOTT & GLOVER, W.S.—HORE & ALLARDYCE, W.S.—T. M. POLE, Solicitor—Agents.

MISS JANE ELIZABETH GIBSON AND OTHERS, Pursuers (Reclaimers). —*Constable, K.C.—Guild.*
ALEXANDER FOTHERINGHAM, Defender (Respondent).—*Sol.-Gen. Morison—Aitchison.*

No. 117.
June 24, 1914.
Gibson v. Fotheringham.

Arbitration—Oversman—Devolution—Award—Lease—Outgoing—Valuation of crop and stock.

The landlord of a farm and the outgoing tenant entered into a submission by which, in terms of the lease, they referred certain questions of valuation to two arbiters mutually chosen and their oversman, under the declaration that whatever the arbiters or their oversman should "determine . . . by decree or decrees arbitral, interim or final," should be binding on the parties.

In an action by the landlord for the reduction of two awards issued by the oversman *held* (1) that a formal devolution of the reference upon the oversman was not necessary; (2) that where there was a difference of opinion between the arbiters—even though that difference was only on a point, though on a crucial point, of procedure—the oversman was entitled to act at the request of one of the arbiters, notwithstanding the express dissent of the other; (3) that it was competent for the arbiters from time to time to devolve upon the oversman questions on which they disagreed while keeping in their own hands the decision of questions which they had not yet considered; (4) that it would not render an award of the oversman invalid that it included decisions which had already been arrived at by the arbiters.

Opinions that in a valuation under a lease the same strictness of procedure is not customary or required as would be necessary under a formal reference.

MISS JANE ELIZABETH GIBSON and Miss Annie Agnes Lyle Gibson, the proprietrices of the farm of Shepherdshaugh, Kincardineshire, and Mrs Agnes Gibson, their mother, brought an action against Alexander Fotheringham, the outgoing tenant of the farm, and Charles Cargill and John Milne, arbiters, and James Ebenezer Esslemont, oversman, acting under a minute of submission entered into between the pursuers and Alexander Fotheringham, for the reduction of two awards issued by Mr Esslemont as oversman.

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The following narrative of the circumstances of the case is taken from the opinion of the Lord Ordinary (Hunter):—

"Prior to Whitsunday 1913 the defender Alexander Fotheringham was tenant under the pursuers of the farm and lands of Shepherdshaugh, in the county of Kincardine, his tenancy coming to an end, as regards the houses, farm-offices, pasture and fallow land in preparation for the green crop, at that date, and as to the remainder of the farm at the separation of the hay and grain crops of that year.

"In terms of the defender's lease it was provided that the tenant should leave, and the landlord or incoming tenant should take, at the valuation of arbiters mutually chosen, or their oversman—(First) The work performed prior to the term of removal from the houses and others on the fallow ground in preparation for the green crop; (Second) The whole of the manure at the said term so far as made subsequent to the sowing and proper manuring of the preceding green crop, provided it shall not exceed the quantity usually on the farm about the term of Whitsunday; (Third) The machinery of the threshing-mill, but not exceeding £50, and if below that sum then only its actual worth; (Fourth) All the fencing, so far as belonging to the said Alexander Fotheringham; (Fifth) The one-half of the grain and straw as the crop stands in the fields about the middle of August, but under deduction of a reasonable allowance for cutting, harvesting, and stacking; and (Sixth) The value to the ingoing tenant of the grass of two years old or upwards, in so far as such grass shall exceed 40 acres in extent but not exceed 80 acres.

"By minute of submission, dated 21st and 23rd May 1913, the pursuers and the defender Fotheringham nominated and appointed the defenders, Charles Cargill and John Milne, as arbiters mutually chosen to value the said subjects. [It was declared in the minute of submission that whatever the arbiters or their oversman should 'determine . . . by decree or decrees arbitral, interim or final,' should be binding on the parties.] By minute dated 9th June 1913, endorsed on the minute of submission, the arbiters appointed the defender Mr Esslemont to be their oversman.

"The awards issued by Mr Esslemont are challenged upon the ground that there was no valid devolution of the reference upon him. The pursuers allege that there was neither a formal nor real difference of opinion between the arbiters."

The pursuers pleaded, *inter alia*;—(1) The reference not having been devolved upon the oversman by a formal minute of devolution, or other writing under the hand of the arbiters, *et separatim* the arbiters not having differed upon any question falling within the scope of the reference, no part of the reference devolved upon the oversman, and he had no power or authority to intervene in the reference, and to execute and issue the pretended awards complained of, and the same accordingly fall to be reduced as concluded for.

The defender Fotheringham lodged defences, in which he pleaded, *inter alia*;—(2) The pursuers' averments,* so far as material, being unfounded in fact, the defender should be assoilzied from the con-

* The pursuers had averred, *inter alia*, that no difference of any kind had arisen between the arbiters upon the questions falling to be decided under the submission.

clusions of the summons. (3) The awards libelled being within the powers conferred upon the arbiters and oversman, and the procedure in the arbitration having been in all respects regular and proper, the defender is entitled to absolvitor, with expenses.

The action was conjoined with an action brought on 16th September 1913 by Fotheringham against the present pursuers for payment of the sums found due under the first of the oversman's awards.

A proof in the conjoined actions was allowed and led. The facts found proved, which are fully set forth in the opinion of the Lord Ordinary, *infra*, were to the following effect:—On 26th May 1913 the arbiters and the oversman met on the ground to consider the valuations. The evidence was conflicting as to what happened, one of the arbiters insisting that the suggestions as to values made by the oversman were agreed to by the arbiters, the other arbiter and the oversman (whose evidence the Lord Ordinary preferred) maintaining that no agreement was come to and that the values were left to the oversman to fix. Further meetings of the arbiters and oversman took place on the ground with regard to other matters of valuation but, as little progress was being made, one of the arbiters wrote to the oversman on 1st July stating that a difference of opinion had arisen and requesting him to act. The other arbiter protested against any devolution on the oversman taking place. A correspondence ensued which did not advance matters, and on 1st August the oversman issued an award which fixed the valuations for the whole of the subjects except the grain crop, which did not fall to be valued till the middle of August. When the arbiters should have been proceeding to value the grain crop a dispute arose between them as to whether a clerk to the reference should be appointed, and on 1st September one of them wrote to the oversman stating that they could not agree as to the value of the grain crop and asking him to act. The oversman accordingly issued an award fixing the valuation of the grain crop.

On 22nd April 1914 the Lord Ordinary (Hunter) pronounced the following interlocutor:—"The Lord Ordinary, having considered the conjoined actions—(1) In the action of reduction at the instance of Miss Jane Elizabeth Gibson and others against Alexander Fotheringham and others, assoilzies the defenders from the conclusions of the action, and decerns; and (2) In the action at the instance of the said Alexander Fotheringham against the said Miss Jane Elizabeth Gibson and others, decerns against the defenders in terms of the conclusions of the summons. . . ."*

* "OPINION.—[After the narrative quoted *supra*]—The facts as proved are briefly these. On 26th May 1913 the arbiters had a meeting on the ground with a view to fixing the value of the subjects. As is usual in such references, they were accompanied by the oversman. It had been agreed between parties that in addition to the subjects mentioned in the minute of submission, the arbiters should value the grates in the farmhouse and two small sheds at the cottar-house. These were the matters that were first considered. Thereafter the arbiters and oversman went over the farm and noted the various fields and fences. The values of the grass, of the machinery at the mill, and of the dung were in turn considered. There is a material discrepancy in the evidence given on the two sides as to the part played by the oversman on this occasion. Mr Milne says that while he and Mr Cargill started by each giving a different figure as

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The Misses Gibson and their mother reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 9th, 10th, and 11th June 1914.

Argued for the reclaimers;—The oversman's awards should be reduced. (1) The evidence showed that neither on 26th May nor 1st July nor 1st September was there any final disagreement between the arbiters; and, although a minute of devolution was not indeed required,[1] it was settled law that the oversman could not act unless the arbiters were unable to arrive at a joint decision.[2] (2) Assuming that there was disagreement between the arbiters on 1st July and 1st September but not on 26th May, there could be no devolution upon the oversman of the points on which the arbiters had already, on 26th May, come to an agreement. The oversman had no power to deal with these points and his doing so rendered his award invalid.[3] (3) Assuming that on 26th May there was dis-

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the value of the subjects dealt with, they always agreed upon figures on the suggestion of the oversman. On the other hand, Mr Cargill says that he and his co-arbiter agreed upon nothing, and that, in each case of difference of opinion as to price, it was left to the oversman to fix a price, and he did so. I think that the account given by Mr Cargill is more in accordance with what actually occurred than is the account given by Mr Milne. The oversman, Mr Esslemont, who appeared to me to give his evidence fairly and candidly, explained that, in agricultural references as to the value of the subjects on a farm, the oversman, without disclosing any figure as his own, may make a suggestion to the arbiters which they accept as an agreed-on figure; but that in this case the prices fixed by him were his own independent figures and were not accepted by the arbiters. I understood from his evidence that in such references, even if the oversman is left to fix the price of one subject, the arbiters proceed to consider the other subjects with a view to seeing if they can agree upon their values. From awards exhibited to me by the parties in the course of the proceedings it appears to be not unusual for both arbiters and oversman to sign the award, though, in view of the decision in the case of *Davidson* v. *Logan*, 1908 S. C. 350, this practice is not unattended with risk.

"After the meeting of the 26th May 1913, the arbiters and oversman had several meetings upon the ground. These were devoted to considering the extent of the fencing belonging to the outgoing tenant, the ownership of the mill-wheel, and the amount of dung usually on the farm. Information was got upon these points principally from the parties themselves in an informal way. A considerable amount of time was being wasted without any progress being made, and for this I think Mr Milne was largely responsible. Accordingly on 1st July 1913 Mr Cargill intimated to his co-arbiter that, as they had differed in opinion and failed to pronounce a finding, he was applying to the oversman to act in the submission. In terms of this intimation he sent a request to the oversman to act. Mr Milne took up the position that he would not agree to devolve the reference upon the oversman and that he would resist any interference on his part. On 7th July Mr Esslemont wrote to Mr Milne

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[1] Dick v. Inglis, (1907) 15 S. L. T. 615.

[2] Bell on Arbitration, (2nd ed.) p. 190; Russell on Arbitration and Award, (9th ed.) p. 180; Frederick v. Maitland & Cunningham, (1865) 3 Macph. 1069, *per* Lord Cowan, at p. 1072; Colquhoun v. Corbet, (1784) 2 Pat. 626.

[3] Frederick v. Maitland & Cunningham, 3 Macph. 1069; Davidson v. Logan, 1908 S. C. 350.

agreement between the arbiters, and that they devolved upon the oversman the questions on which they then differed, it was not competent for them to take any part in the submission thereafter. Once there was devolution upon the oversman the arbiters were *functi officii* and could not resume their duties unless they had special power to do so.[1] The cases relied on by the respondent were distinguishable. In *M'Gregor* v. *Stevenson*[2] and *Paterson & Son, Limited,* v. *Corporation of Glasgow*[3] the objections to the awards were based on mere irregularities of procedure. In *Nivison* v. *Howat*[4] the reference was informal, and the arbiters had no power to make interim awards.[5]

Argued for the respondent;—The strict rules of law applicable to an ordinary arbitration did not apply to a reference like the present.[6] No formal devolution upon the oversman was necessary before he could act; it was sufficient that there was a difference of opinion

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saying he was prepared to act on Mr Cargill's request, and stating that he would be on the ground on Saturday, 12th July, to hear parties on disputed points. About this time agents were consulted and a certain amount of correspondence passed. On 10th July Mr Reed, who was acting for the defender Mr Fotheringham, wrote Mr Cargill saying that he had seen Mr Ferguson, who acts for the pursuers, that 12th July would not be a suitable date for them, and suggesting an alteration of the date. On 14th July Mr Esslemont wrote to Mr Ferguson, as agent for the pursuers, asking him to state definitely within four days if he wished a proof on the subjects of valuation and, if so, on what points, and intimating that if he got no notice that proof was desired, he would proceed in terms of the submission. A similar notice was sent to the agent of the compearing defender. On 15th July Mr Ferguson wrote to Mr Cargill asking him to fix a meeting so that he might learn on what points the arbiters had differed, and what was said to be devolved upon Mr Esslemont. On the same day he replied to the latter gentleman that he did not recognise him as oversman, and that any award issued by him would be taken exception to. Mr Esslemont maintained that he was entitled to act, and, on 1st August, issued his award dealing with the valuation of the subjects of the reference other than the grain crop. The prices fixed in the award are those which he had intimated to the parties as his valuation at the time when the arbiters stated that they disagreed, and desired him as oversman to state his price. The subjects included are those which, on the information submitted at the various meetings on the ground, the oversman considered fell within the reference.

"The valuation of the grain crop had, by the provisions of the lease and of the minute of submission, to be made about the middle of August. Correspondence passed between the agents of parties as to fixing a date for a joint meeting at the farm. After a certain amount of procrastination Mr Milne, on 20th August, wrote to Mr Cargill, saying: 'I am quite ready to fix a day for the valuation, but before doing so it will be neces-

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[1] Lang v. Brown, (1855) 2 Macq. 93, *per* Lord Cranworth, L. C., at p. 95.
[2] (1847) 9 D. 1056.
[3] (1901) 3 F. (H. L.) 34.
[4] (1883) 11 R. 182.
[5] Marshall v. Edinburgh and Glasgow Railway Co., (1853) 15 D. 603, and Forbes, &c., v. Underwood, (1886) 13 R. 465 (*disapproving* Sinclair v. Fraser, &c., (1884) 11 R. 1139), were also referred to.
[6] M'Gregor v. Stevenson, 9 D. 1056, *per* Lord President Boyle, at p. 1059; Paterson & Son, Limited, v. Corporation of Glasgow, 3 F. (H. L.) 34; Davidson v. Logan, 1908 S. C. 350, *per* Lord Stormonth-Darling, at p. 368, and Lord Low, at p. 366.

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between the arbiters, either on the merits of the questions involved or on points of procedure, resulting in a deadlock[1]; and the evidence showed that such a difference of opinion had arisen by 30th June. By that time the difference was as great as was the difference in *Nivison's* case.[2] At 30th June the whole subject-matter of the reference devolved upon the oversman. Alternatively, on the view that the arbiters had agreed upon some matters prior to 30th June, there devolved upon the oversman such matters as still remained in dispute between them. Such partial devolution was competent.[3] It was also competent for the oversman to issue an award dealing with the points in dispute and also embodying decisions already arrived at by the arbiters.[2]

At advising on 24th June 1914,—

LORD SALVESEN.—We have had a very full and able argument from the reclaimers in this case; but in the end I have come to be of opinion

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sary for us to appoint a clerk to the reference seeing there has been so much irregularity up to the present, and that we have still to issue an award not only for the half of the grain crop, but for the whole of the other articles submitted to us which were valued by us at the term of Whitsunday.' The appointing of an agent to act as clerk is unusual and unnecessary in such a reference as that on which Mr Cargill and Mr Milne were engaged. On 21st August 1913 Mr Cargill, although expressing the view that a clerk was unnecessary, said: 'If, however, you desire to have a clerk appointed I am willing that any solicitor in Kincardineshire be nominated, but I think it right to state now to save any misunderstanding that I decline to again open up the question of the Whitsunday valuations.' On 23rd August he also intimated that as Mr Milne had failed to make an appointment for a joint inspection of the grain crop, he had personally examined the crop and arrived at certain valuations, which he stated. On the same date Mr Milne wrote that he agreed to appoint Mr Mitchell as clerk to the reference, and saying that he would meet his co-arbiter. A meeting took place on the 28th August. On the request of Mr Milne Mr Mitchell attended this meeting. There was no necessity for his being present. Mr Milne, though agreeing with Mr Cargill as to the fields that were to be taken over by the landlord, would not proceed with the valuation unless Mr Cargill put the submission in the hands of Mr Mitchell as clerk to the reference. To this Mr Cargill objected, as the oversman's award upon the Whitsunday valuations was appended to the document. By this time the award had been delivered to the defender Fotheringham, and I think that the request of Mr Milne was in the circumstances unreasonable. After further communication with Mr Milne, Mr Cargill wrote to Mr Esslemont, the oversman, on 1st September, requesting him, in view of the arbiters hav-

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[1] Middleton v. Chalmers, (1721) Rob. 391; Dick v. Inglis, 15 S. L. T. 615, *per* Lord Salvesen, at p. 616; Sinclair v. Fraser, 11 R. 1139; *In re* Tunno and Bird, (1833) 5 B. & A. 488; Winteringham v. Robertson, (1858) 27 L. J. (Ex.) 301, *per* Watson, B., at p. 304; Cudliff v. Walters, (1839) 2 Moo. & R. 232, *per* Coleridge, J., at p. 235; Paterson & Son, Limited, v. Corporation of Glasgow, 3 F. (H. L.) 34, *per* Lord Robertson, at p. 40.

[2] Nivison v. Howat, 11 R. 182.

[3] Nivison v. Howat, 11 R. 182, *per* Lord Craighill, at p. 191; Davidson v. Logan, 1908 S C. 350, *per* Lord Ardwall, at p. 358.

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that we ought not to disturb the result at which the Lord Ordinary has arrived. I accept generally his statement of the facts. I think, according to the weight of the evidence, what happened on the 26th of May was that the arbiters, having differed as to the prices, referred their differences one by one to the oversman, who there and then decided the points so referred. Even, however, if one accepted the view of the reclaimers—that the oversman merely made suggestions which the arbiters accepted—I do not think the result would be different; although perhaps technically there ought to have been an award by the arbiters as to the matters which they settled, and a separate award by the oversman on the points which were still in dispute and were devolved upon him. In the present case there is no substance in the distinction, because the oversman's award proceeded on the basis of the prices fixed at the meeting on the 26th of May; and I cannot see that it makes his award bad that it included the

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ing failed to agree as to the value of the half of the grain crop to be taken over by the proprietors, to issue an award fixing the value. Mr Esslemont seems to have made an independent examination of the fields on the 4th September and fixed the valuation. The fields selected by the proprietors had previously been pointed out to him by both arbiters. His award was not actually issued until 8th January 1914. Nothing in the proof suggests to my mind that Mr Esslemont acted other than fairly and impartially in a position which Mr Milne's attitude rendered unnecessarily difficult and trying. I do not in the circumstances of this case attach importance to Mr Esslemont, before issuing his awards, asking for and getting an undertaking from Mr Reed, as agent for Mr Fotheringham, to keep him free of costs in connection with any proceedings in consequence of his issuing his awards as requested.

"Mr Milne is now tenant of the farm of Shepherdshaugh. He has consumed, or is in possession of, practically all the subjects that fell to be valued, and for the price of which the outgoing tenant has until now received no payment. If the awards made by Mr Esslemont are set aside it will be extremely difficult, if not impossible, for other arbiters or oversmen to arrive at a fair valuation of the subjects. I should not, however, allow this circumstance to weigh with me if the pursuers have made out a case for reduction.

"The pursuers did not in argument insist on the first part of their first plea in law that a formal minute of devolution or other writing was necessary in order to entitle the oversman to act. It has been settled by the cases of *Colquhoun*, (1784) 2 Pat. 626, and *Dick* v. *Inglis*, (1907) 15 S. L. T. 615, that where there is a written appointment of an oversman it is not necessary that the devolution upon him should be in writing. There must, however, be evidence that the arbiters have applied their minds to the subject of reference, and have differed in opinion. The inference I draw from the proof is that there was such difference of opinion in this case. I had most difficulty with the question of the grain crop, but I think the opinion expressed by Lord Salvesen in the case of *Dick* is consistent with and supports the view I take that Mr Milne's silence after Mr Cargill's communication to him of the figures he had arrived at justified the latter gentleman in holding that a difference of opinion had arisen and in referring the matter to the oversman.

"It was contended for the pursuers that there was no room for a partial devolution, the arbiters being bound to make a partial award so far as they agreed, and *quoad ultra* to devolve everything upon the oversman. I think that there were informalities about the procedure in this case which would or might have invalidated a formal reference. In the

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sums which the arbiters had agreed to be due to the tenant. To put it no higher, the reclaimers have no interest to contend that they should pay the sum found due by the arbiters under an award bearing their signatures rather than pay the same sum under an award issued by the oversman.

The next question raised by the reclaimers is whether the reference was competently devolved on the oversman. It would not have been so unless the arbiters had differed in opinion; and the main controversy between the parties—as to which the bulk of the proof has been led—was whether in fact there was a difference of opinion which justified the oversman in intervening. The peculiarity of the case is that one of the arbiters—Mr Milne—from the first strenuously protested that the arbiters had not differed. It seems probable that Mr Milne never applied his mind to the merits of the various claims put forward, but it is plain that matters had come to a deadlock so far as the arbiters were concerned on questions of procedure. To take only one instance—the valuation of the corn crop—Mr Milne insisted that a clerk to the reference should be appointed before anything further was done. Mr Cargill, the other arbiter, thought such an appointment entirely unnecessary. It is not for us to decide the merits of this dispute; although I fail to see how, in a question of mere valuation, a professional gentleman would have been of much assistance to the arbiters. It is sufficient that, on a crucial point of procedure on which each of the arbiters had definitely made up his mind, they were unable to come to an agreement. In these circumstances, which were known to the oversman, I think he was entitled to act at the request of only one of the arbiters, notwithstanding the express dissent

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case of *Nivison* v. *Howat*, (1883) 11 R. 182, however, Lord Young, dealing with valuation by arbiters on the termination of a lease, said, 'No formalities required to be observed by two farmers in valuing a crop or by a third who is competently called in to decide where they differ. All the parties here desired or bargained for was the intelligent opinion of two skilled persons, and if they differed then the decision of another skilled man.' The pursuers founded upon the decision in the recent case of *Davidson* v. *Logan*, 1908 S. C. 350, and particularly upon Lord Ardwall's opinion therein. The ground of judgment in that case, where an award was set aside, was that the arbiters had not determined the question submitted to them. The technical grounds upon which Lord Ardwall thought the award fell to be reduced, with one exception (*i.e.* the signing of the award by the two arbiters and the oversman), were not approved by the Inner House. Lord Low, at page 367, said: 'The submission was substantially one for valuation, and in such a case if it appeared that the parties had obtained the honest opinion of the gentlemen selected upon the questions submitted to them, I should not regard mere irregularities of procedure as being sufficient to nullify the award.' In the present case I think that the parties have obtained the honest opinion of the oversman on the value of the subjects after the arbiters had failed to agree. I also think that what I may describe as the in and out method of referring to the oversman from time to time as differences arose between the arbiters may be irregular procedure in a formal reference, but is not of such materiality as to invalidate a valuation under a lease. . . .

"I shall, therefore, assoilzie the defenders from the conclusions of the action of reduction, and give decree in Mr Fotheringham's favour in the action founded upon the award."

of the other. I adhere to the views which I expressed on this subject in the case of *Dick* v. *Inglis*.[1]

The only other argument which it is necessary to notice is that it was incompetent for the arbiters partially to devolve the subject-matter of the reference, while retaining in their own hands the decision of claims which, at the time of the partial devolution, they had not considered. That argument is, in my opinion, met by the terms of the submission which authorises the arbiters to pronounce decrees, interim or final. It is therefore obvious that the arbiters were authorised to dispose of the questions submitted to them by awards issued at different times. Indeed, as some of the subjects fell to be valued at Whitsunday, and others about the middle of August, I think it was clearly contemplated that they should exercise the power so conferred. I see no inconvenience or injustice, but much the reverse, in a reference of this description, which involved for the most part valuations by practical men, that any difference of opinion with regard to the price of crop or the like should be settled on the spot by invoking the decision of the oversman, while the arbiters still retained the right to dispose of matters which involved further inquiry. What the parties contracted for was the joint decision of the arbiters on any claim which they fell to dispose of, or, failing their agreement, the decision of the oversman appointed by them. Whatever view might be taken of the facts, I think this is what the parties here have got. All the claims put forward were capable of being separately dealt with, and there was no interdependence between them. I need not, however, pursue the subject further, as I adopt entirely the Lord Ordinary's conclusions in fact, as well as the reasons in law on which his judgment has proceeded.

Lord Guthrie.—In these conjoined actions the Lord Ordinary has found in favour of the outgoing tenant, and has refused to reduce the awards of 1st August 1913 and 8th January 1914, which the landlords dispute on two grounds, first, because the reference had not been devolved on the oversman by whom the awards were pronounced, and second, because, so far as the first award is concerned, it was, as regards certain matters dealt with, *ultra fines compromissi*. The Lord Ordinary's judgment disposing of the second ground adversely to the reclaimers was not questioned before us by them.

I think the Lord Ordinary has dealt rightly with the two questions of fact involved, and that he has reached the right result in law. The first question of fact is whether the prices contained in the first award were arrived at by the oversman after hearing the arbiters who had been unable to agree, or whether these prices were the arbiters' prices, who had been enabled to agree on them by means of suggestions made by the oversman. It seems to me that the difference between these two questions is a slender one, and that equally honest and accurate witnesses might well differ as to whether what took place fell under the one description or the other. I agree with the Lord Ordinary in accepting the oversman's account of what took place, and in holding that the arbiters validly

[1] 15 S. L. T. 615.

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devolved the determination of the price in each case on him. The case made by the landlords in article 5 of their condescendence, namely, that "no difference of any kind arose between them [the arbiters] as to the valuation prices to be paid by the pursuers to the defender Alexander Fotheringham," is contradicted by the evidence on both sides. But suppose that the true result of the evidence is to show either that some of the items were adjusted by the arbiters with or without hearing the oversman's suggestions, while others were devolved by them upon the oversman, who thereupon disclosed his own valuation and fixed the prices, or that in all cases the prices were fixed by the arbiters with or without hearing the oversman's suggestions, I agree with Lord Salvesen in thinking that the award, although pronounced by the oversman, would not be thereby rendered invalid, being in this case admittedly identical with the figures which, according to the landlords, were arrived at by the arbiters without difference of opinion.

In regard to the second award, it is admitted that the arbiters differed in opinion. But the landlords say that this difference not being on the merits of the questions submitted to the arbiters, but on a mere question of procedure, namely, as to whether at a certain stage of the reference a solicitor should be appointed as clerk to the reference, it was incompetent for one of the arbiters to devolve or for the oversman to act. It seems to me, on the authorities, that it is sufficient to bring the office of an oversman into active operation if there be such a difference of opinion between arbiters—either on the merits of the questions involved or on the proper procedure to be followed—as brings the proceedings to a deadlock. The correspondence read along with the evidence makes it clear that such a deadlock had in point of fact occurred. It is immaterial whether Mr Cargill, the tenant's arbiter, or Mr Milne, the landlords' arbiter, was in fault. It is sufficient that a deadlock had occurred. I therefore think that the Lord Ordinary's interlocutor should be affirmed.

LORD JUSTICE-CLERK.—I agree with the opinions delivered. This is a case of a very ordinary arbitration in which the questions relate to skilled valuation only. There was, therefore, no call for formality of procedure, and the mode in which matters were dealt with up to a certain point was quite in accordance with ordinary practice in such cases. The main difficulty which arose at a later stage was, I think, the consequence of what I cannot characterise otherwise than as the unreasonable conduct of one of the arbiters, by which matters would have been brought to a deadlock unless the oversman had intervened. I am satisfied that, when the oversman did intervene to bring the arbitration to a conclusion, he did so rightly, and that there is no ground for holding that, when he did intervene, anything was done which can be impugned on any reasonable ground. The Lord Ordinary has disposed of the case on grounds stated by him, and with his views I entirely concur.

THE COURT adhered.

GUILD & GUILD, W.S.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

THE EARL OF MANSFIELD AND WILLIAM DALZIEL MACKENZIE, Complainers (Reclaimers).—*Blackburn, K.C.—Lord Kinross.*
JAMES PARKER, Respondent.—*G. Watt, K.C.—Duffes.*
JOSEPH DOUGLAS, Respondent.—*Party.*

No. 118.
July 18, 1914.
Earl of Mansfield v. Parker.

Fishings—Salmon fishings—White fishings—White fishings carried on to injury of salmon fishings—Paidle-net—Form and position of net.

Circumstances in which *held* (*rev.* judgment of Lord Skerrington), in an action of interdict at the instance of proprietors of salmon fishings in the River Annan, that the use of paidle-nets—not exceeding five feet in height and having no cover over the nets—erected in the Solway by fishermen engaged in the white fishing was illegal, in respect that the nets were so placed and so constructed as to be fitted to catch salmon to a material extent; and interdict against the use of such nets, except during the close time for salmon, *granted*.

Observed that, having established these facts, it was unnecessary for the complainers to prove further, (*a*) that the nets had been erected with the intention of catching salmon, or (*b*) that any salmon caught in them had been killed, or (*c*) that material injury to the salmon fishings had actually occurred.

Question whether the complainers would have been entitled to interdict if the respondents had proved (*a*) that they had adopted every known and practicable means to avoid catching salmon, and (*b*) that they had put back every salmon caught in their nets.

2D DIVISION. Lord Skerrington.

ON 3rd August 1912 the Earl of Mansfield and William Dalziel Mackenzie of Newbie, proprietors of salmon fishings in the River Annan and its tributaries, presented a note of suspension and interdict against John Fisher, James Parker, and Joseph Douglas. The prayer of the note was that the respondents should be interdicted "from erecting and using stake-nets, paidle-nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to prejudice, interfere with, or injure the complainers' rights of salmon fishings on the River Annan or estuary thereof, and upon the sands and shores between high and low water marks within the limits of the district of the River Annan, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act, 1862." The respondent Fisher did not appear to defend the action, but answers were lodged by the two other respondents.

The complainers averred that the respondents had erected and used stake-nets on the lower part of the River Annan and within the limits of the district of that river as fixed by the Commissioners acting under the Salmon Fisheries (Scotland) Act, 1862. They further averred:—"The nets used by the respondents are illegal inasmuch as they are used for the purpose of capturing salmon or fish of the salmon kind, and because they are constructed and worked in such a manner, and are placed in such positions, as to facilitate the capture of salmon, and thus to injure the complainers' rights of salmon fishing. . . . The said nets of the respondents are ostensibly used for the capture of white fish only, but they are in reality used for, or at any rate have the effect of, capturing salmon or fish of the salmon kind, and large numbers of salmon are taken therein, to the great injury of the complainers' fishings."

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The compearing respondents in their answers averred that their nets were adapted and used solely for the capture of white fish, and denied that they were constructed or used in such a manner as to injure the salmon fishings of the complainers to any appreciable extent.

The complainers pleaded;—In respect that the use of said stake-nets as constructed and situated constitutes a material injury to the salmon fishing rights of the complainers, interdict should be granted as craved.

The respondent Parker pleaded, *inter alia*;—(2) The respondent James Parker, in erecting and using the nets in question, having acted in pursuance of his just and legal rights, is entitled to be assoilzied from the conclusions of the action. (3) The respondent James Parker is entitled to be assoilzied from the conclusions of the action in respect that (first) he has not erected or used the nets in question for the purpose of catching salmon or fish of the salmon kind; (second) and the said nets are not of such size, construction, or so situated or used as to injure the complainers' rights of salmon fishing to any substantial or material extent.

The respondent Douglas adopted these pleas in his answers.

On 17th December 1912 the Lord Ordinary (Skerrington) pronounced an interlocutor refusing the prayer of the note.*

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* "OPINION.—The complainers are the Earl of Mansfield and Mr Mackenzie of Newbie, who are the proprietors of salmon fishings within the salmon fishery district of the River Annan. At the date when the present note of suspension and interdict was presented the respondents, John Fisher, James Parker, and Joseph Douglas, were fishing each with a range of three paidle-nets on the Blackshaw Bank, a large sandbank which is dry at low tide and which is situated in the parish of Caerlaverock and county of Dumfries. An imaginary line running north and south across this bank divides the salmon fishery district of the River Annan on the east from the district of the River Nith on the west. The complainers ask for an interdict to restrain the respondents from 'erecting and using stake-nets, paidle-nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind, or fitted to capture salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to prejudice, interfere with, or injure the complainers' rights of salmon fishings on the River Annan or estuary thereof, and upon the sands and shores between high and low water marks within the limits of the district of the River Annan, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act, 1862.' The complainers' pleadings are as confused as their prayer, and they mix up in a very perplexing manner three separate and distinct grounds of action, viz., (1) the old Scots Statutes, and particularly the Act 1563, cap. 68, which have been construed as prohibiting fixed engines for the capture of fish within the estuaries of rivers where the tide ebbs and flows, but excepting always fixed engines in 'the water of Solway'; (2) the Salmon Fisheries Acts of 1861 and 1862, which prohibit the placing or using of fixed engines 'for catching salmon' in the Solway Firth or its tributary rivers; and (3) the rule of the common law which is expressed in the maxim *sic utere tuo ut alienum non laedas*. Though the *locus* in the present case is within the fishery district of the River Annan, the Ordnance Plan, No. 21 of process, shows that it is also in the Solway Firth. The salmon stake-nets belonging to the complainer Mr Mackenzie are four miles further east and nearer the mouth of the River Annan, but they have been held to be legal as being in the Solway Firth—*Johnstone* v. *Mackenzie*, (1869) 6 S. L. R. 727. On the other hand, in a case

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The complainers reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 12th, 16th, 17th, and 18th June 1914.

Argued for the reclaimers;—The Lord Ordinary's interlocutor was erroneous. The action was laid under the common law; and the prayer of the note followed the form in *Duke of Buccleuch* v. *Smith*,[1] and was not open to the strictures passed on it by the Lord Ordinary. The respondents were undoubtedly entitled to fish with fixed nets for white fish. That right was derived not from the Acts of Queen Anne,[2] or of George II.,[3] but from the Act of 1563, cap. 68; and, although the concluding portion of that Act, including the reference to the Solway, was repealed by the Statute Law Revision Act, 1906,[4] the right had been recognised in a series of decisions,[5] and was not disputed by the complainers. But it was also recognised in these decisions[5] that the right of salmon fishing was the

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which he decided in 1886, Lord Trayner found that the paidle-nets complained of in that action were not in the Solway, but were in the River Nith. This distinction is of great practical importance, because it followed from the foregoing finding in fact that these nets were illegal without any proof that they were placed or used for catching salmon and without proof of material injury either actual or imminent. The respondent Douglas, who acted as his own counsel, argued that it was not proved that the place on which his three nets had been erected was within the district of the River Annan. I do not agree with him. The respondent Fisher did not lodge answers. The respondent Parker lodged answers and was represented by counsel.

"For the reason already explained, I decide that the respondents' nets were in the water of Solway. I now proceed to consider whether they were illegal under the Acts of 1861 and 1862 or at common law. The nets used by the three respondents were paidle-nets—in other words, miniature stake-nets, 4½ to 5 feet in height, as contrasted with proper salmon stake-nets, which are from 10 to 12 feet in height. Paidle-nets are primarily adapted to catch flounders—fish which swim near the bottom, and will therefore enter the nets at all states of the tide, except when the nets are dry. On the other hand, as salmon swim near the surface, these nets are specially adapted in order to avoid, so far as possible, either catching salmon or obstructing their passage up and down the Solway. Owing to the lowness of the white fishers' nets, it would be difficult for them to creep into the chambers at low tide and collect the fish, and they would further, with their heavy boots, destroy the netting which is generally spread over the floor of the chambers. Hence the advantage of a 'paidle' or barrel trap in which the fish are collected, and from which they are removed by the fishermen shortly before low tide. Salmon-nets have no paidle; the fisherman walks into the chamber and collects the fish. It has been recently suggested that paidle-nets ought to have a heck or gate made of horizontal spars three inches apart in order to prevent salmon from entering the chamber, but this suggestion has not yet been proved to be feasible. In the opinion of the white fishermen it would prove unworkable owing to the quantities of jelly-fish which are found in the Solway. The present case is in its facts entirely different from one which was recently decided by the Second Division on appeal from the Sheriff of Dumfries and Galloway, and which at first sight

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[1] 1911 S. C. 409.

[2] Act 1705, cap. 2.

[3] Fisheries (Scotland) Act, 1756 (29 Geo. II. cap 23).

[4] 6 Edw. VII. cap. 38.

[5] Gilbertson v. Mackenzie, (1878) 5 R. 610, and cases there cited.

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paramount right, and that the right of white fishing must not be so exercised as to cause material injury to the salmon fishing. Proof of the actual injury caused was not required as the complainers had by statute[1] a title and interest to sue. It was enough if the nets were fitted to take salmon. Every material point that was proved in the case of *Duke of Buccleuch* v. *Smith*[2] was established here. The only difference that could be pointed to was the absence of covers to the nets, but the absence of these covers did not really reduce the effectiveness of the nets for catching salmon. It was not necessary, as the Lord Ordinary had held, to prove that the respondents used their nets for the purpose of catching salmon. The question was as to the character of the nets, not as to the intention of the fishermen; and the cases of *Haydon* v. *Cormack*,[3] *Marshall* v. *Phyn*,[4] and *Watts* v. *Lucas*,[5] were not in point. The nets here were of the same character as those which had been condemned in the earlier cases. In *Coulthard* v. *Mackenzie*[6] it was ordered that paidle-nets

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appears to be very similar, *Buccleuch* v. *Smith*, 1911 S. C. 409. The *locus* was the same sandbank, but that part of it which lies within the fishery district of the River Nith. It also appears from the opinions of the Judges that they assumed that the nets complained of were in the Solway Firth. Lastly, except for one specialty which affects the respondent Parker alone, the nets used in the two cases were substantially the same, viz., the ordinary paidle-net. So far, the two cases were very similar. On the other hand, it appears from the opinions of the Lord Justice-Clerk (p. 417), Lord Ardwall (p. 424), and Lord Salvesen (p. 425), that they held it to be proved that the netting which formed a cover over the top of the chamber of the defenders' nets was useless for preventing the escape of flounders, but was useful for preventing the escape of salmon. It was inevitable that white fishers who used nets specially adapted for catching salmon and not flounders should be subjected to an interdict. I have not seen the evidence by which it was proved that flounders will not rise from the sand and escape by swimming when there is plenty of water available. No such evidence was adduced by the complainers in the present action. Neither in his cross-examination nor in his speech did their counsel suggest any doubt as to the truth and accuracy of the evidence given by the respondent Parker and his witnesses to the effect that the removal of the covers subsequent to the judgment of the Second Division had been proved by actual experience to diminish the value of the catch of white fish by about one-half owing to the larger flounders making their escape through the top of the net. On the other hand, the complainers' counsel tried to prove that the cover did not materially facilitate the capture of salmon. His witnesses propounded the theory that a salmon would not try to jump or swim through the top of the net, but would make its way straight into the paidle. In deference to the views expressed in the 1911 case, most of the Caerlaverock white fishers, including the respondent Parker, removed the covers from their nets and submitted during the seasons 1911 and 1912 to the loss of a large part of their catch. The complainers are not content with this sacrifice, but insist that the paidle also must be removed. No person has ever used a net which had neither cover nor paidle, and I do not believe that such a method of white fishing is practicable, though it was recommended so long ago as 1881 in

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[1] Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 37; Stewart on Fishing (2nd ed.), p. 159.

[2] 1911 S. C. 409.

[3] (1885) 22 S. L. R. 563.

[4] (1900) 3 F. (J.) 21.

[5] (1871) L. R., 6 Q. B. 226.

[6] (1879) 6 R. 1322.

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should be removed; but they were subsequently replaced, and accordingly interdict against their use was obtained in *Mackenzie* v. *Murray*.[1] In *Duke of Buccleuch* v. *Kean*[2] the Court ordered paidle-nets to be removed in respect that they interfered with the rights of the proprietors of the salmon fishings. The present case was ruled by the decision in *Duke of Buccleuch* v. *Smith*.[3] In the case of *Buccleuch* v. *Herries*,[4] the nets in question had no covers.

Argued for the respondent Parker;—The public were entitled to fish in the Solway for white fish with fixed nets,[5] and this fishing was favoured by the law.[6] The reservation in the Statute Law Revision Act,[7] had the effect of preserving the right of fishing under the Act of 1563. In order to entitle the complainers to interdict they must show that the purpose of the net was to catch salmon; or at any rate that the net was so constructed and used as to take salmon to such an extent as to cause material injury to the

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the report referred to by Lord Ardwall at page 423 of his opinion. I distrust the complainers' theories as to the mode in which the respondents ought to carry on their business, and as to the probable behaviour of fish when enclosed in the chamber of a net. It is very remarkable that the theories upon which the Court was induced to interdict the white fishers in 1911 are now abandoned as not worth defending.

"The complainers tried to prove that the respondents had selected a fishing ground which was better suited for catching salmon than flounders, and that, under the pretext of catching flounders, they fished with the object of catching salmon, but this attempt was a failure. I saw Parker and I heard his evidence. I believed him when he said that he had no desire to catch salmon and did not try to do so. He proved his sincerity by taking the covers off his nets after the Judges had suggested that the covers were hurtful to the salmon fishery owners. Douglas did not go into the witness-box, but as he had not the benefit of legal advice I do not draw any unfavourable inference from this fact. It is enough to say that it is not proved that salmon and not flounders were the real object of his fishing. His refusal to remove the covers from his nets shows merely that he objected to the loss of his best flounders. There is no evidence that any of the respondents killed a single salmon. But it is proved that their nets, whether with or without covers, were capable of catching not only flounders but salmon, and did in fact capture some salmon or fish of the salmon kind. Their nets were repeatedly inspected by the police from late in April until early in July 1912. In the case of Fisher (who used a cover but no paidle) thirteen visits disclosed eight salmon or fish of the salmon kind in his three nets; in the case of Parker (who used a paidle but no cover) twenty-one visits disclosed four such fish in his three nets; and in the case of Douglas (who used both cover and paidle) eighteen, or as he maintains twenty-two, visits disclosed sixteen such fish in his three nets. In view of these figures I do not think it possible to hold that the respondents captured salmon only occasionally or acci-

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[1] (1881) 9 R. 186. [2] (1890) 17 R. 829. [3] 1911 S. C. 409.

[4] Reported in a footnote to Duke of Buccleuch v. Smith, 1911 S. C. 409, at p. 414.

[5] M'Whir v. Oswald, (1833) 11 S. 552, 1 S. & M'L. 393; Murray v. Earl of Selkirk, (1821) 1 S. 107, 2 Shaw's Apps. 299; Stewart on Fishings (2nd ed.), p. 344; Act 1705, cap. 2; Fisheries (Scotland) Act, 1756 (29 Geo. II., cap. 23).

[6] Gilbertson v. Mackenzie, 5 R. 610, *per* Lord Ormidale, at p. 616, Lord Justice-Clerk Moncreiff, at p. 621.

[7] 6 Edw. VII. cap. 38.

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complainers. There was no proof of this in the present case. The nets were used in the *bona fide* pursuit of white fishing; they were low and, unlike the nets condemned in *Duke of Buccleuch* v. *Smith*,[1] they had no covers; and it appeared that salmon were not plentiful where the nets were placed and that only an occasional salmon was taken. In fact the respondent had adopted all practicable means to avoid the taking of salmon. Further, the complainers must show the nature of their interest in the salmon-fishings, and they had failed to do so. In any case the terms of the interdict sought were too vague,[2] and the note fell, therefore, to be refused.

The respondent Douglas, who was not represented by counsel, submitted on his own behalf an argument to the same effect, except that he admitted that the chambers of his nets had covers.

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dentally. There must be many places within the Solway Firth (which for the present purpose extends to the Mull of Galloway) where no one would expect to catch salmon, though occasionally a salmon might come into a net as might a porpoise or a small shark. But the Blackshaw Bank seems to me to be a place where the capture of salmon or sea trout is at least probable, notwithstanding the fact that a paidle-net is used and not a proper salmon-net. Accordingly, if the respondents' acquittal depends on my holding that it was an unlikely event that salmon would be caught in their nets, and that they in fact entertained any such belief, I should find them guilty. I use the language of criminal law because the first question is whether the complainers have proved that the respondents have committed an offence against the Salmon Fisheries Acts, 1861 and 1862.

"Section 33 of the Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. cap. 97), enacts that from and after 1st January 1865 the provisions of the English Act of 1861 shall 'extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth, situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon: Provided, that all offences against such provision shall be prosecuted and punished as directed by this Act.' The Commissioners under the Act of 1862 fixed the limit dividing the Solway Firth from the sea to be a straight line from the Mull of Galloway to Hodbarrow Point in Cumberland. Section 11 of the English Salmon Fisheries Act of 1861 (24 and 25 Vict. cap. 109), enacted that 'No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters, and any engine placed or used in contravention of this section may be taken possession of or destroyed, and any engine so placed or used and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall for each day of so placing or using the same incur a penalty not exceeding £10.' The section excepted 'any ancient right or mode of fishing as lawfully exercised at the time of the passing of this Act by any person by virtue of any grant or charter or immemorial usage.' In order to give practical effect to this legislation a private Act was passed on 14th August 1877 (40 and 41 Vict. cap. ccxl.), authorising the appointment of Commissioners to inquire 'into the legality of all fixed engines erected or used for the taking of salmon in the waters and on the shores of the Solway Firth in Scotland,' and empowering the Commissioners to 'abate and remove all such fixed engines as are not proved to their satisfaction to be privileged,

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[1] 1911 S. C. 409.

[2] Cathcart v. Sloss, (1864) 3 Macph. 76; Cairns v. Lee, (1892) 20 R. 16; Perth General Station Committee v. Ross, (1897) 24 R. (H. L.) 44.

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LORD SALVESEN.—This case marks a further stage in the controversy which has now raged for at least 150 years between the white fishers of the Solway and the proprietors of salmon fishings on the north side of the estuary. I am not so sanguine as to believe that our judgment will finally settle this dispute; but at all events it is desirable that it should be consistent with previous decisions, and it may help towards the regulation of the conflicting rights which have given rise to all the trouble in the past.

In the case of the *Duke of Buccleuch* v. *Smith*[1] this Division decided that stake-nets erected by the respondents in the estuary of the River Nith, ostensibly for the purpose of white fishing, were constructed in such a way and placed in such a position that they were calculated

as hereinafter provided.' In Stewart on Fishings, (2nd ed.) p. 556, *et seq.*, there is a list of the fixed engines on the Solway which received a certificate of privilege, and also a memorandum by the Commissioners as to their proceedings. The Act of 1877 does not throw any light upon the interpretation of the Act of 1861. It uses the words 'erected or used' as equivalent to the words 'placed or used' in the earlier Act. The Court of Session decided that these Commissioners had jurisdiction to order the removal of paidle-nets, when they were satisfied that such nets had been erected or used for taking salmon—*Coulthard* v. *Mackenzie*, (1879) 6 R. 1322. The Acts of 1861 and 1862 are highly penal, and must be strictly construed. The purpose for which the net is set is of the essence of the offence—*Haydon* v. *Cormack*, (1885) 22 S. L. R. 563; *Marshall* v. *Phyn*, (1900) 3 F. (J.) 21; *Watts* v. *Lucas*, L. R., 6 Q. B. 226. According to the ordinary use of language a person does not fish for salmon who adopts every known and practicable means in order to avoid catching them, and who puts back every salmon which is caught in his net. Fishermen cannot help catching fish which are either worthless to them or which they are legally bound to return to the water. Anglers for trout catch eels, salmon anglers catch kelts, and sea fishers catch dog-fish. It is inevitable that they should do so, and in a sense they intend to catch these fish, because every man must be deemed to contemplate and intend the natural consequences of his acts. But in ordinary parlance it would be absurd to say that such fishermen use their tackle for catching eels or kelts or dog-fish. If the Act of 1862 had intended to make it a part of the law of Scotland that no fixed engine capable of catching salmon as well as white fish should be placed or used in waters frequented by salmon it would have said so. Any such enactment would have made white fishing impossible in places where it had been practised from time immemorial. I do not believe that Parliament would have passed such a law without giving the white fishers an opportunity of defending themselves by their counsel and witnesses. They have since had such an opportunity before departmental and Royal Commissioners, but no legislation has followed upon these inquiries. If upon a sound construction of the Act of 1861 the paidle-net is illegal merely because it is fitted to catch salmon as well as flounders, I do not understand why the Nith and Annan Fishery Boards have not long ago swept them away. Instead of doing so they have left it to individual proprietors of salmon fisheries to attack individual white fishers upon the ground that the latter, though ostensibly fishing for flounders, did so as a pretext for catching salmon. Anyone can see that a paidle-net will catch a salmon, and everybody knows that

[1] 1911 S. C. 409.

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to capture, and did capture, large quantities of salmon to the prejudice of the complainer's rights, and we granted interdict accordingly against the use of these nets. The interdict applied only within the limits of the River Nith. The respondents have erected similar nets on that part of the Blackshaw Bank which is within the limits of the district of the River Annan. Accordingly the previous interdict, which applied to at least one of the respondents in this action, was of no value as soon as the nets were removed into the Annan district, which is bounded on the west by a line intersecting the Blackshaw Bank from north to south. The nets used by the respondent Douglas are precisely the same as those which were the subject of the interdict at the instance of the Duke of Buccleuch. Those of the respondent Parker differ only in respect that there are no covers on the chamber into which the fish are led by the arm of the net which is placed at right angles to the current. Those of

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large numbers of salmon ascend and descend the Solway Firth between the mouth of the Nith and the mouth of the Sark. If the capacity to catch salmon is the test of legality, no evidence except of a formal kind would be necessary in an application for an order for removal of such a net from a place like the Blackshaw Bank. Proof of material injury, or indeed of any injury, to a salmon fishery, is, by statute, unnecessary in an action for interdict or removal directed against a white fisher who uses an illegal engine within the same fishery district—see the Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 37. The complainers have, in my judgment, failed to prove that the respondents, while ostensibly fishing for flounders, placed or used their nets for the purpose of catching salmon.

"Their case under the Acts of 1861 and 1862 having failed, it now remains to consider whether they have made out a case which entitles them to a remedy at common law. The common law applicable to cases of this kind is familiar and simple, and is summed up in the maxim *sic utere tuo ut alienum non lædas*. There is, so far as I am aware, no specialty affecting the application of this general principle of law to conflicts between a heritable right of salmon fishing and a public right of white fishing, though the contrary is, I think, sometimes assumed to have been decided in the case of *Gilbertson* v. *Mackenzie*, (1878) 5 R. 610, and although that decision is sometimes referred to as if it professed to lay down in advance precise conditions with which persons fishing for white fish by means of stake-nets must comply under pain of being regarded as outlaws. In *Gilbertson's* case the pursuer had come into Court with the extravagant claim that he was entitled to fish for white fish by means of stake-nets without any regard whatsoever to the rights and interests of the owners of salmon fisheries. He was met with the equally extravagant defence that members of the public who used the foreshore in the exercise of their undoubted common law and statutory right of fishing were not entitled to use stake-nets for the purpose of catching white fish. The Court negatived both these contentions. Accordingly, in declaring that the pursuer as one of the public had right to fish for white fish in the Solway by means of stake-nets fixed on the shore, the Court added the words 'in such places and of such a description as not to interfere with the defenders' salmon fishing.' The interlocutor further contained a reservation 'of the right of the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachments on or interferences with his or their respective right of fishing.' From this judgment I extract four propositions, viz. :—(1) The public right of white

the respondent Fisher are identical with those of Douglas except that Fisher dispenses with the paidle. There was some evidence to the effect that the nets which are the subject of the present case were lower than those which we had under our consideration in 1911; but I am not satisfied that any substantial difference in height has been established; nor do I think that, in view of certain of the facts found proved by the Lord Ordinary, the difference, if any, is material to the legal question we have to decide.

The Lord Ordinary has held it proved that the part of the Blackshaw Bank on which the respondents' nets were placed was "a place where the capture of salmon or sea trout is at least probable notwithstanding the fact that a paidle-net is used and not a salmon-net." "Accordingly," he says, "if the respondents' acquittal depends on my holding that it was an unlikely

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fishing resembles all other rights, in that it is absolute and unqualified only in those cases where its exercise does not to any extent interfere with the rights of third parties, *e.g.*, a right of salmon fishing; (2) if there is any interference at all with the rights of third parties, the Court must decide whether it is material or negligible; (3) if the interference is material, the Court must try to reconcile the exercise of both rights so that each may subsist and continue to be enjoyed; and (4) if in any particular case white fishing by means of stake-nets is impossible without material injury to a salmon fishing, it may be that the latter right should prevail as being 'the higher and more potential,' but no decision was pronounced on this point. The recent case of *Pirie & Son, Limited*, v. *Kintore*, 5 F. 818, 8 F. 1058, *aff.* 8 F. (H. L.) 16, is a practical example of the application of the principles which were affirmed in general terms in *Gilbertson's* case. The action arose out of a conflict between a right of salmon fishing and a proprietary right to divert the water of a river for driving a mill. Both the Court of Session and the House of Lords rejected the argument that it was illegal for riparian owners to build a weir across a river, because it would necessarily interfere with the rights of the owners of salmon fishings by detaining salmon in the pool below the weir where they were liable to be caught by poachers. On the other hand, interdict was granted on proof of material obstruction to the passage of the fish up and down the river. Lord Davey said (p. 18), 'The respondents say that their right is to have the river maintained in its natural condition, and that any interference, however slight, with the natural flow of the stream is therefore a wrong which may be restrained by interdict. I think that this puts the right of the fishery owners against the lower riparian proprietors too high, and that their right is only to require that no interference shall be made which materially obstructs the passage of the fish.'

"Applying these principles to the facts of the present case, I find that the complainers have failed, or rather have not attempted, to prove that the respondents' nets have in the past caused any material injury to their salmon fisheries, or that any such injury directly resulting from the use of these nets is imminent and certain in the future. There is no proof that salmon are diverted from the complainers' nets, the nearest of which are four miles distant from the nets of the respondents. There is no proof that the respondents have caught and killed a single salmon or sea trout. The only interference which the complainers have proved is the detention of a few salmon for a short time in the respondents' nets upon their journey up and down the Solway Firth. If the respondents are carrying on a business which is otherwise lawful, it is absurd to suggest that they can be interdicted upon any such ground. The complainers, no doubt, believe, rightly or wrongly, that the respondents will poach and kill salmon when-

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event that salmon would be caught in their nets, and that they in fact entertained any such belief, I should find them guilty"; and in another part of his opinion he says: "I do not think it possible to hold that the respondents captured salmon only occasionally or accidentally." He has, however, also held it proved that Parker had no desire to catch salmon, and did not try to do so; and that as against Douglas, who did not go into the witness-box (perhaps because he was defending his own case), "it is enough to say that it is not proved that salmon and not flounders were the real object of his fishing."

I entirely agree with the Lord Ordinary with regard to the former finding in fact, which is to the effect that the respondents' nets were fitted to capture, and did capture, salmon in considerable numbers. I do not, however, agree with him that the evidence of the respondent

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ever they get the chance of doing so with impunity, but at the same time they shrink from incurring the trouble and expense of proving their case. They wish to have the benefit of the Acts of 1861 and 1862, without having to prove what the Acts require as a condition of the remedy. Accordingly they ask the Court to assume without evidence that the respondents' nets were placed and used for the purpose of catching salmon. The difficulty of proving actual or intended poaching is not a good reason for assuming that men who may be innocent are guilty.

"There are four decisions by the Second Division of the Court of Session in which decree has been pronounced at the instance of the owners of salmon stake-nets for interdict against the use of, or for removal of paidle-nets. In the earliest of these cases, *Mackenzie* v. *Murray*, (1881) 9 R. 186, the *locus* was Powfoot, a village some miles to the east of the Blackshaw Bank. The Court held that the paidle-nets complained of had been used for the purpose of catching salmon and had been 'chiefly profitable as real salmon-nets.' It followed that these nets had been placed and used in contravention of the Acts of 1861 and 1862. It was further proved that they had been placed unduly near to the complainer's nets, and that they diverted salmon from these nets. It followed that they were also illegal at common law. The second case is the decision by Lord Trayner in 1886 to which I have already referred. It is reported under the name of *Buccleuch* v. *Herries*, in a footnote to the report of *Buccleuch* v. *Smith*, 1911 S. C. 409, to which I have also already made reference. The *locus* in both these cases was the Blackshaw Bank. Lord Trayner's first ground of judgment was that the nets complained of were 'placed on the River Nith and estuary thereof and not in the waters of the Solway.' The contrary was assumed to be the fact in the 1911 case. The plan No. 6 of the present process was used in the litigations of 1886 and 1911. The nets referred to in the 1886 case are marked in red and numbered in black ink. The nets referred to in the 1911 case are marked in black and numbered in red ink. They are very numerous in each of the two cases and occupy much the same positions. The line of nets begins at a point which is undoubtedly on the left bank of the River Nith and not in the Solway, and it extends for a long distance southward along the side of the channel in which the Nith runs at low water before joining the Solway Firth. It then turns eastwards across the Blackshaw Bank until it crosses the line dividing the district of the River Nith from that of the River Annan, and so reaches the *locus* of the present dispute. There has been much litigation as to the boundary between the River Nith and the Solway.—See *M'Whir*, 11 S. 552, *rev.* 1 S. & M'L. 393, 15 S. 299, 873. The line fixed in *M'Whir's* case is shown on the plan No. 6, as running parallel to and three-quarters of a mile to the west of the line which divides the

Parker is sufficient to displace the real evidence in the case—that he set them for the purpose of catching salmon as well as white fish. I reach a conclusion adverse to the respondents from the following facts which I hold to be established. In the first place, in the early months of the open season for salmon fishing flounders are out of condition, although even then they are marketable at about 1s. 2d. per stone. They gradually improve as the summer advances, and they are marketable from June onwards at 1s. 6d. per stone. They are best in the autumn months and until the flounder fishing has to be stopped—usually in November—by the rough weather which prevails at that time. In the second place, the value of flounders is so small that the takes made by any fisherman by means of nets placed where the respondents had set theirs are insufficient when marketed to afford them reasonable remuneration for their personal labour and the expense to which they are put in maintaining their nets. In the third place, I think it is conclusively proved that the value of the "red fish"

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fishery districts. The Salmon Fisheries Acts of 1862 and 1868 do not touch this question of fact—see Stewart on Fishings (2nd edn.), p. 354 note. In the litigations of 1886 and 1911 the Court in each case applied the broad axe, and in the earlier case treated the nets as being all in the Nith, and in the later case as being all in the Solway. Lord Trayner's second ground of judgment was that the respondents' nets were erected and used for the capture of salmon, and were not *bona fide* erected or used for the capture of white fish. This amounted to a conviction of an offence against section 11 of the 1861 Act. His third ground of judgment was that the capture of salmon in these nets was prejudicial to the pursuers as salmon fishery owners. It was proved that prior to 1886 the owners of paidle-nets thought themselves entitled to capture and kill and did capture and kill salmon. The case which Lord Trayner had to decide was, therefore, a very clear one; (1) under the old Scots Acts, (2) under the Acts of 1861 and 1862, and (3) at common law. The same is true of the recent case in the Second Division, except that the old Scots Acts did not apply, as the *locus* was assumed to be in the Solway. The fourth case—*Buccleuch* v. *Kean*, 17 R. 829—was decided in the year 1890, and the *locus* was Powfoot. This decision seems to carry the rights of the salmon fishers very far, as it does not appear that there was any evidence of guilty intention or of actual injury to a salmon fishing on the part of the white fisher by killing salmon or otherwise. This last decision and also the dicta of some of the Judges in all the four cases have caused me considerable difficulty. After giving them the best consideration in my power I do not think that they compel me to issue an interdict against persons who are not proved to have fished with the object of catching salmon or to have caused any injury whatsoever to the complainers. For the sake of clearness I have thrown into statutory form the legal proposition which I should have to affirm if I granted interdict in the present case, and the result is a very formidable amendment of the Act of 1861, viz.: 'No stake net capable of catching salmon, though primarily adapted for catching flounders, shall be erected or used for the *bona fide* purpose of catching flounders in any place in the Solway Firth where the capture of salmon (except accidentally or occasionally) is likely to result, or has, in fact, resulted, from the use of such a stake-net; and the erection or use of such a stake-net in any such place shall, without further evidence, be deemed to be injurious to every salmon fishery in the same fishery district.'

"For the foregoing reasons I refuse the note and recall the interim interdict in the case of the respondents Parker and Douglas."

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(a convenient term to denote fish of the salmon kind) taken in the respondents' nets is at least as great as the value of the flounders which they capture during the open season for salmon-fishing. The number of flounders is no doubt vastly in excess of the number of "red fish," but that is of no importance having in view that the respondents fish for a livelihood and not for sport. Fourthly, the combined value of the "red fish" and the flounders taken together is not more than reasonable remuneration to the fishermen for their labour in attending to the nets. Fifthly, the respondents were perfectly well aware that nets similar to those which they were using had been interdicted on the other side of the imaginary line which divides the Nith and Annan districts; and had been so interdicted because they were fitted to capture and did capture large numbers of "red fish." From these facts I think it is a reasonable inference that the respondents set the nets with the intention of catching "red fish" as well as flounders, and that they would not have set their nets in the position selected unless they could have caught both kinds.

At this point I think it necessary to notice a misapprehension which may to some extent have affected the mind of the Lord Ordinary as I deduce it from his statement "that the theories upon which the Court was induced to interdict the white fishers in 1911 are now abandoned as not worth defending." I take it that he is here referring to the use of covers, which I thought in the previous case went far to indicate that the intention of the net fishers was to catch "red fish," as, in my opinion, it was not likely that flounders which had once entered the chamber would endeavour to escape by rising over the sides. It is true that in the present case less importance is attached by the complainers' witnesses to the presence or absence of the cover as they think salmon entering the chamber would be likely to find their way into the paidle. That they do so to a large extent is plain from the findings of the Lord Ordinary to which I have already referred; but I do not read the complainers' evidence as negativing the view that the use of the cover makes the net a more efficient instrument for capturing red fish. That was certainly not the view of the respondents' witnesses, who one and all maintained that the efficiency of the net for catching flounders is much improved by the use of the cover. Some of them go so far as to say that large flounders invariably escape over the sides of the chamber when it is not covered; and indeed one of them estimated that only half the quantity of white fish can be got in a net which has no covering over the chamber. If this be true of flounders whose habit it is to swim near the bottom it must be much more true of the salmon which is a surface fish. Taking the evidence as a whole I see no reason to modify the view I expressed in the case of the *Duke of Buccleuch*.[1] I think it possible that the absence of the cover may make the net a less efficient instrument for the capture of white fish; but that it certainly makes it less efficient for the capture of salmon.

Even if I could hold with the Lord Ordinary that the complainers have failed to establish that the respondents' nets were set with the object *inter alia* of catching salmon, I should not agree in his conclusion. They

[1] 1911 S. C. 409.

are undoubtedly fitted to catch salmon and do catch them in considerable numbers. The view of the respondent Douglas was that even on this assumption the complainers would not be entitled to an interdict unless they were able to establish that the respondents actually kept the salmon which they so captured; and that the complainers must trust the net fishers to release all the salmon which they catch in their nets. If this were so the complainers would be practically without any remedy. The mere possession by the respondents of "red fish" during the open season would not infer any invasion of the complainers' rights; for some of them have licences to fish with the so-called "haaf" nets, and they might have captured the salmon in their possession by this means. On the other hand, the nets are placed on a flat sandy shore where the water bailiffs can be seen at a great distance, and the white fishers would of course release the salmon whenever they anticipated a visit from them. It would be a most unsatisfactory way of regulating the conflicting rights of salmon and white fishers if the owners of the salmon-fishing could not prevent the capture of salmon, but had in each case to prove that salmon had been killed as well as captured. I think also it would be highly undesirable that the white fishers should be exposed to the ever-recurring temptation of appropriating the property of the complainers when they considered that they could do so without risk of detection. The true answer to the Lord Ordinary's view appears to me to be this, that the complainers are entitled to their remedy if they can show that the respondents' nets are so placed and are of such a description as to be fitted to catch salmon, not as a mere incident of the white fishing, but as a substantive and valuable portion of the total catch. He has besides entirely overlooked the loss that may be caused to the owners of the salmon fisheries by the detention of the salmon in the nets and the injury which some of the fish at all events are likely to suffer, even although liberated while still alive. The character of the nets appears to have been the issue in all the previous cases, including the unreported case between the Earl of Mansfield and Mr Neilson, the decision in which was pronounced on 13th February 1811. It was there found that the Earl of Mansfield, who then occupied the position of the present respondents, "when fishing for white fish must adopt such mode as not to encroach upon or anyways injure Mr Neilson's sole and exclusive right of salmon fishings within the bounds and limits now fixed and ascertained to him." In *Gilbertson's* case[1] the declarator of the right to white fishing by means of stake or other nets or engines fixed on the shore was thus qualified:—"In such places and of such a description as not to interfere with the defenders' salmon fishing." It follows that nets which would interfere with the salmon fishing constitute an encroachment on the rights of the salmon proprietors, and might be made the subject of an interdict. The judgment in the case of *Coulthard*[2] proceeds on the same lines. That was an appeal from a deliverance of the Commissioners acting under the Solway Salmon Fisheries Commissioners (Scotland) Act, 1877, which ordered the removal of paidle-nets. An appeal was allowed

[1] 5 R. 610.

[2] 6 R. 1322.

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by way of a special case, which set forth that the Commissioners had come to the conclusion that the nets in question were erected and used for the taking of salmon. On this finding in fact the Court refused to interfere with the order. A description of the nets is given by Lord Gifford, from which it appears that they were substantially the same as those that the respondents use. Lord Gifford said:—"A net might be erected with the intention of catching white fish, with the purest motives, and yet if in point of fact it was used for the catching of salmon the Commissioners would have power to remove it." There is nothing in the report of that case to show that the appellants had actually killed any of the salmon which were captured in their nets; and, indeed, as they disclaimed any right of capturing salmon, I think it must be assumed that there was no evidence to this effect. If the respondents' argument were well founded it seems to me that the description of the net would be of no consequence, provided it was one which was well fitted to catch flounders—as an ordinary salmon net undoubtedly would be. The only difference between such a net and the net used by the respondents is that the latter catches fewer salmon, because it is of less height; but in the cases I have already cited it appears to me that the decisions proceeded throughout on the footing that a net which was fitted to catch salmon and was placed on a shore frequented by salmon was in itself illegal, although it might also be an excellent instrument for catching white fish.

In the later case of *Mackenzie*[1] it was the nets again which were made the subject of the interdict. The finding on which the interdict proceeded was that the stake-nets or paidle-nets complained of were "placed, constructed, or used so as to take salmon and otherwise interfere with the complainers' salmon-fishings." Before the judgment of the Inner House was delivered two reports by an expert had been obtained. From these reports it appears that the nets were of the same height and construction as those with which we are now dealing. The reporter describes them as "salmon stake-nets in miniature," and he stated his opinion that they obstructed and injured the free course of the fish to the complainers' salmon-nets during the open salmon season, and stopped or retarded the run of the fish to the spawning beds during the close salmon season. He recommended that the nets should not exceed 4 feet in height; that there should be no cover on any part of the nets or the runaways attached thereto, and that no paidle or barrel should be attached to them. On considering these reports the Court unanimously adhered to the Lord Ordinary's interlocutor, the respondents having declined to bind themselves to the adoption of the form of net recommended by the reporter. It is impossible to read Lord Young's opinion in that case without coming to the conclusion that practically the same questions which we have here were agitated in that case, and that the same conclusions in fact were reached as I have above expressed. I find no trace of there having been any evidence that salmon were killed as distinct from being captured. The same observations apply to the judgment in the case of the *Duke of Buccleuch* v. *Kean*.[2] The Sheriff-substitute's finding was that the nets

[1] 9 R. 186. [2] 17 R. 829.

"are by their situation and construction calculated to be injurious to the salmon-fishings belonging to the petitioners," and that they were illegal. These findings were substantially repeated on appeal. The Lord Justice-Clerk said that the evidence seemed "conclusively to show that such nets as are now standing on the Solway shore at the place in question are nets calculated to take salmon and that they do take salmon, and that the result of that is necessarily that the rights of the salmon-fishing proprietor are interfered with." The proof was much weaker than in the present case, for the only evidence of capture of salmon was that on one occasion two salmon had been confined in the defenders' nets.

I do not require to refer in detail to the opinion of Lord Trayner in *Buccleuch* v. *Herries*[1] in 1886 except to point out that he reached the same conclusions in fact as those at which I have arrived upon what appears to have been substantially the same evidence. I do not agree with the attempt which the Lord Ordinary makes to distinguish the facts in that case from those which exist here; but it is unnecessary to subject his opinion to any minute analysis. Holding as I do that the purpose of the respondents in setting the nets in question was to capture red fish as well as white fish the cases are practically indistinguishable.

In the last case of *Buccleuch* v. *Smith*[2] the Court also came to the conclusion on the evidence—which was not a bit more cogent than what we have here—that the respondents' object in setting the nets was to catch salmon as well as flounders; but it is obvious from the terms of the interdict pronounced, that the Court thought it sufficient to justify interdict that the stake-nets used were fitted to catch salmon. This conclusion is also borne out by the opinions. Lord Ardwall said: "In view of these decisions and of the findings in *Gilbertson's* case[3] the question really raised for our decision in the present case is, as I have already said, a question of fact whether the defenders' nets are of such construction and so placed as to catch salmon in considerable numbers and so materially to interfere with the pursuers' rights of salmon-fishing. I have read through the evidence with considerable care and have come without difficulty to the conclusion that the nets now in question are so constructed as to capture salmon and fish of the salmon kind; that they are placed in such situations as to capture salmon; that in point of fact they do capture them in the sense of enclosing them in considerable numbers and thus materially interfere with the rights of salmon fishing possessed by the pursuers and the other proprietors within the Nith fishery district." It is noteworthy that in so stating the question for decision no reference whatever is made to the purpose for which the nets were set.

There is thus a long and consistent chain of decisions by which we are bound and which establish that, even if the complainers had failed to prove, as the Lord Ordinary has I think erroneously held, that the respondents' nets were not set for the *bona fide* purpose of catching flounders alone, the complainers are entitled to interdict if it is proved that the nets which they use in the positions in which they place them are fitted to

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[1] Reported in footnote to Duke of Buccleuch v. Smith, 1911 S. C. 409.
[2] 1911 S. C. 409. [3] 5 R. 610.

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catch salmon in considerable numbers. I might have agreed with the Lord Ordinary in his conclusion if I could have accepted the view that the respondents have adopted every known and practicable means in order to avoid catching salmon; and that they put back every salmon which is caught in their nets. The latter statement rests upon the evidence of Parker alone, and is entirely without corroboration even from such notes as he might easily have preserved of the actual returns he has obtained by the use of the nets. With regard to the former statement it is sufficient to say that the respondents have declined to adopt the recommendation of the Fishery Board to use "hecks" at the entrances to the chamber, which hecks would I am satisfied not materially interfere with the catch of flounders and would effectually prevent salmon being captured. It is said that hecks would be obstructed by jelly fish and this may to some extent be true; although it is equally true of the nets themselves. As the nets are attended to twice in twenty-fonr hours the obstructions can be removed by cleaning the hecks; but from the position in which the hecks must be placed I think they are very unlikely to be materially obstructed as they are protected by netting on three sides. The true reason why the respondents object to the use of hecks is, I believe, that the nets so modified would not capture salmon, which is one of the main objects for which they are set and without which the fishing on the Blackshaw Bank could not be prosecuted with success. I would only add that I substantially agree with the four propositions which the Lord Ordinary has extracted from the judgment in the case of *Gilbertson* v. *Mackenzie*.[1] Where I differ from him is in his view that it is necessary that direct injury to the complainers' salmon-fishings should be proved. Injury is I think to be presumed where salmon are captured in considerable numbers when on their way to an estuary where the complainers are the proprietors of salmon fisheries. Their title and interest to sue are conferred by statute and do not require to be the subject of substantive proof.

For these reasons I am of opinion that we must recall the interlocutor reclaimed against; and grant interdict substantially in the terms expressed in our interlocutor in *Buccleuch* v. *Smith*.[2] I am disposed to think however that the interdict should be limited to the period of the open salmon fishings as it was in *Mackenzie's* case.[3] After that no doubt injury may still be done by the capture of salmon; but the possession by the respondents of salmon in the close season would of itself infer a contravention of the Solway statutes which I think ought to afford sufficient protection against material encroachments on the complainers' rights.

Lord Guthrie.—I am of the same opinion. The Lord Ordinary says, and the misapprehension, as I think it, goes deep into the grounds of his judgment:—"The complainers' pleadings are as confused as their prayer, and they mix up in a very perplexing manner three separate and distinct grounds of action, viz.:—(1) The old Scots statutes, and particularly the Act 1563, cap. 68, which have been construed as prohibiting fixed engines

[1] 5 R. 610. [2] 1911 S. C. 409. [3] 9 R. 186.

for the capture of fish within the estuaries of rivers where the tide ebbs and flows but excepting always fixed engines in 'the water of Solway'; (2) the Salmon Fisheries Acts of 1861 and 1862, which prohibit the placing or using of fixed engines 'for catching salmon' in the Solway Firth or its tributary rivers; (3) the rule of the common law which is expressed in the maxim *sic utere tuo ut alienum non lædas.*" I confess I can find no confusion, either of thought or of statement, either in the complainers' pleadings or in the prayer of their note of suspension and interdict, which are substantially in the form used and given effect to, without adverse comment from the bench, in the case of the *Duke of Buccleuch* v. *Smith.*[1] So far from the old Scots statutes, and particularly the Act of 1563, chapter 68, being a separate and distinct ground of action, they are not even referred to either in the pleadings or in the prayer, and, while the Salmon Fisheries Act of 1861 is not mentioned at all, the Salmon Fisheries Act of 1862 is appealed to, not as a ground of action, but in reference to the limits of the River Annan as fixed by the Commissioners under that Act. The action is brought on a simple ground to try a simple issue, namely, whether the complainers' common law rights as heritable salmon-fishing proprietors have been injured by the proceedings of the respondents which are complained of, and it is the respondents, and not the complainers, who have confused the issue, if there has been truly any confusion, by raising questions under the 16th and 19th century statutes—questions which, it seems to me, have all been settled by a train of decisions adversely to the respondents' contentions.

The complainers' title to complain is not now disputed. But it is said that they are entitled to interdict only if they can prove material injury resulting to their individual fisheries from the respondents' operations. It is enough to say that, in the cases dealt with by Lord Salvesen, the opposite of this proposition has either been assumed or expressly laid down. On the other hand, the complainers admit that, within the limits in question, the respondents' stake-nets cannot be attacked as in themselves illegal engines, an admission which is ignored in several parts of the Lord Ordinary's very able opinion. Their nets are attacked, not because they are fixed engines, but because, on account of their situation and construction, they do material and unnecessary injury to the complainers' salmon fishings. I shall consider immediately whether I am justified in my use of the word "unnecessary." There appear to be parts of the River Annan where the salmon are so few that no material injury could be reasonably apprehended from the use of nets so constructed, and it may be that, even in their present situation, the use of such contrivances as a heck, applied to the nets as at present constructed, might bring about the same result.

On record, the respondents plead that they are entitled to be assoilzied, unless the complainers have proved, first, that the nets in question were set on purpose to catch salmon, and, second, that they did in fact catch salmon so as materially to injure the complainers' fishings, which latter plea implies, in their view, that the complainers must prove that any fish caught in the nets were killed by the respondents. The respondent

[1] 1911 S. C. 409.

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Douglas adhered to both these pleas; but I understood that counsel for Parker in the end admitted that, in view of the decided cases, he could not dispute that the complainers would be entitled to prevail if they have proved material and unnecessary injury through the respondents' operations, even although they failed also to prove, directly or by reasonable inference, a deliberate purpose to take salmon. The main question in the case, therefore, becomes one of fact. But the parties are not agreed as to how the question should be stated. The complainers would state it thus:—Have we proved that the respondents' operations, in catching salmon at the place and with the nets now used, are calculated materially to injure the complainers' rights of salmon fishing? The respondents, on the other hand, say the true question is:—Have the complainers proved that material injury has actually occurred through the catching and killing of salmon by the respondents? I am of opinion that the true question is the one stated by the complainers, and that they have proved that the respondents' operations are calculated to produce the result alleged. Even, however, if proof of actual injury were required, I think the proof sufficiently establishes such injury in view of the fact found by the Lord Ordinary on the clearest evidence that the taking of salmon was not occasional or accidental, and in view of the further fact that there was nothing exceptional about the recurrent occasions on which salmon were found in the respondents' nets. On the question of whether the fish caught at other times were released or killed, I do not think it was for the complainers to prove that they were killed, but for the respondents to prove that they were released; and I cannot hold this onus discharged by the mere statement of the respondents themselves. I may add that, for the reasons stated by Lord Salvesen, I am prepared to hold that, if it were necessary to prove deliberate purpose to catch salmon by the use of the nets of the construction and at the situations in question, the complainers have sufficiently established such purpose by reasonable inference from the facts tabulated by Lord Salvesen.

It is not necessary to decide the question to which I have referred above, namely, whether it would be a good answer that the respondents, being entitled by statute to use fixed engines for the capture of white fish in the river at the places in question, were able to show, first, that they had taken "every known and practicable means," to use the Lord Ordinary's expression, to exclude salmon from their nets, consistent with the reasonable efficiency of these nets for catching white fish; and, second, that they regularly returned any salmon which their nets might catch. That view may be sound, or it may be that, in such a conflict of rights, the heritable right of salmon fishing would be held the paramount right as against the public right of white fishing. In any view, the onus in both cases would be on the respondents, and I do not think they have established either proposition.

On the whole matter, I am unable to see how, in any view of the facts and the law, interdict can be refused as against Douglas, whose case is covered in terms by the case of the *Duke of Buccleuch* v. *Smith*.[1] The

[1] 1911 S. C. 409.

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only ground on which the Lord Ordinary refuses interdict against Douglas is because it has not been proved by the complainers that the catching of salmon, and not of flounders, was the real object of his fishing. I cannot agree with the Lord Ordinary where he says that the *Duke of Buccleuch's* case[1] is entirely different in its facts from the present case. It seems to me identical in all essential features, and even identical in all important features, with one exception, that the respondent Parker has dispensed with the use of a cover, a contrivance which was held important, but which, as I read the opinions in that case, was not, as the Lord Ordinary seems to think, the ground on which the Court was induced to interdict the white fishers in 1911. As to the other respondents, I agree that the interlocutor proposed by Lord Salvesen is the right one.

Lord Justice-Clerk.—I am of the same opinion. Looking into this case I have come to the conclusion that I could not add anything to what I said in the former case, which I think in all practical directions leads to the same result.

The Court pronounced the following interlocutor:—"Recall the interlocutor reclaimed against . . . Interdict and prohibit the respondents James Parker and Joseph Douglas and each of them from erecting and using, excepting during the close time for salmon fishing, stake-nets, paidle-nets, or other fixed engines for the purpose of capturing salmon or fish of the salmon kind or fitted to capture salmon, or fish of the salmon kind, in the River Annan or estuary thereof, and upon the sands and shores between high and low water-marks within the limits of the district of the River Annan fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act, 1862. . . ."

Dundas & Wilson, C.S.—W. C. Morris, Solicitor—Agents.

No. 119.

Jan. 27, 1914.

MacPhail v. Heritors of Kilbrandon and Kilchattan.

The Rev. William MacPhail, Appellant.—*Johnston, K.C.*—*W. Wilson.*

The Heritors of the United Parish of Kilbrandon and Kilchattan, Respondents.—*Wilson, K.C.*—*J. Macdonald.*

Church—Manse—Glebe—Access—Heritors' obligation to maintain access to manse and glebe.

Held (by the Lord Ordinary on Teinds, Ormidale) that the heritors were bound to put a private road, which formed the access to a manse and also to the glebe, into, and to maintain it in, a condition sufficient for the minister's use, including the use of a horse and trap, the width in the circumstances being fixed at 10 feet.

Observations as to whether the obligation of repair and maintenance would exist with regard to a road forming an access to the glebe only.

Teind Court. Ld. Ormidale.

The following narrative of the circumstances of this case is taken from the opinion of the Lord Ordinary on Teinds (Ormidale):—

"On 5th January 1912 the Rev. William MacPhail, minister of

[1] 1911 S. C. 409.

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the united parishes of Kilbrandon and Kilchattan, in the county of Argyll, presented a petition to the Presbytery of Lorn, within whose jurisdiction the parishes are situated, praying it, *inter alia*, to find that the church of the said parishes needed to be repaired, and that the manse and offices must be rebuilt and enlarged; that the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse must be repaired and appointed to be not less than 15 feet broad, and that the glebe must be sufficiently enclosed and the garden wall repaired. Objection was taken by the heritors before the Presbytery to the competency of the petition in respect that the findings dealing with the access to the glebe and manse and with the glebe fences were outwith the jurisdiction of the Presbytery. On 24th January 1912 the Presbytery resolved to visit and inspect the whole subjects.

"The proceedings were then taken, by way of appeal,* at the instance of the heritors, to the Sheriff of Argyll. In the appeal the heritors repeated their objection to the jurisdiction of the Presbytery to deal with the matter of the access to the glebe and manse and of the glebe fences, and also objected on the merits to the extent of the operations alleged by the minister to be necessary to put the church and manse into a sufficient state of repair. Objections stated in seven pleas in law to the competency of this appeal were taken by the minister. The pleas were repelled by the Sheriff-substitute (Wallace) on 29th March 1912.

"Thereafter, the minister having been allowed to amend his record by adding thereto additional pleas in law, the Sheriff-substitute on 23rd May 1912, pronounced the following interlocutor:—'Oban, 23rd May 1912.—The Sheriff-substitute, having further heard parties' agents on the additional pleas in law stated for defender, sustains the fourth plea in law stated for pursuers, and repels the third additional plea in law stated for defender so far as it affirms the liability of the pursuers to repair the access to the glebe and manse and the glebe fences; remits to Mr George Woulfe Brenan, architect and civil engineer in Oban, to report *quam primum* on the various matters referred to in the defender's petition to the Presbytery, with the exception of the repair of the glebe fences and of the entrance to the glebe and manse, and meantime continues the cause.'

"The fourth plea in law for the pursuers (the heritors) is as follows:—'4. *Separatim*, the defender's petition in so far as it relates to repairing the access to the glebe and manse and to the repair of the glebe fence, is incompetent, and should be dismissed.'

"The third additional plea in law for the defender is as follows:—'3. *Separatim*, the repair of the glebe fences, and the maintenance in good repair and space sufficient for the minister's use of the entrance to the glebe from the public road and the part of the road within the glebe leading to the manse being included in the legal liability of the pursuers and other heritor or heritors of the parish, the defender is entitled to pronouncement of the finding thereanent craved by him in his petition to the Presbytery.'

"The present appeal to the Lord Ordinary on Teind Causes is at the instance of the defender, the minister. At the hearing the

* The writ of appeal was in the ordinary form of a Sheriff Court action, the heritors being the pursuers and the minister the defender.

minister did not insist in his contention that the heritors were bound to repair the glebe fences. He limited his argument to the question of their liability to repair the entrance to the glebe and manse.

"It appeared to me desirable that the exact condition of the access or entrance should be ascertained before dealing with this question, and accordingly on 18th July 1913 I made a remit to Mr Peddie to inquire into and to report upon the condition of the road. From this report it appears that the road to the manse leaves the main or public road nearly opposite to and on the other side of the road from the parish church, being shut off from the public road by an iron gate, that the road is at present fitted only for the roughest of wheeled traffic and that it is dangerous in places for foot-passengers at night, owing to the absence of fencing, and that in wet weather the low-lying parts of it, which form a considerable section of the road, are nearly impassable. The total length of the road is 840 yards, the distance between the main road and the glebe being about 512 yards. The cost of making the existing road into a good serviceable road 10 feet wide would be, on the section of the road from the public road to the glebe, £105, and on the section from the glebe to the manse, £70, in all £175. The average money value of the minister's stipend, it may be noted, is about £140.

"That the access road has really ceased to be a road in the ordinary sense of the term, and has come to be nothing more than a rough and ill-defined and somewhat dangerous cross-country track, and is in urgent need of repair, is, to my mind, clear. To make it a decent serviceable road it requires to be repaired, and the question which I have to decide is whether the cost of so repairing it falls to be borne by the heritors."

The case was heard on 29th November 1913, when the following authorities, in addition to those referred to by the Lord Ordinary, were cited:—*Maxwell* v. *Presbytery of Langholm*,[1] and *Eliot* v. *Hunter*.[2]

On 27th January 1914 the Lord Ordinary (Ormidale) pronounced the following interlocutor:—" . . . In respect that the appellant has not insisted in his appeal so far as regards the finding of the Sheriff-substitute to the effect that the respondents are not liable for the repair of the glebe fences, and that it is therefore unnecessary to dispose of that question in this appeal, recalls the interlocutor of the Sheriff-substitute of date 23rd May 1912 except in so far as it negatives the liability of the respondents to repair the glebe fences: *Quoad ultra* sustains the third additional plea in law for the appellant to the effect that the respondents are bound to repair the access road to the manse and glebe and provide a suitable road of not less than 10 feet in width . . ."

OPINION.—[After the narrative quoted *supra*]—The question is an entirely novel as well as an extremely difficult one. There is no case in which the matter appears to have been referred to even indirectly, and the writers on ecclesiastical parochial law do not offer any opinion.

When the case was before the Sheriff-substitute the minister still asserted his right to call upon the heritors to repair the fences of the glebe, and the Sheriff-substitute has dealt almost exclusively with this

[1] (1867) 40 Scot. Jur. 13, 5 S. L. R. 16. [2] (1867) 5 Macph. 1028.

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topic in his most admirable note. If I were able to agree with him in what he says in the concluding paragraph of his note, "that the same observations apply to the questions of the repair of the entrance to the glebe and manse," I should have derived much assistance from these observations in coming to a conclusion on the subject.

It seems to me, however, that the entrance to the manse is in a quite different position from the fences of the glebe. Once a glebe has been designed it is difficult, as Professor Rankine puts it, to conceive of any further burden resting on the heritors by way of maintenance. If it should become unprofitable by inundation, sanding, or any other extraordinary accident, then there is an express duty imposed by statute upon the heritors to provide a new one. But short of annihilation the glebe is at the disposal of the minister for the time, to make what profit he may from it.

In the case of a manse, the heritors have not only to provide a competent manse, there is a continuing obligation on them to keep it sufficient in point of repair and accommodation. If, then, the requirements of a competent manse include at the outset a reasonable access to it from a public road, it seems to me that there is not the same difficulty, as in the case of glebe fences, in inferring that there is a continuing obligation upon the heritors to keep that access in sufficient repair. In the present case, as it happens, it is not necessary to treat, as raising separate questions, the entrance to the glebe and the entrance to the manse, for the road or access to the manse from the public road passes through the glebe *en route* to the manse and so forms an access to it. But it may be noted that there is authority for the proposition that the heritors are bound to provide an access to the glebe. In *Potter* v. *Ure*, (1710) M. 5129, the Laird of Shargarton advocated the designation of a glebe out of his lands upon grounds of iniquity, as the marginal note to the report shortly puts it. The second of these grounds was that the presbytery had appointed the entry to his glebe to be 20 feet broad, whereas the 38th Act 1661 prescribed that breadth only to highways leading to and from market towns and seaports. It was answered to this that the law required that ministers have free ish and entry to their glebes, to give an easy passage to his carts and wains that one may pass by another. That, no doubt, has reference to a provision contained in the Act 1593, cap. 165, but as Sheriff Johnston says (Parochial Ecclesiastical Law of Scotland, p. 429), in commenting on the case, the obligation may be derived apart from statute law from principles of common law. The important point to note is that Shargarton did not disclaim liability to make an access to the glebe. Unfortunately the only point before the Lords was whether they should remit the trial or advocate it to themselves, and no further light can be derived from the report on the question of access.

Now it seems to me that the claim for an access to a manse is *a fortiori* of that for an access to a glebe. There is certainly no statutory enactment imposing the burden. No reference is made to "ish or entry" in any of the Acts concerned with the heritors' duty of providing a manse. But then I think that the obligation to provide one may be derived from principles of common law. "Nothing is better settled than that the conveyance of a piece of property implies a right of access to it. No one can possess a piece of ground without having a right of ish and entry and the way that is to be obtained if the conveyance is silent, is just the existing way"—*Walton Brothers* v. *Magistrates of Glasgow*, (1876) 3 R. 1130, at p. 1133. As it is put by Professor Rankine (Land Ownership, 4th ed. p. 431),—"If the tenement bequeathed, conveyed, or reserved does not abut on a public access, but is landlocked on all sides either by the rest of the estate hitherto held along with it or by that and the estates of third parties, there is implied a right to a way of necessity through the disjoined property." Now, while admitting that the position of a minister in relation

to his house is not that of a feudal proprietor, still his right to a manse as part of the temporality of the benefice is in its nature indefeasible and he can compel the heritors to provide him with one. If that be so, then it seems to me that the law I have referred to imposes on the heritors, when they design the half acre which is to form the site of the manse, offices, and garden of the minister, and that half acre does not abut on a public access, a duty to furnish a way to the minister of getting to the public access.

It is not, however, necessary to examine this topic at length, for counsel for the heritors admitted that there was an initial obligation on the heritors to furnish the minister with an access, and they say that it must be assumed that they duly implemented this obligation. I am prepared to make this assumption, although what precisely was the kind of access that was supplied cannot now be determined. What the heritors say is that they are under no further obligation to the incumbent with reference to the access so provided by them.

In my opinion they are. It appears to me that the manse of a minister ceases to be a sufficient manse if it ceases to be accessible. The incumbent is no longer able to occupy it. He cannot serve the cure from it. Obviously the proper performance of his duties necessitates his having at all times ish and entry from the dwelling-house with which the heritors, in fulfilment of a duty laid upon them by the law, have furnished him. It is not merely that his personal enjoyment of his residence is affected. His ministerial duties are directly and seriously interfered with. In the present case the access in question is the only way by which the minister can get to the church. In such circumstances it seems to me that it would be most unreasonable and highly inexpedient to lay the burden of maintaining the access upon the incumbent for the time. I doubt very much whether he would have any right or title to interfere with the access to his manse, where it passes through ground that is outside the glebe, and yet he might be, as apparently he is in the present case to all intents and purposes, the sole user of it so that no one else might have any interest in its proper maintenance. It is certainly not a public road falling to be upkept at the public expense. The absence of a statutory enactment relative to the providing or maintaining of an access is not perhaps remarkable, for if, following the directions thereanent, the heritors select as the stance for the manse a site as close to the church as is possible, it may be assumed that such a site will in nearly every instance abut upon a public road and the public road will be the access to the manse. In such a case the burden of maintaining the road will fall neither on the heritors *qua* such nor on the minister. Moreover, many obligations are laid upon heritors which are not the creatures of statute, *e.g.*, a garden wall is not provided for by any statute, and yet the law has held that a minister may require the heritors to furnish one on the ground that without one he cannot have the beneficial use of the garden to which he is entitled; and I take it, as at present advised, that if a wall becomes ruinous through no fault of the minister, the heritors are bound to rebuild it. In the same way an access being indispensable for the beneficial use and enjoyment of his manse *qua* incumbent, it seems to me that the heritors are bound to provide and to maintain one. On the other hand, something more than a mere footpath is necessary. A minister is entitled to have, among the offices attached to his manse, a stable, which assumes the possible use of a horse and trap. What precisely the nature or quality of the access ought to be must be a question of circumstances. Here the minister claims to have a 15 feet wide road. In the circumstances I am not disposed to sustain that claim. The access to his manse has never, so far as I can judge, been so wide as 15 feet. On the report of Mr Peddie, a 10 feet wide road will form a reasonably sufficient access once it is put into a thorough state of repair.

Jan. 27, 1914.

MacPhail v. Heritors of Kilbrandon and Kilchattan.

As regards the competency of the appeal to the Sheriff from the Presbytery, I think that the Sheriff-substitute was right in the conclusion at which he arrived.

I am prepared to recall the interlocutor of the Sheriff-substitute so far as it negatives the liability of the heritors to repair the access to the manse and glebe. That disposes of the only questions debated before me, and it seems desirable, before pronouncing any other order, to hear parties as to further procedure.

RONALD & RITCHIE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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1. The whole beneficiaries under a will, being the six surviving children of the testatrix, presented a petition for declarator that the will was duly subscribed. The petition was opposed by the pupil son of a predeceasing daughter of the testatrix, who would have shared in his grandmother's estate under the provisions of a former will but was deprived of all interest by the will in question. A Court of seven Judges having decided, by a majority of four to three, that the will was duly subscribed, the pupil's father, as his tutor, applied to the Court for an order on the testatrix's trustees to supply the pupil with funds out of the estate wherewith to prosecute an appeal to the House of Lords. The Court *refused* the application. Walker v. Whitwell, p. 560.

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The landlord of a farm and the outgoing tenant entered into a submission by which, in terms of the lease, they referred certain questions of valuation to two arbiters mutually chosen, and their oversman, under the declaration that whatever the arbiters or their oversman should "determine . . . by decree or decrees-arbitral, interim or final," should be binding on the parties. In an action by the landlords for the reduction of two awards issued by the oversman *held* (1) that a formal devolution of the reference upon the oversman was not necessary; (2) that where there was a difference of opinion between the arbiters—even though that difference was only on a point, though on a crucial point, of procedure—the oversman was entitled to act at the request of one of the arbiters, notwithstanding the express dissent of the other; (3) that it was competent for the arbiters from time to time to devolve upon the oversman questions on which they disagreed while keeping in their own hands the decision of questions which they had not yet considered; (4) that it would not render an award of the oversman invalid that it included decisions which had already been arrived at by the arbiters. *Opinions* that in a valuation under a lease the same strictness of procedure is not customary or required as would be necessary under a formal reference. Gibson v. Fotheringham, p. 987.

ARRESTMENT. *Ship—Maritime lien—Form of process for making maritime lien effective.*

1. It is competent to initiate proceedings for the purpose of making a maritime lien effective by presenting a petition to the Lord Ordinary on the Bills for a warrant to arrest the vessel. *Form* of order pronounced by the Lord Ordinary. M'Connachie, p. 853.

Arrestment jurisdictionis fundandæ causa—Subjects arrestable—Accountability—Sum in hands of bank—Bank not liable to account directly to common debtor.

2. A London firm sold to a Glasgow firm a quantity of iron, which was to be shipped to Scottish ports and to be paid for "nett cash against shipping documents." When the iron had reached the ports of destination the sellers handed the shipping documents to their bank in London with instructions to obtain payment of the price from the purchasers, and the bank sent on the documents to their correspondents, a bank in Glasgow, with instructions to carry through the transaction. The Glasgow bank accordingly, in exchange for the documents, obtained payment from the purchasers of the price, and entered it in their books to the credit of the London bank. An hour afterwards the purchasers arrested this money in the hands of the Glasgow bank to found jurisdiction against the sellers in an action of damages. *Held* that, as the Glasgow bank were under no duty to account for this money to the sellers, but only to the London bank who had employed them, the arrestments were inept to found jurisdiction. J. & C. Murray v. Wallace, Marrs, & Co., p. 114.

ASSESSMENT. See *Rates and Assessments.*

ASSIGNATION. *Assignation by executors before confirmation—Title of assignee to sue.*

The trustees and executors of a deceased, acting under his trust-disposition and settlement which contained a general disposition in their favour, granted an assignation of certain copyrights forming part of his estate, before they had obtained confirmation. The assignee having brought an action in respect of infringement of the copyrights, *held* that he had a good title to sue, although confirmation would have to be expede by the trustees before he could extract a decree for payment. Mackay v. Mackay, p. 200.

BANK. *Verbal representations by bank-agent as to customer's credit—Mercantile Law Amendment Act*, 1856, *sec.* 6.

1. *Opinion reserved, per* the Lord President, as to whether section 6 of the Mercantile Law Amendment Act, 1856—which provides that representations as to a person's credit made for the purpose of enabling that person to obtain credit or money shall be of no effect unless in writing—applied to representations made by a bank-agent to an intending guarantor of the account of one of the bank's customers. Royal Bank of Scotland v. Greenshields, p. 259.

Bank's duty to cautioner—Disclosure of principal's indebtedness.

2. *Circumstances* in which *held* that a bank-agent was under no duty to disclose to a prospective cautioner the fact that the principal debtor was indebted to the bank under certain accommodation bills. *Observations, per* the Lord President and Lord Mackenzie, on the circumstances in which a bank-agent might have a duty to make such a disclosure. Royal Bank of Scotland v. Greenshields, p. 259.

Deposit-receipt—Payment to wrong person induced by fraud—Liability to make repayment to depositor—Special endorsement.

3. A, who had placed £100 on deposit-receipt with a Scottish bank, wrote from abroad to the bank requesting them to pay £60 out of the £100 to his brother (who was unknown to the bank) on presentation of the endorsed receipt. At the same time A wrote to his brother, enclosing the endorsed receipt, and also enclosing a letter addressed to the bank in similar terms to the letter sent direct to them. The letter sent to the bank was duly delivered, but the letter to the brother was stolen in the course of post. Thereafter a person, pretending to be the brother, presented the endorsed receipt and letter to the bank, and after having been required to endorse the receipt himself, which he did in the brother's name, received payment of the money. A having brought an action against the bank for payment of the amount to himself, the defenders pleaded that, having paid the sum to the person having A's authority to receive it, they were not liable. *Held* that the bank, being authorised to pay the money only to A's brother, and having in fact paid it to someone else, must bear the loss; and decree *granted*. Wood v. Clydesdale Bank, Limited, p. 397.

BANKRUPTCY. *Effect—Illegal preference at common law—Voluntary assignation in security granted by insolvent—Reduction—Necessity of averring granter's knowledge of his insolvency.*

1. The trustee in a sequestration brought an action of reduction, on the ground of fraud at common law, of an assignation in security voluntarily granted by the bankrupt in favour of two persons who were joint agents for a bank to which he was indebted, and one of whom was also his law-agent. The pursuer averred that at the date of the assignation the bankrupt was insolvent; that the defenders, the two assignees, were aware of this, but concealed the fact from him; that the assignation was obtained by the defenders in order to secure the debt to the bank; and that its effect was, with another contemporaneous assignation to the bank, to strip the bankrupt of his whole assets. *Held* that, as it was not averred that the bankrupt was at the date of the assignation aware of his insolvency, the pursuer's averments were irrelevant; and action *dismissed*. MacDougall's Trustee v. Ironside, p. 186.

Effect—Company—Winding-up—Creditor's right to a security—Obligation to assign debenture in security for debt—Assignation not completed at date of liquidation—Trust—Constitution.

2. *A company entered into an arrangement with a bank to which they were indebted, whereby it was agreed that, on the bank surrendering certain moveables belonging to the company which the bank held in*

BANKRUPTCY—*Continued.*

security, the company should obtain from J, who was indebted to them, a debenture over his assets, and should assign the debenture to the bank in lieu of the surrendered security. The moveables were surrendered and the debenture was obtained from J; but before it had been assigned to the bank the company went into liquidation. The bank having claimed the debenture on the ground that the company held it merely for behoof of the bank as trustees or agents, held *that the company did not hold the debenture for the bank, but had, at most, come under a contractual obligation to assign it; that accordingly the company were the parties beneficially interested in it at the date of the liquidation, and claim for the bank* rejected. Dictum *of Lord Westbury in* Fleeming v. Howden, (1868) 6 *Macph.* (*H. L.*) 113, *at p.* 121, *L. R.*, 1 *H. L. Sc.* 372, *at p.* 383, *that "an obligation to do an act with respect to property creates a trust"* discussed. Bank of Scotland v. Liquidators of Hutchison, Main, & Co., Limited, (H. L.) p. 1.

Sequestration—Discharge of bankrupt—Nobile Officium—Trustee elected but not confirmed—Petition to nobile officium by bankrupt for discharge and reinvestment—Competency.

3. At a statutory meeting for the election of a trustee in a sequestration the creditors elected a trustee and fixed the amount for which he should find security, but did not decide on the sufficiency of the caution offered, and consequently the Sheriff refused to confirm the election. No further steps having been taken in the sequestration for seven years, the bankrupt (who had paid no dividend) presented a petition to the *nobile officium* of the Court, praying for his discharge, for reinvestment in his estates, and to have the sequestration declared at an end. The petition was opposed by one of the creditors. The Court *held* the application competent, and in the circumstances *granted* the prayer for discharge, but *quoad ultra dismissed* the petition. Aitken v. Robson, p. 224.

Trustee—Agreement to share fees.

4. *A firm of land-agents agreed with their manager that all fees which he earned from any appointment which he might obtain as trustee or factor on any estate should be pooled with all fees which they derived as salesmen or valuators in connection with that estate, and that the fees so pooled, after payment to the firm of the balance of any debt due to them by such estate, should be divided equally between the parties. In an action by the firm against their manager to recover, under this agreement, a proportion of fees alleged to have been earned by him as trustee an various insolvent estates,* held (aff. *judgment of Second Division reported Court of Session, p.* 129) *that the agreement was illegal and therefore unenforceable in respect that it involved a violation of the fundamental principle of bankruptcy law providing for the equal distribution of assets among creditors; and action* dismissed. Farmers' Mart, Limited, v. Milne, (H. L.) p. 84.

BETTING. See *Justiciary Cases*, 6-8.

BUILDING RESTRICTIONS. See *Property*, 2.

BYE-LAW. See *Justiciary Cases*, 15-18.

CANAL. See *Compulsory Powers*, 1.

CAUTIONER. *Bank's duty to cautioner—Disclosure of principal's indebtedness.*

1. H., whose bank account was overdrawn to the extent of about £300 and who was also indebted to the bank to the amount of about £1100 in respect of certain accommodation bills, requested G., an acquaintance

CAUTIONER—*Continued.*

who had no knowledge of his financial position and in particular of his indebtedness to the bank, to guarantee his account to the extent of £300. The latter expressed to the bank-agent his willingness to undertake a guarantee to that amount, and was informed by the agent that a guarantee of £300 might not assist the principal debtor, as that sum would be taken up by the bank. The agent, however, did not make any disclosure of the principal's further indebtedness of £1100 under the bills, and G., believing an overdraft of £300 to be the sole debt, granted a guarantee for £500. *Circumstances* in which *held*, in an action against G. for payment under the guarantee, that the bank-agent was under no obligation to disclose to him the principal's indebtedness under the bills. *Observations, per* the Lord President and Lord Mackenzie, on the circumstances in which a bank-agent might have a duty to make such a disclosure. Royal Bank of Scotland v. Greenshields, p. 259.

Verbal representations by bank-agent as to customer's credit—Mercantile Law Amendment Act, 1856, *sec.* 6.

2. *Opinion reserved, per* the Lord President, as to whether section 6 of the Mercantile Law Amendment Act, 1856—which provides that representations as to a person's credit made for the purpose of enabling that person to obtain credit or money shall be of no effect unless in writing—applied to representations made by a bank-agent to an intending guarantor of the account of one of the banker's customers. Royal Bank of Scotland v. Greenshields, p. 259.

See *Process*, 4—*Right in Security*, 3.

CHARITABLE BEQUESTS AND TRUSTS. *Administration—Settlement of scheme—Application by ex officio directors for authority to denude and transfer.*

1. *Circumstances* in which *ex officio* directors of a charitable society for the benefit of domestic servants in Aberdeen were *authorised* to denude of the trust, and to transfer the funds and management thereof to the Aberdeen Association for Improving the Condition of the Poor. Aberdeen Servants' Benevolent Fund, p. 8.

Failure of object—Dissenting Church—Dispersal of congregation—Cy près—Crown—Bona vacantia.

2. A church and a manse were held by trustees "for the congregation of United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown." Adherence to the principles contained in a document known as the "Testimony" was declared in the trust-deed to be a condition of the right of any individual to remain a member of the congregation. The congregation had seceded on a question of doctrine from the Synod of the United Original Secession Church. In 1878 the congregation (which had become reduced to fourteen individuals) ceased to worship together and the trustees let the property and accumulated the rents. In 1912 the last of the trustees died, and his testamentary trustees brought an action of multiplepoinding for the disposal of the property and the accumulations of rent. *Held* that, failing the establishment of a right to the property by any congregation of the Original Seceders, the trust, being a trust for public purposes, fell to be administered *cy près*, and claim for the Crown as *ultimus hæres* entitled to *bona vacantia repelled*. *Observations* (1) on the application of *cy près* administration to trusts for public purposes, whether these purposes could be described as "charitable" in the narrow sense of the word or not; (2) on the distinction in regard to *cy près* administration between trusts which have taken effect but have lapsed through failure of the beneficiary, and trusts which have never taken effect

CHARITABLE BEQUESTS AND TRUSTS—*Continued.*
through non-existence of the beneficiary. Anderson's Trustees v. Scott, p. 942.

CHILDREN. See *Justiciary Cases*, 20—*Reparation*, 12.

CHURCH. *Manse—Glebe—Access—Heritors' obligation to maintain access to manse and glebe.*
Held (by the Lord Ordinary on Teinds, Ormidale) that the heritors were bound to put a private road, which formed the access to a manse and also to the glebe, into, and maintain it in, a condition sufficient for the minister's use, including the use of a horse and trap. *Observations* as to whether the obligation of repair and maintenance would exist with regard to a road forming an access to the glebe only. MacPhail v. Heritors of Kilbrandon and Kilchattan, p. 1015.
See *Insurance*, 3.

COMPANY. *Director—Personal liability—Breach of trust—Sums paid to company for specified purpose applied to another purpose.*
1. A limited company, which consisted of two shareholders only who were also its sole directors, received from their foreign correspondents a sum of £1000 for the purpose, expressed in a covering-letter, of meeting three named bills drawn by them upon the company, which were shortly to become due. The company did not meet the bills on maturity, but the £1000 was applied, to the extent of £600, in repaying to one of the directors outlays averred to have been incurred by him on behalf of the company. *Held* that the directors' actings constituted not merely breach of contract but breach of trust, and that they were personally liable jointly and severally to repay the £600. Brenes & Co. v. Downie, p. 97.
Alteration of memorandum—Power to sell or amalgamate—Power to acquire similar businesses—Companies (Consolidation) Act, 1908, *sec.* 9 (1).
2. A limited company presented a petition for confirmation of a special resolution, by which it was proposed to alter its memorandum of association by adding powers to acquire similar businesses; to sell the undertaking of the company; or to amalgamate with any other firm, person, or company. The Court, while confirming the power to acquire similar businesses, *refused* to confirm the other alterations, on the ground that they were not within the alterations which a company was authorised to make by sec. 9 (1) of the Companies (Consolidation) Act, 1908. John Walker & Sons, Limited, p. 280.
Winding-up—Appointment of liquidators—Nominee of creditors—Neutral liquidator.
3. A motor manufacturing company, having resolved to go into voluntary liquidation, and having appointed its chairman, who was also its managing director, to be liquidator, petitioned the Court for an order, *inter alia*, that the liquidation should be continued under the supervision of the Court, and that the liquidator should be allowed to carry on the business of the company for a certain period. At a meeting of creditors of the company subsequently held it was decided by a majority that application should be made to the Court for the appointment of the auditor of the company to act jointly with the liquidator already appointed, and the petitioners made an application to this effect. The appointment of the auditor as joint liquidator was opposed by certain of the creditors on the ground, *inter alia*, that as both liquidators proposed were connected with the company there would be no independent officer to investigate its affairs in the interests of the creditors. The Court *granted* the prayer of the petition in so far as it craved that the liquidation should proceed under the supervision of the Court, and *appointed* the auditor to be liquidator, but con-

COMPANY—*Continued.*

joined with him a chartered accountant who had no connection with the company, and *superseded* the appointment of the managing director. Argylls, Limited, v. Ritchie & Whiteman, p. 915.

Winding-up—Action against company without leave of Court—Competency—Waiver of objection by company—Duty of Court—Companies (Consolidation) Act, 1908, *sec.* 142.

4. A pursuer, without having obtained the leave of the Court, as required by the Companies (Consolidation) Act, 1908, sec. 142, brought an action against a company in liquidation, and also against the liquidator and certain secured creditors. Decree in absence was granted against the company and the liquidator. The secured creditors, who were the only compearing defenders, did not plead on record any objection to the competency of the action. *Held* that as the company and the liquidator had waived any objection to the competency, it was not *pars judicis* for the Court to enforce the provisions of the section, and decree *granted*. Hill v. Black, p. 913.

Winding-up under supervision—Failure to present reclaiming note within fourteen days of order reclaimed against—Companies (Consolidation) Act, 1908, *sec.* 181 (3).

5. *Held* that a reclaiming note against an order pronounced by a Lord Ordinary, to whom a winding-up had been remitted, was, under section 181 (3) of the Companies (Consolidation) Act, 1908, incompetent, in respect that it had not been presented until after the expiry of fourteen days, although the reclaimer argued that the respondent had not been prejudiced by the delay. *Observed* (*per* the Lord President) that the reclaimer might find a remedy in the Court of Session Act, 1808, section 16. Macarthur v. Mackay, p. 547.

See *Bankruptcy*, 2—*Insurance*, 1, 2—*Succession*, 3.

COMPENSATION. *Contract of sale—Time of delivery not specified—Unreasonable delay in delivery—Competency of counter claim of damages for delay in defence to action for price.*

In an action for the price of goods sold and delivered under a contract which specified no time for delivery, *held* that it was competent for the defender to plead *ope exceptionis* a claim of damages for failure to deliver within a reasonable time. British Motor Body Co., Limited, v. Thomas Shaw (Dundee), Limited, p. 922.

COMPULSORY POWERS. *Canal—Right of support—Mines and Minerals—Oil shale—Mineral owner empowered to work minerals provided no danger to canal—Canal company empowered to stop dangerous working on payment of compensation—Constitution of notice to "stop working."*

1. *Section* 112 *of a private Act of* 1817, *under which a company acquired lands for the construction of a canal, reserved to the vendors the mines and minerals lying within or under such lands, and permitted them to work the minerals subject to an obligation not to injure the canal. Section* 113 *empowered the company, in case they should find it necessary for the safety of the canal, "to stop the working" of the minerals on making satisfaction for their value to the owners. The company having informed the representative of the vendor of certain lands through which the canal had been constructed that they would hold him responsible for any damage caused by his working a seam of oil shale, subjacent and adjacent to the canal within the lands in question, the representative of the vendor brought an action against the company in which he claimed the value of this shale on the grounds that it was a "mineral" reserved to him under section* 112, *and that the company's intimation was an intimation "to stop the working" within the meaning of section* 113. Held *that the defenders fell to be assoilzied in respect that sections* 112 *and* 113 *were independent sections, and that the company*

COMPULSORY POWERS—*Continued.*

had not exercised the right of "stopping the working" of the shale conferred on them by section 113, *but had merely intimated that they held the pursuer bound by the obligation not to injure the canal imposed on him by section* 112. *No opinions expressed upon the question whether shale was a mineral, the main question argued and decided in the Court of Session.* Marquis of Linlithgow v. North British Railway Co., (H. L.) p. 38.

Lands purchased by railway under compulsory powers—Statutory title—Lands Clauses Consolidation (Scotland) Act, 1845.

2. *Observed* that when a railway company acquires lands compulsorily the only title it can make up to them is a statutory title. Heriot's Trust v. Caledonian Railway Co., p. 601.

Railway—Expenses—Compulsory taking of lands—Expenditure of purchase price on land to be entailed—Expenses of entailing—Lands Clauses Consolidation (Scotland) Act, 1845, *sec.* 79.

3. An heir of entail in possession of an entailed estate, part of which had been taken by a railway company under compulsory powers, presented a petition under the Entail Acts for authority to uplift the purchase money paid in respect of the lands so taken, and to apply it in purchasing a heritable property held by him in fee-simple, to be settled on the heirs under the entail. The prayer of the petition having been granted the petitioner was found entitled to expenses in so far as the railway company was liable therefor in terms of the Lands Clauses Consolidation (Scotland) Act, 1845. *Held* that under section 79 of that Act the expenses of a remit to a man of skill as well as of a remit to a man of business, for reports appropriate to an entail petition, were expenses that fell to be paid by the railway company. *Held* further, by the Lord Ordinary (Anderson), that the expense of service of the petition upon the next heirs of entail did not fall to be paid by the company. Lord Blythswood v. Glasgow and South-Western Railway Co., p. 726.

CONFUSIO. See *Ground-annual*, 3.

CONTRACT. *Constitution—Construction—Error—Remedy—Contract induced by innocent misrepresentations causing essential error—Rescission—Restitutio in integrum—Conditions limiting liability—Work executed different from work contemplated—Basis of payment.*

1. A railway company invited tenders for the construction of a line of railway, and for the information of intending offerers exhibited what purported to be a journal of bores taken along the proposed line. A firm of contractors, to whom that journal had been exhibited, tendered for the work, and a lump sum contract was entered into with them for the construction of the railway. The contract contained an exemption clause which stated that the company did not guarantee the accuracy of the bores and would not be liable in respect of any inaccuracy in the journal or any error in or omission from the specification of work prepared by them. During the progress of the work the contractors encountered more rock or hard substance than they had anticipated, and in consequence the work cost far more than the contract price. The contractors completed the work, and thereafter brought an action against the company concluding, in name of recompense, or alternatively in name of damages, for a sum to cover the extra cost of constructing the railway. *Circumstances* in which *held* (1) that although the work as executed by the pursuers was not so materially different from that contemplated by the contract as to make the contract inapplicable, yet, as the exemption clause did not protect the defenders against errors caused by their own misrepresentation, and as the pursuers had entered into the contract under essential error induced by

CONTRACT—*Continued.*

certain misrepresentations and omissions (although innocent) of the defenders regarding the journal of bores and the existence of a water-pipe, the pursuers, in spite of their inability to give *restitutio in integrum* otherwise than by a readjustment of the money payments, were entitled to set aside the contract; (2) or otherwise, that the defenders, being in breach of an essential implied condition of the contract, namely, that the journal of bores should include all the bores, and should be an accurate record of the borers' reports, were not entitled to hold the pursuers to the contract as the basis of charge; (3) and on either view, that the pursuers were entitled to payment on the footing of *quantum meruit* for the extra cost in which they had been involved through the error into which they had been led. *Held* alternatively, and on the assumption that there was no sufficient ground for treating the contract as rescinded, that the pursuers were entitled to claim damages for the loss which they had sustained through the failure of the defenders to supply an accurate and complete journal of bores and to disclose the existence of the water-pipe. Boyd & Forrest v. Glasgow and South-Western Railway Co., p. 472.

Constitution—Right in security—Ground-annual—Contract by a party purporting to create a ground-annual in favour of himself.

2. *Held* that a contract, entered into by a proprietor of lands as first party and himself as second party, purporting to create a ground-annual in favour of himself was ineffectual, in respect that a man cannot by any deed constitute a debt by himself to himself. Church of Scotland Endowment Committee v. Provident Association of London, Limited, p. 165.

Pactum illicitum—Agreement to refrain from prosecution.

3. In an action brought by a firm against a former employee to recover a sum which he was alleged to have embezzled, the pursuers founded on a promissory-note granted by him to them for this sum, and on a letter from him admitting that he had used the firm's money and acknowledging their kindness in not prosecuting him. The defender averred that the pursuers had induced him to sign these documents by threatening that otherwise they would prosecute him; and pleaded that this was a *pactum illicitum*, and, accordingly, that the documents could not be founded on against him. *Held* that, even if an agreement to refrain from prosecuting the defender would have been unlawful, no such agreement had been relevantly averred; and defences *repelled*. The Lamson Paragon Supply Co., Limited, v. MacPhail, p. 73.

Pactum illicitum—Trustee in bankruptcy—Agreement to share fees.

4. *A firm of land-agents agreed with their manager that all fees which he earned from any appointment which he might obtain as trustee or factor on any estate should be pooled with all fees which they derived as salesmen or valuators in connection with that estate, and that the fees so pooled, after payment to the firm of the balance of any debt due to them by such estate, should be divided equally between the parties. In an action by the firm against their manager to recover, under this agreement, a proportion of fees alleged to have been earned by him as trustee on various insolvent estates,* held (aff. *judgment of the Second Division, reported Court of Session, p.* 129) *that the agreement was illegal and therefore unenforceable in respect that it involved a violation of the fundamental principle of bankruptcy law providing for the equal distribution of assets among creditors; and action* dismissed. Farmers' Mart, Limited, v. Milne, (H. L.) p. 84.

See *Reparation*, 18.

COUNTY. See *Expenses*, 6—*Local Government.*

CROWN. See *Charitable Bequests and Trusts*, 2—*Title and Interest to Sue*, 5.

CY PRÈS. See *Charitable Bequests and Trusts*, 2.

DAMAGES. See *Appeal to House of Lords*, 2—*Patent—Reparation.*

DELICT. See *Reparation*, 18.

DEPOSIT-RECEIPT. See *Bank*, 3.

DILIGENCE. *Arrestment — Ship — Maritime lien—Form of process for making maritime lien effective.*

It is competent to initiate proceedings for the purpose of making a maritime lien effective by presenting a petition to the Lord Ordinary on the Bills for a warrant to arrest the vessel. *Form* of order pronounced by the Lord Ordinary. M'Connachie, p. 853.

DONATION. *Title of donee to sue for recovery of gift sent in error to third party.*

The pursuer in an action for payment of a sum of money averred that the money was a charitable donation intended for her which had been sent in error to the defender, and that the defender fraudulently refused to part with it though informed by the donor that the gift was not for his benefit but for that of the pursuer. *Held* that the pursuer had relevantly averred a title to sue the defender for recovery of the gift. Costin v. Hume, p. 134.

ELECTION. See *Succession*, 1.

ENTAIL. *Validity—Defect in the cardinal prohibitions—Powers conferred on heir of entail—Power to appoint—Power to sell.*

1. An heir of entail having brought an action of declarator that the entail was invalid, and that he held the estate free from the conditions contained in the deed, on the ground that the entail was defective in two of the cardinal prohibitions, seeing that under a power of appointment he could alter the order of succession, and that he had also full power to sell the estate, *circumstances* in which *held* that the powers contained in the deed did not make the entail defective in the cardinal prohibitions, and consequently that the deed constituted a valid entail. Verney v. Verney, p. 801.

Disentail—Effect of disentail—Debts affecting the heirs of entail—Burden imposed on heirs of entail in favour of third parties—Preservation of third parties' rights—Entail Amendment Act, 1848, *secs.* 6 *and* 32.

2. A deed of entail contained a condition that the whole succeeding heirs of entail should, in all time thereafter, make payment annually of a sum of £200 to a certain kirk-session. An heir of entail in possession presented a petition for disentail and contended that, as this condition was dependent on the continued existence of the entail, he was entitled to disentail without giving security for the further payment of these annual sums. *Held* that, under secs. 6 and 32 of the Entail Act of 1848, the condition was a debt affecting the heirs of entail for the perpetual payment of which the petitioner must give security before the lands could be disentailed. Baikie v. Kirkwall Educational Trust, p. 860.

EQUITABLE COMPENSATION. See *Succession*, 1.

ERROR. See *Contract*, 1—*Donation—Husband and Wife*, 1.

ESTATE-DUTY. See *Revenue*, 1.

EXCISE. See *Revenue*, 2.

EXECUTOR. *Confirmation—Assignation by executors before confirmation—Title of assignee to sue.*

1. The trustees and executors of a deceased, acting under his trust-disposition and settlement which contained a general disposition in their favour, granted an assignation of certain copyrights forming part of

EXECUTOR—*Continued.*

his estate, before they had obtained confirmation. The assignee having brought an action in respect of infringement of the copyrights, *held* that he had a good title to sue, although confirmation would have to be expede by the trustees before he could extract a decree for payment. Mackay v. Mackay, p. 200.

Title and interest to sue—Sisting new parties—Death of pursuer pendente lite—Right of executor to be sisted—Executor having no interest in the merits—Title and interest of executor to sue merely for expenses.

2. A member of a trades union brought an action to interdict the union from applying funds contributed by its members to political purposes. The pursuer died before the case was heard in the Procedure Roll. His widow, as his executrix, craved to be sisted in his place as pursuer in order that she might insist in the action for the purpose of recovering as expenses the sums which he had expended in the litigation. *Held* that the executrix was entitled to be sisted, reserving all questions as to her right to insist in the cause. After hearing the executrix, *held* further that, as she had no interest in the merits, and as there had been no unreasonable conduct on the part of the defenders, she should not be allowed to proceed with the action merely for the purpose of recovering expenses; and action *dismissed.* Martin's Executrix v. M'Ghee, p. 628.

See *Lease*, 11.

EXPENSES. *Abandonment of reclaiming note or appeal—Expenses of respondent.*

1. *Held* that, "as a general rule, when a motion is made by a reclaimer or appellant for the refusal of a reclaiming note or an appeal which has already been sent to the Roll, the respondent will be allowed in the case of a reclaiming note two guineas, and in the case of an appeal three guineas, of expenses. But in certain exceptional cases a remit will be made to the Auditor to tax the respondent's account of expenses. Where a reclaiming note or appeal has appeared in the Roll, or would in ordinary course soon appear in the Roll, then the respondent may, after communication with his opponent, proceed to print such documents as he thinks necessary for the presentation of his case to the Court; and, if he does so, then his expenses will be allowed if the Court, having regard to all the circumstances of the case, think that his preparations were reasonable." As a general rule "communication with the other side on the question of printing is indispensable if there is to be a remit of the respondent's account of expenses to the Auditor." H. R. Marsden, Limited, v. Brunton & Sons, p. 868.

Jury trial—Motion for a rule—Fees to opposing counsel.

2. A motion for a rule having been refused with expenses, the Court *allowed* a fee of two guineas to the opposing party's junior counsel for attending that motion, but *disallowed* a fee to his senior counsel for that attendance; and also *disallowed* a fee to his junior counsel for attending when the motion was sent to the Summar Roll. M'Govern v. West Calder Co-operative Society, Limited, p. 674.

Appeal to House of Lords—Pupil litigant.

3. *Circumstances* in which the Court refused to grant an application made on behalf of an unsuccessful pupil litigant for an award of expenses to enable him to prosecute an appeal to the House of Lords. Walker v. Whitwell, p. 560.

Compulsory taking of lands—Expenditure of purchase price on land to be entailed—Expenses of entailing—Lands Clauses Consolidation (Scotland) Act, 1845, sec. 79.

4. An heir of entail in possession of an entailed estate, part of which had

EXPENSES—*Continued.*

been taken by a railway company under compulsory powers, presented a petition under the Entail Acts for authority to uplift the purchase money paid in respect of the lands so taken, and to apply it in purchasing a heritable property held by him in fee-simple, to be settled on the heirs under the entail. The prayer of the petition having been granted the petitioner was found entitled to expenses in so far as the railway company was liable therefor in terms of the Lands Clauses Consolidation (Scotland) Act, 1845. *Held* that under section 79 of that Act the expenses of a remit to a man of skill as well as of a remit to a man of business, for reports appropriate to an entail petition, were expenses that fell to be paid by the railway company. *Held* further, by the Lord Ordinary (Anderson), that the expense of service of the petition upon the next heirs of entail did not fall to be paid by the company. Lord Blythswood v. Glasgow and South-Western Railway Co., p. 726.

Husband and Wife—Action by wife with concurrence of husband—Husband taking active part in litigation—Liability of husband.

5. In an action of damages for personal injuries at the instance of a married woman with the consent of her husband, the husband gave evidence as to the extent to which a business, in which he and his wife were the sole partners, had suffered owing to his wife's absence in consequence of her injuries. The Court *decerned* against the husband jointly and severally with the wife for the expenses of the action, in respect that he had taken an active part in the litigation. M'Ilwaine v. Stewart, p. 934.

Public Authorities Protection Act, 1893, *sec.* 1 (*b*)—*County Council sisting themselves as defenders in action of right of way.*

6. *Held* that the provisions of section 1 (*b*) of the Public Authorities Protection Act, for the taxation as between agent and client of expenses awarded to a public authority, were not applicable to the case of a District Committee of a County Council, who, in order to vindicate a public right of way, had sisted themselves as defenders to, and had successfully defended, an action of interdict brought against a private individual. M'Robert v. Reid, p. 633.

See *Executor*, 2—*Process*, 2, 4.

FACTORY REGULATION. See *Justiciary Cases*, 11.

FACULTIES AND POWERS. See *Succession*, 9.

FEE AND LIFERENT. See *Succession*, 10.

FERRY. See *Harbour.*

FISHINGS. *Salmon fishings—White fishings—White fishings carried on to injury of salmon fishings—Paidle-net—Form and position of net.*

1. *Circumstances* in which *held* in an action of interdict at the instance of proprietors of salmon fishings on the River Annan, that the use of paidle-nets—not exceeding five feet in height and having no cover over the nets—erected in the Solway by fishermen engaged in the white fishing was illegal, in respect that the nets were so placed and so constructed as to be fitted to catch salmon to a material extent; and interdict against the use of such nets, except during the close time for salmon, *granted*. *Observed* that, having established these facts, it was unnecessary for the complainers to prove further, (*a*) that the nets had been erected with the intention of catching salmon, or (*b*) that any salmon caught in them had been killed, or (*c*) that material injury to the salmon fishings had actually occurred. *Question* whether the complainers would have been entitled to interdict if the respondents had proved (*a*) that they had adopted every known and practicable means to avoid catching

FISHINGS—*Continued.*
salmon, and (*b*) had put back every salmon caught in their nets. Earl of Mansfield v. Parker, p. 1001.

Salmon fishing—Weekly close time—Failure to open stake-nets—Net out of water at ebb tide—Salmon Fisheries (Scotland) Act, 1862, *secs.* 6 *and* 7—*Salmon Fisheries (Scotland) Act*, 1868, *sec.* 24, *and Schedule D, Bye-law* 1.

2. *Held* that the bye-law of the Commissioners under the Salmon Fisheries (Scotland) Acts, 1862 and 1868, made "with respect to the due observance of the weekly close time," and enacting that a clear opening shall be made "and kept free from obstruction" in the pouches of every stake-net, had not been contravened by the owner of a stake-net placed *in situ* for fishing in a tidal river, who had closed the pouches of his net during the last 3½ hours of the weekly close time, in respect that during the whole of these 3½ hours the net had been on dry land owing to the ebb of the tide. Earl of Galloway v. Birrell, (J.) p. 92.

Sea Fisheries Act, 1883, *secs.* 12 *and* 14 (2)—*Powers of sea fishery officer—Refusing to obey officer's order—Legality of order—Power to "take' offending trawler to nearest port—Trawler ordered to "go" to nearest port—Trawler subsequently acquitted of illegal fishing.*

3. A sea-fishery officer, who had reasonable grounds for believing that he had detected a trawler fishing within the three-mile limit, ordered the captain to go with his vessel to Cromarty, which was the nearest and most convenient port. At the time the sea was too rough to permit of a boat being sent to the trawler to put anyone on board. *Held* that the order to go to Cromarty was a lawful order, although the only express authority given by the Sea Fisheries Act, 1883, section 12, was authority to "take" the offender to port, and that the master of the trawler by refusing to comply was guilty of refusing to comply with a direction lawfully given by the officer in contravention of section 14 (2) of the Act. *Opinions* that the order would have been lawful even if the weather had permitted of a boat being sent to the trawler. *Held* further that, as the officer had reasonable grounds for believing that the master had been trawling within the three-mile limit, the lawfulness of the order was not affected by the fact that the charge against the master was subsequently found to be not proven. Gordon v. Hansen, (J.) p. 131.

See *Insurance*, 4.

FOREIGN. *Marriage-contract executed in Scotland—Spouses dying domiciled in England—Lex loci contractus or lex domicilii.*

An antenuptial contract of marriage was entered into between an Englishman residing in Scotland and a Scotswoman. The contract was prepared by a Scottish solicitor, was in Scottish form, and contained a provision that a fund provided by the wife should, after her death failing issue, belong to her "next of kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, and the wife died domiciled there. *Circumstances* in which *held* that it was the intention of the parties to the contract that the wife's next of kin entitled to succeed to the fund should be ascertained according to the law of Scotland, and accordingly that brothers and sisters of the half blood were excluded. Lister's Judicial Factor v. Syme, p. 204.

See *Jurisdiction*, 1.

FRAUD. See *Bankruptcy*, 1.

GAMING. See *Betting.*

GLEBE. See *Church.*

GROUND-ANNUAL. *Definition.*

1. *Observed per* Lord Dundas: "Ground-annual is not a *vox signata;*

GROUND-ANNUAL—*Continued.*

I think it simply means a perpetual rentcharge secured in some effectual fashion as a real burden on land." Church of Scotland Endowment Committee v. Provident Association of London, Limited, p. 165.

Contract by a party purporting to create a ground-annual in favour of himself.

2. *Held* that a contract, entered into by a proprietor of lands as first party and himself as second party, purporting to create a ground-annual in favour of himself was ineffectual. Church of Scotland Endowment Committee v. Provident Association of London, Limited, p. 165.

Discharge—Confusio.

3. *Held* that ground-annuals could not be extinguished *confusione* upon the creditor therein becoming the proprietor of the subjects burdened; *per* the Lord President and Lord Johnston on the ground that ground-annuals are in their nature incapable of being extinguished *confusione*, *per* Lord Skerrington on the ground that the personal obligation of the original debtor still subsisted. Healy & Young's Trustee v. Mair's Trustees, p. 893.

GUARANTEE. See *Cautioner.*

HARBOUR. *Ferry—Statutory trust—Ultra vires—Harbour Trustees vested in ferry undertaking—Right to use ferry steamers for excursions beyond ferry limits—Dundee Harbour and Tay Ferries Consolidation Act*, 1911.

A body of harbour trustees were vested by private Act of Parliament in a monopoly of ferry within certain local limits. For the purposes of the ferry the trustees maintained several steamers which were not all required for the ferry at the same time, and occasionally they hired out one of the steamers for excursions beyond the ferry limits. They had no power expressed in their Act to use the steamers for any other than ferry purposes. *Held* that the trustees were not entitled to use the ferry steamers to carry passengers from and to places outwith the boundaries of the ferry. D. & J. Nicol v. Dundee Harbour Trustees, p. 374.

See *Title and Interest to Sue*, 5.

HERITABLE AND MOVEABLE. See *Succession*, 3, 4.

HERITOR. See *Church.*

HUSBAND AND WIFE. *Nullity of marriage—Error—Fraudulent concealment—Wife pregnant to third party at date of marriage.*

1. *Held* that concealment by a woman from her husband at the time of their marriage that she was pregnant to another man entitled the husband to have the marriage declared null and void. *Question* whether this would have been so if issue had been born of the marriage. Stein v. Stein, p. 903.

Access to child—Jurisdiction to entertain petition for access—Foreign parents divorced abroad—Decree of foreign Court regulating access.

2. The marriage of two domiciled Danes was dissolved of consent by decree under the law of Denmark. By this decree the custody of a son of the marriage was awarded to the father, and access to the child by the mother was refused. Thereafter, both parents being resident in Scotland, the mother presented a petition to the Scottish Courts for access to the child "in respect of her natural rights as his mother." *Held* that, the question of access having been determined by the Court of the parents' domicile, the Scottish Courts had no jurisdiction to entertain the application, and petition *dismissed*. *Opinions* that the Scottish Courts had power to protect the children of foreign parents resident in Scotland, and might for this purpose intervene in an application brought in the interests of the children. Westergaard v. Westergaard, p. 977.

INCOME-TAX. See *Revenue*, 3-5.

INNUENDO. See *Reparation*, 5, 6.

INSANITY. See *Justiciary Cases*, 5—*Poor*, 1.

INSURANCE. *Liquidation of insurance company—Ranking of creditors—Company conducting various classes of insurance business—Separate funds—Contract of re-insurance—Policy-holder—Assurance Companies Act*, 1909, *secs.* 1, 2, *and* 3.

1. A Scots insurance company, carrying on employers' liability insurance and other classes of insurance business, entered into a contract of re-insurance with a Welsh insurance company whereby it undertook, in consideration of a percentage of the premiums, to relieve the Welsh company of claims arising under its employers' liability insurance policies. The Scots company having gone into liquidation at a date when it was indebted, under the re-insurance contract, to the Welsh company in certain sums, the latter company claimed to be ranked in respect of these sums on the separate employers' liability fund of the Scots company along with its direct policy-holders. *Held* (1) that sec. 3 of the Assurance Companies Act, 1909, did not give a preference on the separate fund of a particular class of business to the policy-holders over the ordinary creditors of the company having claims in connection with that class of business; and (2) that the Welsh company, as a creditor of the Scots company in its employers' liability insurance business, was accordingly entitled to be ranked, along with the direct policy-holders, on that company's employers' liability fund. *Question* whether the Welsh company was a "policy-holder" of the Scots company within the meaning of the Act. Liquidators of Glasgow Assurance Corporation, Limited, v. Welsh Insurance Corporation, Limited, p. 320.

Contract of re-insurance—Liability of re-insuring company—Sums paid by re-insured company towards expenses of its policy-holders.

2. *Opinion*, upon the construction of a contract of re-insurance whereby an insurance company undertook to relieve another insurance company of claims under its employers' liability insurance policies, that the re-insuring company was bound to indemnify the other company for the legal and medical expenses which the latter was bound, under its policies, to pay to the insured employers. Liquidators of Glasgow Assurance Corporation, Limited, v. Welsh Insurance Corporation, Limited, p. 320.

National Insurance — Employment — Contract of service — Church—Assistant ministers—Student missionaries—Lay missionaries—Master and servant—National Insurance Act, 1911, *secs.* 1 (1) *and* (2), *and First Schedule, Part I.* (*a*).

3. *Held* that,—in the Church of Scotland and in the United Free Church of Scotland,—assistant ministers and student missionaries were not, whereas lay missionaries were, employed, persons within the meaning of the National Insurance Act, 1911. Scottish Insurance Commissioners v. Church of Scotland, p. 16.

National Insurance—Employment—Contract of service—Share Fishermen—Payment by share of profits—National Insurance Act, 1911, *sec.* 1 (1) *and* (2), *First Schedule, Part I.* (*a*) *and* (*b*) *and Part II.* (*k*).

4. *Held* that (*a*) share fishermen remunerated by shares in the profits of fishing vessels, and under an obligation, sanctioned by custom, to share any losses incurred, but having no proprietary interest in the vessels nets, or gear, and (*b*) net share fishermen, similarly situated except that they received in addition to such shares of profits a further share thereof in respect of their ownership of the nets used on board the vessels, were not employed persons within the meaning of the National Insurance Act, 1911. *Held*, further (in terms of a minute of admissions), that trawl share fishermen, who were paid wages or shares, as the case might be, even when the voyage resulted in a loss, were

INSURANCE—*Continued.*

employed persons within the meaning of the Act. Scottish Insurance Commissioners v. M'Naughton, p. 826.

National Insurance—Failure to pay contributions—Proof—Sufficiency of evidence—Ordinary and emergency cards—Separate charges—Evidence of single witness to each charge—National Insurance Act, 1911—*Regulations* (1913), *secs.* 3 *and* 6.

5. An employer, charged with failure to pay the contributions due by him under the National Insurance Act, 1911, in respect of two servants in his employment, was convicted upon an admission in the witness-box, by each of the servants, that he did not get an insurance card (*i.e.*, an ordinary card) stamped by the accused while in his service, and upon proof that the accused and the two servants had refused to give any information when interrogated by the representatives of the National Insurance Commissioners. *Held* that the charge had not been proved as, even assuming that the evidence was sufficient to establish that no ordinary cards had been stamped, the prosecutor had failed to prove that the accused had not adopted the alternative course of stamping "emergency" cards. *Observations* on the evidence required to prove a charge of failure to pay contributions under the National Insurance Act, 1911, and, in particular, upon the question whether the evidence of one servant that the employer had not stamped a card for him was evidence supporting a similar charge made against the accused with regard to another servant. Kinnear v. Brander, (J.) p. 141.

National Insurance—Workmen's Compensation Act, 1906, *Second Schedule* (9)—"*Party interested*"—*National Insurance Act*, 1911—*Approved Society.*

6. *Question* whether an approved society under the National Insurance Act, 1911, is a "party interested" who, in terms of the Workmen's Compensation Act. 1906, Second Schedule (9), may apply for registration of a memorandum of an agreement regarding the payment of compensation to one of its members. William Baird & Co., Limited, v. Ancient Order of Foresters, p. 965.

INTERDICT. See *Reparation*, 2.

ISSUE. *Form of issue—Illegal apprehension "without reasonable grounds of suspicion"—Malice.*

The Glasgow Police Act, 1866, *sec.* 88 *empowers constables within the city to take into custody, without any other authority than the Act, any person "who is either accused or reasonably suspected of having committed" a penal offence. In an action of damages for wrongous arrest brought against two Glasgow constables who had apprehended the pursuer without a warrant, the defenders maintained that, as they had* bona fide *suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by section* 88 *of the Glasgow Police Act*, 1866, *which empowers constables to arrest without warrant persons "reasonably suspected of having committed" a penal offence.* Held *that the pursuer was not bound to prove ill will on the part of the defenders, and accordingly that malice need not be put in issue; and an issue whether the defenders "wrongfully and illegally, and without reasonable grounds of suspicion apprehended the pursuer"* approved. Shields v. Shearer, (H. L.) p. 33.

JOINT OR SEVERAL. See *Succession*, 8.

JURISDICTION. *Foreign—Husband and Wife—Parent and Child—Access to child—Jurisdiction to entertain petition for access—Foreign parents divorced abroad—Decree of foreign Court regulating access.*

1. The marriage of two domiciled Danes was dissolved of consent by

JURISDICTION—*Continued.*

decree under the law of Denmark. By this decree the custody of a son of the marriage was awarded to the father, and access to the child by the mother was refused. Thereafter, both parents being resident in Scotland, the mother presented a petition to the Scottish Courts for access to the child "in respect of her natural rights as his mother." *Held* that, the question of access having been determined by the Court of the parents' domicile, the Scottish Courts had no jurisdiction to entertain the application, and petition *dismissed*. *Opinions* that the Scottish Courts had power to protect the children of foreign parents resident in Scotland, and might for this purpose intervene in an application brought in the interests of the children. Westergaard v. Westergaard, p. 977.

Court of Session—Declarator of Heirship.

2. An action was brought in the Court of Session for declarator that the pursuer was heir of a certain deceased person, the only purpose of the action admittedly being to obtain a decree which might be used as evidence before the Privy Council in support of a claim by the pursuer to be placed on the Roll of Baronets. The Court *dismissed* the action as incompetent, in respect that a question of propinquity alone was a matter for the Sheriff of Chancery, and that the Court would not pronounce a decree, which would be inoperative except for the purpose of aiding the pursuer to maintain a claim elsewhere. Menzies v. M'Kenna, p. 272.

JUS RELICTÆ. See *Succession*, 3.

JUSTICIARY CASES. *Crime—Fraud—Relevancy of indictment—Tendering worthless cheque in payment for goods already delivered.*

1. An indictment set forth that the accused, having purchased and obtained delivery of nine cattle through a cattle mart, did fraudulently tender in payment to the cashier of the mart a cheque upon a bank, although he had no funds in the bank and knew that the cheque would not be honoured, and that he thus defrauded the mart of the price of the cattle. *Held* that the indictment did not contain a relevant charge of fraud, in respect that it did not set forth that the accused had obtained delivery of the cattle by means of the worthless cheque. Mather v. H. M. Advocate, (J.) p. 184.

Crime—Habitual Criminality—Evidence—Review—Duty of Court of Criminal Appeal.

2. *Held* that, in an appeal to the Court of Criminal Appeal against a verdict on a charge of being a habitual criminal, it is the duty of the Court to consider the case on its merits, and not merely to consider whether there was evidence upon which the jury could reasonably return the verdict appealed against. *Observations* as to the evidence which may legitimately be taken into consideration by a jury in dealing with such a charge, and by the Court of Criminal Appeal in disposing of such an appeal. Heron v. H. M. Advocate, (J.) p. 7.

Crime—Incest—Intercourse with brother's wife while brother alive—Act 1567, 1 *Jas. VI. cap.* 14.

3. *Held* that sexual intercourse between a man and his brother's wife during his brother's lifetime is a crime by the law of Scotland. H. M. Advocate v. Ryan, (J.) p. 108.

Crime—Incest—Intercourse with wife's sister while wife alive—Act 1567, 1 *Jas. VI. cap.* 14.

4. *Held* that sexual intercourse between a man and his wife's sister during his wife's lifetime is not a crime by the law of Scotland. Solicitor-General v. A B, (J.) p. 38.

JUSTICIARY CASES—*Continued.*

Crime—Murder—Culpable homicide—Insanity—Mental degeneracy not amounting to insanity.

5. *Direction* to a jury (*per* Lord Johnston) that mental degeneracy, not amounting to insanity, at the date when an alleged murder was committed was not an extenuating circumstance which could reduce the crime from that of murder to that of culpable homicide. H. M. Advocate v. Higgins, (J.) p. 1.

Statutory Offences—Betting—Betting-house—Ready-money or credit betting—Betting Act, 1853, *sec.* 1.

6. A bookmaker occupied premises in Edinburgh, where he carried on his business by receiving communications from his clients by telephone, the client subsequently sending by post a note of the bet along with a postal order for the sum staked. In a prosecution of the bookmaker for contravening the Betting Act, 1853, section 1, by keeping an office for the receipt of money as the consideration for a promise to pay money thereafter on events relating to horse races, no instance was proved of money being received by the bookmaker before the race on which it was staked was run, but it was proved that clients did not receive their winnings until after their money had been received by the bookmaker. *Held* that the bookmaker had committed a contravention of the Act. Traynor v. Macpherson, (J.) p. 174.

Statutory Offences—Betting—Betting-house—Newspaper office—Newspaper offering prizes for forecasts of football matches—Betting Act, 1853, *sec.* 1.

7. The proprietors of a weekly newspaper inserted in certain issues of their paper a notice offering a money prize to the person who, on a coupon cut from the paper and sent to their office, should give a correct forecast of the result of certain football matches. The papers were sold by the proprietors at 9d. a dozen to newsagents, who retailed them to members of the public at 1d. each. No papers were sold directly to the public by the proprietors, and no coupons were sold apart from the papers. A certain number of papers were bought by members of the public from the newsagents solely for the sake of the coupons. *Held* that the proprietors of the paper used their premises solely for the selling of newspapers and not for the receipt of money on a promise to pay on the contingency of any game or sport, and, accordingly, that they had not contravened section 1 of the Betting Act, 1853. John Leng & Co., Limited, v. Mackintosh, (J.) p. 77.

Statutory Offences—Betting—Gaming—Lottery—Implement for practising game of hazard—Element of skill in game—Glasgow Police (Further Powers) Act, 1892, *sec.* 22.

8. In a prosecution under section 22 of the Glasgow Police (Further Powers) Act, 1892, for exposing in a shop "a lottery" consisting of a penny-in-the-slot machine, the player's object being to catch a ball in a sliding cup, *held* by a full bench that although, in the hands of an ordinary member of the public, success depended largely on chance, yet, as the desired result might be attained on every occasion by the exercise of skill, the machine was not a "lottery." Di Carlo v. M'Intyre, (J.) p. 60.

Statutory Offences—Brothel—Managing a brothel—Manager found "in" a "building" used as a brothel—Two tenements having same access, but separated by common court—Burgh Police (Scotland) Act, 1892, *sec.* 403.

9. Certain premises consisted of two separate tenements of dwelling-houses, a front tenement facing the street, and a back tenement separated from the front tenement by a common court. Access to both tenements was obtained by a close running from the street through the front tenement to the common court. A woman found in the front tenement was

JUSTICIARY CASES—*Continued.*

charged with, and convicted of, managing the back tenement as a brothel. *Held* that as the accused had not been found in the back tenement she had not been found "in" a house or building used as a brothel in the sense of section 403 of the Burgh Police (Scotland) Act, 1892, and conviction *quashed*. Blackwood v. M'Intyre, (J.) p. 165.

Statutory Offences—Criminal Law Amendment Act, 1885, *secs.* 5 *and* 9 *—Charge of attempted rape—Conviction of a statutory offence—Competency—Statute not libelled—Original charge abandoned—Original charge only for attempt.*

10. In the course of the trial of an accused on a complaint which only libelled a common law charge of attempt to ravish, the prosecutor withdrew the charge, and asked for, and obtained from the jury, a verdict of guilty "of a contravention of the Criminal Law Amendment Act, 1885, section 5." In a suspension the Court *quashed* the conviction, *holding* that, while the power created by section 9 of the Act of convicting of the lesser statutory offence was available to a prosecutor although the Act had not been libelled in the complaint or indictment, it was not so available (1) where the accused was not charged with committing the major crime, but only with attempting to commit it; (2) where the original charge had been withdrawn from the jury with the result that they could not, as required by section 9, acquit the accused of that charge before finding him guilty of the minor offence. Townsend v. H. M. Advocate, (J.) p. 85.

Statutory Offences—Factory and Workshop Act, 1901, *sec.* 149 (1), *and Sixth Schedule, Part II.* (28)—"*Non-textile factory*"—*Bottling beer by machinery in wine merchant's premises*—"*Bottle washing works*"—*Washing bottles by machinery in wine merchant's premises.*

11. On the first floor of premises occupied by a firm of wholesale and retail grocers, wine merchants, and Italian warehousemen, there was a portable bottle filling machine used for bottling beer, and on the ground floor another machine used for washing the firm's bottles, both machines being worked by electricity. *Held* (1) that the premises on the first floor were not a "non-textile factory" within the meaning of section 149 (1) of the Factory and Workshop Act, 1901, in respect that the process of bottling beer was neither an "adapting for sale of any article" nor a "manufacturing process"; (2) that the premises on the ground floor were not "bottle washing works" within the meaning of the same section and subsection and the Sixth Schedule, Part II. (28), in respect that the bottle washing was merely incidental to the firm's proper business. James Keith, Limited, v. Kirkwood, (J.) p. 150.

Statutory Offences—Loitering with intent to commit felony—Relevancy of complaint libelling mere theft, without aggravation, as a felony—Vagrancy Act, 1824, *sec.* 4—*Prevention of Crimes Act*, 1871, *sec.* 15—*Penal Servitude Act*, 1891, *sec.* 7.

12. A complaint charging a suspected person and reputed thief with loitering "with intent to commit a felony, viz., theft," contrary to section 4 of the Vagrancy Act, 1824 (as amended and applied to Scotland by the Prevention of Crimes Act, 1871, and the Penal Servitude Act, 1891), *held* irrelevant, in respect that "theft" *simpliciter* was not a "felony" within the definition of felony given in the Act of 1871. Reilly v. M'Intyre, (J.) p. 11.

Statutory Offences—Motor car—Heavy motor car—Charge of exceeding speed limit—Speed limit fixed according to axle-weight—Car having one axle above and another below specified axle-weight—Heavy Motor Car (Scotland) Order, 1905, *Art. VII.*

13. The Heavy Motor Car (Scotland) Order, 1905, Art. VII., provides that if a heavy motor car has all its wheels fitted with pneumatic tyres, the

JUSTICIARY CASES—*Continued.*

speed at which it may be driven on the highway shall not exceed "(*a*) Twelve miles an hour—where the registered axle-weight of any axle does not exceed six tons; and (*b*) Eight miles an hour—where the registered axle-weight of any axle exceeds six tons." *Held* that the speed limit for a car of the class referred to, of which the registered axle-weight of the front axle was 2 tons 2 cwts. and that of the back axle over 6 tons, was eight, and not twelve, miles an hour. Auld v. Pearson, (J.) p. 4.

Statutory Offences—Motor car—Charge of exceeding speed limit—Proof—Sufficiency of evidence—Motor Car Act, 1903, *sec.* 9.

14. The driver of a motor car was convicted of driving his car over a measured distance at a speed exceeding the speed limit, the only evidence being that of two constables, who had been stationed at either end of the measured distance, and who deponed, the one to the time at which the car entered, the other to the time at which it passed out of, the measured distance. An objection to the sufficiency of the evidence on the ground that, as each of these times was a fundamental fact in the charge, it could not be established by the uncorroborated testimony of a single witness, *repelled;* and conviction *sustained.* Scott v. Jameson, (J.) p. 187.

Statutory Offences—Places of refreshment—Keeping premises open contrary to bye-law—Conviction—Necessity of proving purpose for which kept open—City of Glasgow Bye-laws made under Burgh Police (Scotland) Acts, 1892 *to* 1911.

15. A bye-law by the Corporation of the City of Glasgow enacted that "a person registered . . . to keep or use any . . . premises as a place for public refreshment shall not keep such premises open, or suffer them to be kept open," except during hours specified. *Held* that proof that an accused person had kept his premises open, or had suffered them to be kept open, after the hours specified was sufficient *per se* to establish a contravention of the bye-law, without any proof as to the purpose for which they were kept open. M'Intyre v. Persichini, (J.) p. 126.

Statutory Offences—Places of refreshment—Registration of places for public refreshment—Ice-cream shop—Ice-cream vendor already registered under Dairies, Cowsheds, and Milkshops Order, 1885—*Necessity for registration under Burgh Police (Scotland) Acts,* 1903 *and* 1911—*Dairies, Cowsheds, and Milkshops Order,* 1885, *sec.* 6—*Burgh Police (Scotland) Act,* 1903, *sec.* 82—*Burgh Police (Scotland) Amendment Act,* 1911, *secs.* 1 *and* 3.

16. *Held* that the registration of an ice-cream vendor in a register of purveyors of milk, kept by the Corporation of Glasgow under the Dairies, Cowsheds, and Milkshops Order 1885, was not "a licence or other sanction or permit" with regard to his premises in the sense of section 3 of the Burgh Police (Scotland) Act, 1911; and accordingly that he was not exempt from registration under the Burgh Police (Scotland) Acts, 1903 and 1911, as a person using premises as a place for public refreshment. Porcelli v. M'Intyre, (J.) p. 169.

Statutory Offences—Protection of animals—Knackery—Prohibition against selling alive or permitting sale of animals delivered to knacker—Sale by knacker's assistant—"Permission" of knacker—"Delivery" of animal—Protection of Animals (Scotland) Act, 1912, *sec.* 5 (2), *First Schedule, Regulation* 9.

17. *Held* (1) that Regulation 9 of the First Schedule to the Protection of Animals (Scotland) Act, 1912, which prohibits a knacker selling alive, or "permitting" the sale alive, of any animal delivered to him, applied not only to knackers but also to their assistants; (2) that it would not be a contravention of the regulation to sell an animal alive that was proved

JUSTICIARY CASES—*Continued.*

to have been delivered for other than knackery purposes; but (3) that in the absence of such proof, a horse purchased by a knacker's assistant for £1 and immediately sold for £1, 10s. to a person who exported it to Antwerp must be presumed to have been delivered for knackery purposes. *Held* further that, in the absence of proof that the knacker knew of or authorised the sale, which took place at a market three miles from the knackery, or had failed to exercise a reasonable supervision over his assistant, he could not be said to have "permitted" the sale, and that accordingly the assistant had, but the knacker had not, contravened the regulation. Dundas v. Phyn, (J.) p. 114.

Statutory Offences—Salmon fishing—Weekly close time—Failure to open stake-nets—Net out of water at ebb tide—Salmon Fisheries (Scotland) Act, 1862, *secs.* 6 *and* 7—*Salmon Fisheries (Scotland) Act*, 1868, *sec.* 24, *and Schedule D, Bye-law* 1.

18. *Held* that the bye-law of the Commissioners under the Salmon Fisheries (Scotland) Acts, 1862 and 1868, made "with respect to the due observance of the weekly close time," and enacting that a clear opening shall be made "and kept free from obstruction" in the pouches of every stake-net, had not been contravened by the owner of a stake-net placed *in situ* for fishing in a tidal river, who had closed the pouches of his net during the last 3½ hours of the weekly close time, in respect that during the whole of these 3½ hours the net had been on dry land owing to the ebb of the tide. Earl of Galloway v. Birrell, (J.) p. 92.

Procedure—Instance—Indictment—Removal of Lord Advocate from office—Lord Advocate appointed to the bench—Indictment at instance of Solicitor-General during vacancy in office of Lord Advocate—Competency—Solicitor-General appointed to bench prior to sentence—Lapse of indictment—Criminal Procedure (Scotland) Act, 1887, *secs.* 2 *and* 3.

19. An indictment dated after the Lord Advocate has been raised to, and has taken his seat upon, the bench, and before the appointment of his successor, rightly proceeds in name of the Solicitor-General and may be signed by a procurator-fiscal, "by authority of the Solicitor-General." Further, the fact that the Solicitor-General has been raised to the bench prior to the conclusion of the case does not cause the indictment to lapse. Solicitor-General v. Lavelle, (J.) p. 15.

Procedure—Instance—Public or private prosecution—Statutory offence—Children Act, 1908, *Part I.—Title of Parish Council to prosecute for offences under Part I.*

20. A Parish Council has no title to prosecute a complaint charging a contravention of any of the provisions of Part I. of the Children Act, 1908. Glasgow Parish Council v. Edward, (J.) p. 159.

Procedure—Pleas in bar of trial—Tholed assize—English sentence on plea of guilty to Scottish offence not yet the subject of complaint or indictment.

21. A person, charged in the Sheriff Court at Jedburgh with obtaining goods on false pretences from a merchant in Jedburgh by means of postal communications from Newcastle-on-Tyne, objected that he had already tholed an assize with respect to the charge. It was proved that he had been convicted of a similar offence by the Court of Quarter Sessions at Wakefield in Yorkshire, and had then pleaded guilty to the Jedburgh offence, in connection with which there was a warrant out for his apprehension but no formal charge had been made against him; and that the Court in passing sentence took the Jedburgh offence into consideration, in accordance, as alleged, with an English practice by which the Court, in sentencing a prisoner, can take into account all outstanding offences of a similar nature to which the prisoner pleads guilty. *Held* that the objection fell to be repelled, in respect that the proceedings at Wakefield were lacking in all the essentials of a trial of the accused for the Jedburgh offence, there being

JUSTICIARY CASES—*Continued.*

neither formal charge nor prosecutor, and the Court having no jurisdiction to try the offence. Hilson v. Easson, (J.) p. 99.

Procedure—Withdrawal of plea of guilty—Crime—Habitual criminality—Withdrawal of plea on appeal after sentence—Criminal Procedure (Scotland) Act, 1887, *secs.* 31 *and* 41—*Prevention of Crime Act*, 1908, *secs.* 10, 17 (3) (5).

22. Two persons, who were charged with theft by housebreaking and with being habitual criminals within the meaning of the Prevention of Crime Act, 1908, sec. 10, having, under sec. 31 of the Criminal Procedure (Scotland) Act, 1887, and sec. 17 (3) of the Prevention of Crime Act, 1908, pleaded guilty to the charge of theft and admitted that they were habitual criminals, were remitted by the Sheriff for sentence to the High Court of Justiciary. Both were sentenced by the presiding Judge to terms of penal servitude and preventive detention, one having asked, and been refused, leave to withdraw his admission that he was a habitual criminal. The accused then appealed to the Court of Appeal and asked leave to withdraw their pleas to the charge of habitual criminality, alleging that in pleading guilty they believed that they were merely admitting that the list of previous convictions annexed to the indictment was correct, and did not understand the nature of the charge and the penal consequences that it involved. The Court *held* that, as the procedure had been regular throughout and the accused had been advised by law-agents, their allegations as to their misunderstanding of the charge could not be accepted as grounds for allowing the plea to be withdrawn; and *refused* the appeals. *Observations* as to the circumstances in which the Court of Appeal will allow such pleas to be withdrawn. *Observed* that it was the duty of a Sheriff, before taking a plea to a charge of being a habitual criminal, to explain to the accused the nature of the charge and the consequences of an admission of guilt. Paul v. H. M. Advocate, (J.) p. 69.

Procedure—Sentence—Court of Summary Jurisdiction—Form of sentence—Summary Jurisdiction (Scotland) Act, 1908, *sec.* 53, *and Schedule E.*

23. The sentence of a Court of Summary Criminal Jurisdiction should always be minuted in the form contained in Schedule E to the Summary Jurisdiction (Scotland) Act, 1908. *Held*, however, that, where an accused was charged on a complaint setting forth twenty separate offences, a sentence finding the accused "guilty" might stand although the statutory words "as libelled" had been omitted, it being clear from the subsequent part of the sentence, which imposed a *cumulo* pecuniary penalty, that the accused had been found guilty of each of the twenty offences libelled. Paterson v. MacLennan, (J.) p. 123.

Procedure—Appeal to High Court—Charge against firm—Competency of partner appearing on behalf of firm—Administration of justice—Counsel.

24. *Held* that a firm of law-agents, appealing to the High Court of Justiciary against a conviction of failing to pay contributions due in respect of their employees under the National Insurance Act, 1911, could not be represented in the High Court by one of the partners of the firm, but must employ counsel. Macbeth & Maclagan v. Macmillan, (J.) p. 165.

Procedure—Appeal by stated case—Method of stating case.

25. *Observed* that a stated case ought to contain a statement of the facts found proved, not a statement of what the witnesses said. Gordon v. Hansen, (J.) p. 131.

Conviction—General conviction—Alternative offences—Criminal Law Amendment Act, 1885, *sec.* 5.

26. *Held* that a verdict of guilty "of a contravention of the Criminal Law Amendment Act, 1885, section 5," could not stand in respect that section 5 of the Criminal Law Amendment Act, 1885, created more than one offence, and that it was impossible to tell from the verdict of

JUSTICIARY CASES—*Continued.*
the jury of which of these offences the accused had been found guilty. Townsend v. H. M. Advocate, (J.) p. 85.
See *Fishings*, 2—*Insurance*, 5—*Public Health—Revenue*, 2.

LAND COURT. See *Lease*, 4-12.

LAW-AGENT. See *Partnership*, 2.

LEASE. *Power of resumption—Notice—Resumption for "building, planting, feuing, or other purposes"—Ejusdem generis—Agricultural Holdings (Scotland) Act*, 1908, *sec.* 18 (1) *and* (5).

1. Under the Agricultural Holdings (Scotland) Act, 1908, sec. 18, in leases from year to year six months' notice of termination must be given, except where there is a stipulation entitling the landlord to resume land for "building, planting, feuing, or other purposes." A landlord let a grass park from year to year, and in the lease reserved power to resume possession on one month's notice for "any purpose whatever except that of letting to another agricultural tenant." The landlord sought, on one month's notice, to resume possession of the park for the purpose of grazing pedigree sheep of his own. The tenant objected that, as this purpose was not *ejusdem generis* with "building, planting, feuing," it was not covered by the words "or other purposes" in subsec. (5); and, accordingly, that he was entitled to six months' notice. *Held* that the purpose was covered by the words "or other purposes" in the subsection, and that the landlord was entitled to resume on one month's notice in terms of the lease. *Observed* further, that "or other purposes" covered any purpose consistent with the good faith of the lease. Crichton Stuart v. Ogilvie, p. 888.

Outgoing—Compensation for improvements—Drainage improvements—Statutory notice of intention to execute improvements—Agreement to dispense with notice—Proof of agreement—Agricultural Holdings (Scotland) Act, 1908, *sec.* (3) (1) *and* (4).

2. In a claim by tenants of a holding for compensation under the Agricultural Holdings (Scotland) Act, 1908, in respect of drainage improvements it appeared that no notice in compliance with sec. 3 (1) of the Act had been given by the tenants to the landlord, but the tenants maintained that there had been an agreement under sec. 3 (4) to dispense with notice. It was proved that, before the improvements were executed, the tenants had interviews with the landlord's factor, at which, although the question of compensation or notice was never specifically raised, the factor was informed of the nature of the proposed work; and that the tiles were supplied to the tenants under orders given by the landlord's factor and were paid for by the landlord, while the cartage and the laying of the drains were done by the tenants at their own expense, and that this was the custom on the estate. *Held* that in these circumstances an agreement to dispense with the notice required by sec. 3 (1) of the Act could not be inferred. Barbour v. M'Douall, p. 844.

Outgoing—Compensation for unreasonable disturbance—Reasonable opportunity to landlord of making valuation of tenant's stock and implements—Compensation for "loss or expense directly attributable to" tenant's quitting his holding—Agricultural Holdings (Scotland) Act, 1908, *sec.* 10.

3. Where the tenants of a holding gave notice to their landlord on 24th May 1912 that they intended to claim compensation for unreasonable disturbance under section 10 of the Agricultural Holdings (Scotland) Act, 1908, and thereafter, without further notice or intimation to the landlord, proceeded on 13th February 1913 to sell their stock and implements by public roup, *held* that the tenants had given to the landlord the "reasonable opportunity of making a valuation" of the implements and stock required by the Act, there being no obligation on a

LEASE—*Continued.*

tenant, on his own initiative, to make an offer to the landlord of such an opportunity. *Observed* that, where there was a displenishing sale, what the tenant would be entitled to as compensation under the section would include not merely the expense of the sale but also the loss through deterioration of the stock upon a sale. Barbour v. M'Douall, p. 844.

Small Holdings—"Holding"—Subjects consisting of weaving mill and croft—Small Landholders (Scotland) Act, 1911, *sec.* 26 (3) (*f*)—*Agricultural Holdings (Scotland) Act*, 1908, *sec.* 35 (1).

4. *Held* that subjects consisting of a carding, spinning, and weaving mill, and a house and steading with 9 acres of agricultural land and 3 roods of pasture, let to one tenant at a *cumulo* rent of £19, 5s., (of which £10, 5s. effeired to the mill and £9 to the rest of the subjects) did not constitute a holding as defined in the Agricultural Holdings (Scotland) Act, 1908, and therefore were not a holding within the meaning of the Small Landholders (Scotland) Act, 1911. Yool v. Shepherd, p. 689.

Small Holdings—"Lotted" lands—Statutory small tenants—Small Landholders (Scotland) Act, 1911.

5. *Held* that the provisions of the Small Landholders (Scotland) Act, 1911, applied to "lotted lands," not equipped with buildings, which had been voluntarily laid out by the proprietor of an estate for occupation as agricultural subjects by householders in an adjoining village, and that a yearly tenant of three of these lots was a statutory small tenant within the meaning of the Act. Seafield's Trustees v. M'Currach, p. 174.

Small Holdings—Exceptions—Permanent grass park held for business not "primarily agricultural or pastoral"—Pasture tenanted by dairykeeper—Small Landholders (Scotland) Act, 1911, *sec.* 26 (3) (*g*).

6. A dairykeeper was the yearly tenant of two fields of permanent pasture which he used for grazing and feeding five cows, whose milk he sold in his dairy business along with the milk, which he purchased, of ten other cows belonging to neighbouring farmers. *Held* that the subjects were held by him for the purposes of a business or calling which was "primarily pastoral," and accordingly did not fall within the provisions of section 26 (3) (*g*) of the Small Landholders (Scotland) Act, 1911, so as to exclude him from the benefit of the Act. Howatson v. M'Clymont, p. 159.

Small Holdings—Exclusive possession of holding—Grazing rights of third party—Landholder—Small Landholders (Scotland) Act, 1911.

7. Certain yearly tenants of holdings, which comprised buildings, arable land, and a right of common grazing, applied to the Land Court for orders declaring them to be landowners within the meaning of the Small Landowners (Scotland) Act, 1911, and fixing fair rents for their holdings. The winter grazing, both of the arable lands and of the common pasturage, was let by the landlord to the tenant of a neighbouring farm, and this fact was set forth in the applications in question. The Land Court having pronounced orders declaring the applicants to be landholders and fixing fair rents, they thereafter sought to interdict the farm tenant from grazing his stock upon the subjects, on the ground that, in virtue of these orders, they were entitled to the exclusive possession of their holdings. *Held* that the orders had no such effect, but applied only to the holdings as possessed at the time when the applications were made; and interdict *refused*. M'Martin v. Robertson, p. 783.

Small Holdings—"Present rent"—Tenant's share of fire insurance premium—Small Landholders (Scotland) Act, 1911, *sections* 13 *and* 26 (3) (*a*).

8. A tenant whose yearly rent was £50 also made to his landlord an

LEASE—*Continued.*

annual payment of 1s. 10d., being his proportion of a premium of insurance over certain buildings on his holding. *Held* that this payment of 1s. 10d. did not fall to be taken into account in computing the tenant's "present rent" within the meaning of section 26 (3) (*a*) of the Act. Marquis of Breadalbane v. Robertson, p. 215.

Small Holdings—Equitable rent—Statutory small tenant—Small Landholders (Scotland) Act, 1911, *sec.* 32.

9. *Observed* that, in fixing an equitable rent, the Land Court is not entitled to reduce the rent below what would otherwise be an equitable rent, for the purpose of recouping the tenant for loss incurred in working the holding or for the over-renting of the holding during the previous period of his tenancy. White v. Stewart, p. 675.

Small Holdings—Compulsory creation of small holdings by order of Land Court—Petition by landowner for appointment of arbiter to award compensation—Competence of petition where order has not fixed fair rent and conditions—Duties of Land Court and Board of Agriculture—Small Landholders (Scotland) Act, 1911, *sec.* 7 (9) (11).

10. *Held* (by the Lord Ordinary on the Bills) that a petition by the owner of an estate for the nomination of an arbiter to fix the amount of compensation due to him in respect of the compulsory constitution of small holdings on his estate was premature and fell to be dismissed, in respect that the order of the Land Court authorising the holdings had not determined the fair rent of the holdings or the terms and conditions thereof, all of which had, under sec. 7 (9) (11) of the Small Landholders (Scotland) Act, 1911, to be determined before a petition to appoint an arbiter could be presented. *Observations* on the provisions of the Small Landholders (Scotland) Act, 1911, and on the duties of the Land Court and the Board of Agriculture, in regard to the creation of small holdings. Scott Plummer v. Board of Agriculture, p. 1.

Small Holdings—Resumption of holding by landlord—Appeal—Death of landlord—Right of his representatives to insist in appeal—Small Landholders (Scotland) Act, 1911.

11. The landlord of a small holding, who had obtained from the Land Court an interlocutor authorising him to resume the holding for the purpose of residing there, but only under certain conditions, died after initiating an appeal against the terms of that interlocutor. *Held* that his children, to whom he had bequeathed the holding, were entitled to insist in the appeal. White v. Stewart, p. 675.

Small Holdings—Resumption of holding by landlord—Statutory small tenant—Duty of Land Court in applications for resumption of holding—Assessment of tenant's claim to compensation—Small Landholders (Scotland) Act, 1911, *sec.* 32 (15).

12. *Held* (1) that, where the Land Court is satisfied that the resumption of a holding is desired for a purpose specified in secs. 19 or 32 (15) of the Small Landholders (Scotland) Act, 1911, it is the imperative duty of that Court, under the latter section, to authorise resumption at the earliest date reasonably possible, and it is not within the power of the Court to postpone resumption beyond that date; (2) that under sec. 32 (15) the Land Court is not entitled to make actual payment of compensation to the tenant a condition precedent to resumption of the holding; and (3) that, as compensation falls to be assessed by arbitration and not by the Land Court, an order pronounced by the Court requiring the tenant to lodge a statement of his claim for compensation was incompetent. White v. Stewart, p. 675.

See *Arbitration—Reparation*, 11.

LEGACY. See *Succession*, 7—*Trust*, 2.

LEGITIM. See *Succession*, 1, 2.

LIEN. See *Arrestment*, 1.

LOCAL GOVERNMENT. *Water-rates—Power of County Council to levy water-rates prior to supplying water.*

Terms of clauses in a private Act of Parliament which were *held* to entitle a County Council to levy a domestic and a public water-rate, although the works authorised by the Act had not been constructed, and the County Council were consequently not in a position to supply water to the parties assessed. Fife County Council v. Fife Coal Company, Limited, p. 882.

See *Poor*, 1, 2.

LORD ADVOCATE. See *Justiciary Cases*, 19—*Title and Interest to Sue*, 5.

MALICE. See *Reparation*, 1, 7-9.

MANSE. See *Church*.

MARCH FENCE. See *Property*, 3.

MARRIAGE-CONTRACT. *Construction—Destination to "next of kin"—Marriage-contract executed in Scotland—Spouses dying domiciled in England—Lex loci contractus or lex domicilii.*

An antenuptial contract of marriage was entered into between an Englishman residing in Scotland and a Scotswoman. The contract was prepared by a Scottish solicitor, was in Scottish form, and contained a provision that a fund provided by the wife should, after her death failing issue, belong to her "next of kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, and the wife died domiciled there. *Circumstances* in which *held* that it was the intention of the parties to the contract that the wife's next of kin entitled to succeed to the fund should be ascertained according to the law of Scotland, and accordingly that brothers and sisters of the half blood were excluded. Lister's Judicial Factor v. Syme, p. 204.

MASTER AND SERVANT. *Liability of master to licensee on premises for injuries caused by negligence of servant.*

A person who goes upon premises as a mere licensee is not there at his own risk if he suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licensee has entered the premises; and the owner is liable in damages. Tough v. North British Railway Co., p. 291.

See *Insurance*, 3—*Process*, 14—*Public Health—Reparation*, 8—*Workmen's Compensation Act*.

MINES AND MINERALS. See *Compulsory Powers*, 1—*Workmen's Compensation Act*, 11.

MINOR AND PUPIL. See *Appeal to House of Lords*, 1.

MOTOR CAR. See *Justiciary Cases*, 13, 14—*Reparation*, 17.

NATIONAL INSURANCE. See *Insurance*, 3-6—*Workmen's Compensation Act*, 20.

NEWSPAPER. See *Justiciary Cases*, 7.

NOBILE OFFICIUM. See *Bankruptcy*, 3—*Trust*, 3.

ONUS. See *Superior and Vassal*, 2.

PARENT AND CHILD. See *Jurisdiction*, 1.

PARISH COUNCIL. See *Justiciary Cases*, 20.

PARTNERSHIP. *Rights and liabilities of members—Dissolution—Expired contract of copartnery continued as partnership-at-will—Application of pre-emption clause in original contract to partnership-at-will—Partnership Act*, 1890, *sec.* 27 (1).

1. A contract of copartnery in a wine and spirit business between three parties, entered into for five years, contained a clause providing that "in the event of the copartnery not being renewed at the expiry thereof the licence shall then be valued by a neutral party mutually appointed, and the first party as holder of the licence shall in his option be entitled to pay out the second and third parties the amount due to them respectively," or that otherwise the licence should be sold in open market, and the proceeds divided among the parties. After the expiry of the term created by the contract the partnership was carried on for several years as a partnership-at-will until dissolved by a notice from the first party. *Held* that the clause conferring the right of pre-emption was carried forward into the partnership-at-will, and that at its termination the first party was entitled to exercise the right. M'Gown v. Henderson, p. 839.

Rights of partners—Charge against firm—Appeal to High Court—Competency of partner appearing on behalf of firm.

2. *Held* that a firm of law-agents, appealing to the High Court of Justiciary against a conviction of failing to pay contributions due in respect of their employees under the National Insurance Act, 1911, could not be represented in the High Court by one of the partners of the firm, but must employ counsel. Macbeth & Maclagan v. Macmillan, (J.) p. 165.

PATENT. *Infringement—Measure of damages—Appeal to House of Lords.* *In an action by patentees for damages in respect of the sale of articles infringing their patent it was proved that the defenders, the infringers, had sold such a number of the articles as would have yielded to the pursuers, had they effected the sales, a profit of approximately* £5000. *The Second Division of the Court of Session (recalling an award by the Lord Ordinary of* £1500) *awarded the pursuers* £3000, *which represented the profits on the proportion of the articles sold by the defenders which, in the opinion of the Court, the pursuers would themselves have succeeded in selling had there been no infringement. The defenders appealed to the House of Lords and craved their Lordships to restore the award of the Lord Ordinary, which they contended was on the facts well founded, and in any event was, like the verdict of a jury, only open to challenge if wholly unsupported by, or contrary to, the evidence. The pursuers expressed their acquiescence in the figure arrived at by the Second Division. The House of Lords, holding that they were entitled to consider the question of damages on its merits, on a review of the whole evidence* affirmed *the judgment of the Second Division.* Opinion (per *Lord Shaw of Dunfermline*) *that legally the pursuers were entitled to damages in respect of all the articles sold by the defenders, irrespectively of whether they themselves could have sold them or not, and that in cases where they themselves could not have effected the sales, damages fell to be assessed by way of a royalty on the articles sold.* Watson, Laidlaw, & Co., Limited, v. Pott, Cassels, & Williamson, (H. L.) p. 18.

PERSONAL BAR. *Arrestment—Obligation to pay "nett cash"—Cash paid to bank for payee—Right of payer to arrest in hands of bank.*

1. A London firm sold to a Glasgow firm a quantity of iron, which was to be shipped to Scottish ports and to be paid for "nett cash against shipping documents." When the iron had reached the ports of destina-

PERSONAL BAR—*Continued.*

tion the sellers handed the shipping documents to their bank in London with instructions to obtain payment of the price from the purchasers, and the bank sent on the documents to their correspondents, a bank in Glasgow, with instructions to carry through the transaction. The Glasgow bank accordingly, in exchange for the documents, obtained payment from the purchasers of the price, and entered it in their books to the credit of the London bank. An hour afterwards the purchasers arrested this money in the hands of the Glasgow bank to found jurisdiction against the sellers in an action of damages. *Held* that the purchasers were not barred by the terms of their contract with the sellers from attempting to arrest the cash payment which they had themselves made. J. & C. Murray v. Wallace, Marrs, & Co., p. 114.

Falsity of slanderous statements admitted in letter of apology—Action of slander for subsequent repetition of same statements—Plea of veritas.

2. *Held* that the defender in an action of damages for slander was not barred from pleading *veritas* by having, on a former occasion, written a letter of apology admitting that similar statements then made by her were false, and undertaking not to repeat them. R. v. S., p. 193.

POLICE FORCE. See *Reparation*, 1.

POOR. *Lunatic pauper—Warrant for removal of pauper to England—Appeal to Local Government Board—Competency—"Residence" of lunatic—Poor Law (Scotland) Act*, 1898, *sec.* 5.

1. The Poor Law (Scotland) Act, 1898, section 5, enacts that, whenever any parish council has obtained a warrant for the removal from any parish in Scotland to England or Ireland of any English-born or Irish-born pauper who has not acquired a settlement by residence in Scotland, an appeal may be taken to the Local Government Board for Scotland if such pauper "shall have resided continuously in such parish for not less than one year before the date of the application for relief." *Held* that the word "resided," as used in the section, referred merely to bodily presence, and not to intelligent residence, in a particular locality; and accordingly that an appeal was competent in the case of a lunatic pauper who had lived in a Scottish parish (being boarded out at the expense of a relative) for more than a year, although she was insane during the whole period. Edinburgh Parish Council v. Local Government Board for Scotland, p. 241.

Poor—Removal of pauper to England—Finding as to residence in Sheriff's warrant—Poor Removal Act, 1862, *sec.* 2.

2. The Poor Removal Act, 1862, section 2, enacts that a warrant for the removal of a pauper from England to Scotland, or from Scotland to England or Ireland, shall contain "the name of the place in Scotland or England or Ireland (as the case may be) where" the justices or magistrate or Sheriff shall find such person "to have been born, or to have last resided for the space of five years in the case of a poor person to be removed to Scotland, and three years in the case of a poor person to be removed to England or Ireland." *Observed* (*per* Lord Dundas) that the residence for three years specified in the section for the case of a removal from Scotland to England is a residence in England and not in Scotland. Edinburgh Parish Council v. Local Government Board for Scotland, p. 241.

POOR'S-ROLL. *Admission—Poverty—C. A. S.*, 1913, *A*, x. 6.

In an application for admission to the poor's-roll the Court will not *ex proprio motu* consider the question whether the applicant's means entitle him to the benefit of the roll. In order to raise the question objection must be taken by the adverse party when the remit to the reporters on *probabilis causa* is made. Ross, p. 450.

PROCESS. *Record—Relevancy of alternative and inconsistent averments of fact.*

1. *Held* that, although in an action of damages for personal injury alternative averments of fact were contradictory and mutually exclusive of each other, yet, as either one or the other would, if proved, infer liability on the part of the defenders, the pursuer had stated a relevant case. Clarke v. Edinburgh and District Tramways Co., Limited, p. 775.

Amendment of record—Court of Session Act, 1868, *sec.* 29—*Reclaiming note—Competency—Failure to print proof—Amendment superseding proof.*

2. Decree in favour of the pursuer having been granted after a proof, the defenders reclaimed and printed the reclaiming note and the record, but did not print the notes of evidence. At the calling of the reclaiming note they tendered a minute of amendment, disclosing a new ground of defence which, they contended, entirely superseded the proof that had been taken. The respondent moved the Court to disallow the amendment and to refuse the reclaiming note, on the ground that the reclaimers had failed to lodge prints of the proof, and that this failure prevented the Court from judging of the expediency of the amendments which, he alleged, would be useless in view of the facts established at the proof. The Court *allowed* the amendment, but only on condition of payment to the respondent of his whole expenses since the closing of the record. Stevens v. Motherwell Entertainments, Limited, p. 957.

Sisting new parties—Death of pursuer pendente lite—Right of executor to be sisted—Executor having no interest in the merits.

3. A member of a trades union brought an action to interdict the union from applying funds contributed by its members to political purposes. The pursuer died before the case was heard in the Procedure Roll. His widow, as his executrix, craved to be sisted in his place as pursuer in order that she might insist in the action for the purpose of recovering as expenses the sums which he had expended in the litigation. *Held* that the executrix was entitled to be sisted, reserving all questions as to her right to insist in the cause. Martin's Executrix v. M'Ghee, p. 628.

Caution for expenses—Bankruptcy—Petition by bankrupt for discharge.

4. As a general rule a bankrupt applying to the Court for his discharge will not be ordained to find caution for the expenses of the application. *Circumstances* in which the Court, applying this rule, *allowed* a bankrupt without finding caution to answer objections lodged by his trustee to his application for discharge. Scott v. Scott's Trustee, p. 704.

Reclaiming note—Competency of reclaiming note prior to closing of record.

5. In an action of declarator of marriage the pursuer sought, before the record had been closed, to amend the summons by adding an alternative conclusion of damages for breach of promise and seduction. The Lord Ordinary refused the amendment, continued the adjustment of the record, and granted leave to reclaim. The pursuer having reclaimed, *held* that the reclaiming note was competent although the record had not been closed. Spence v. Spence, p. 887.

Reclaiming note—Company—Winding-up under supervision—Failure to present reclaiming note within fourteen days of order reclaimed against—Companies (Consolidation) Act, 1908, *sec.* 181 (3).

6. A reclaiming note against an order pronounced by a Lord Ordinary, to whom a winding-up had been remitted, *held* to be incompetent under the Companies (Consolidation) Act, 1908, sec. 181 (3), in respect that it had not been presented until after the expiry of fourteen days. *Observed* (*per* the Lord President) that the reclaimer might find a

PROCESS—*Continued.*

remedy in the Court of Session Act, 1808 (48 Geo. III. cap. 151), section 16. MacArthur v. Mackay, p. 547.

Proof—Witnesses—Order to furnish pursuer with names of defenders' employees.

7. In an action of damages for personal injuries, brought against a tramway company, the pursuer averred that she was injured through the fault either of the conductor or of the driver of a car belonging to the defenders. After the record was closed, but before issues were adjusted, the pursuer moved for an order on the defenders to supply her with the names of the driver and conductor in question. The Lord Ordinary having refused the motion, *held* that the motion ought to have been granted. Clarke v. Edinburgh and District Tramways Co., Limited, p. 775.

Proof or jury trial.

8. In an action of damages for personal injuries against a railway company the pursuer claimed damages in respect of the nervous shock which he had sustained from fright caused by the flying open of the door of the railway carriage in which he was travelling owing to its having been insecurely fastened by the company's servants. *Held* that, owing to the delicacy of the questions of fact and law involved, the inquiry should be by proof and not by jury trial. Fowler v. North British Railway Co., p. 866.

Proof or jury trial—Sheriff Courts (Scotland) Act, 1907, *sec.* 30.

9. A father brought an action in the Sheriff Court against the proprietor of a tenement for damages for injuries sustained by his pupil daughter who, while on her way to visit a companion who lived in the tenement, had fallen from the common stair. He averred that the defenders were in breach of their duty as proprietors in failing to provide an access to the houses on the stair which should be safe for the inmates and their visitors, including children. *Held in the circumstances* that the case was unsuitable for jury trial; and cause remitted back to the Sheriff for proof. Grant v. John Fleming & Co., Limited, p. 228.

Jury Trial—Refusal of bill of exceptions—Motion to apply verdict made before appealing days expired—Jury Trials (Scotland) Act, 1815, *sec.* 7.

10. The Court, having pronounced an interlocutor refusing a bill of exceptions, *granted* a motion to apply the verdict, although the fourteen days had not yet expired within which their interlocutor might be appealed to the House of Lords. M'Ilwaine v. Stewart, p. 934.

Jury trial—Verdict contrary to evidence—Essential part of pursuer's case contradicted by defenders' witnesses—Defenders' witnesses not cross-examined for pursuer on this point—Jury Trials (Scotland) Act, 1815, *sec.* 6.

11. In an action of damages for personal injuries caused to a child who had been run over by a motor car the pursuer averred fault against the driver of the car in respect that, at the moment of the accident, he was talking to another man who was sitting beside him on the front seat of the car, and failed to keep a look-out. The pursuer's evidence on the question of fault was that of three witnesses whose evidence testified to the truth of this averment. This evidence was directly contradicted by all the witnesses for the defenders who spoke to this point. They stated that the driver was alone on the front seat of the car, and none of them were cross-examined for the pursuer with regard to this statement. The jury having returned a verdict for the pursuer, *circumstances* in which *held* that the pursuer, by failing to cross-examine the defenders' witnesses on this essential point, had in substance admitted that the evidence of his three witnesses had been discredited, and that he had accordingly failed to prove the cardinal fact in his case; and new trial *granted*, *per* the Lord President and Lord Johnston, on the ground that

PROCESS—*Continued.*

the verdict was contrary to evidence, *per* Lord Skerrington on the ground that this course was "essential to the justice of the case," as provided by sec. 6 of the Jury Trials (Scotland) Act, 1815. Keenan v. Scottish Wholesale Co-operative Society, Limited, p. 959.

Appeal—Competency—Printing of record—Failure to print amendments —C. A. S., 1913, *D. iii.* 1.

12. In an appeal from the Sheriff Court the print of the record, which had been duly printed and boxed to the Court within fourteen days, did not give effect to certain adjustments which had been put upon the open record in the Sheriff Court. *Held* that there had been no failure to print and box in the sense of the C. A. S., 1913, D. iii. 1, and appellant *allowed* to box corrected prints. Newton v. Methven, p. 753.

Appeal—Competency—Final judgment—Process of competition—Sheriff Courts (Scotland) Act, 1907, *secs.* 3 (*h*), *and* 28 (1), *as amended by Sheriff Courts (Scotland) Act*, 1913—*Court of Session Act*, 1868, *sec.* 53.

13. In determining the question whether an interlocutor pronounced in the Sheriff Court is a "final judgment," and as such appealable to the Court of Session under section 28 of the Sheriff Courts (Scotland) Act, 1907, as amended by the Sheriff Courts (Scotland) Act, 1913, regard must be had not only to section 3 (*h*) of the Act of 1907, which contains a definition of final judgment, but also to the terms of section 53 of the Court of Session Act, 1868, and accordingly the words of the latter section "or of the competition between the parties in a process of competition" must be read into the definition contained in the Act of 1907. Glasgow Corporation v. General Accident Fire and Life Assurance Corporation, Limited, p. 835.

Appeal—Competency—Master and Servant—Action of damages by father of deceased workman against son's employers—Workmen's Compensation Act, 1906, *secs.* 13 *and* 14.

14. By section 14 of the Workmen's Compensation Act, 1906, it is provided that an action of damages at the instance of an injured "workman" cannot be removed to the Court of Session or appealed to that Court except on a question of law. *Held* that this limitation of appeal was also made applicable by section 13 of the Act to actions at the instance of the persons specified in the latter section; and accordingly that an appeal (not on a question of law) in an action of damages for the death of a workman, brought by his father against the employers at common law or under the Employers Liability Act, 1880, was incompetent. Cook v. Bonnybridge Silica and Fireclay Co., Limited, p. 740.

Workmen's Compensation Act, 1906—*Appeal by Stated Case—Remit to arbitrator for further information.*

15. Observations *on the principles which should guide the Court in remitting stated cases back to the arbitrator for further information under the Workmen's Compensation Act*, 1906. Lendrum v. Ayr Steam Shipping Co., Limited, (H. L.) p. 91.

See *Appeal to House of Lords*, 3.

PROMISSORY-NOTE. See *Right in Security*, 3.

PROOF. *Admissibility of extrinsic evidence—Ambiguity in designation of beneficiary.*

1. *Where there is an ambiguity as to the identity of the party to whom a testator has bequeathed a legacy, the fact that the description of one only of the claimants corresponds exactly with the description of the legatee given by the testator does not* per se *conclude the question in favour of that claimant, and does not preclude inquiry into the question whether another claimant, whose description does not exactly correspond, may not be the legatee intended by the testator; but there is a strong presumption in favour of the party exactly described which cannot be*

PROOF—*Continued.*

overcome except by cogent positive evidence. Nasmyth's Trustees v. National Society for the Prevention of Cruelty to Children, (H. L.) p. 76.

Sufficiency of evidence—Motor car—Charge of exceeding speed limit—Motor Car Act, 1903, *sec.* 9.

2. The driver of a motor car was convicted of driving his car over a measured distance at a speed exceeding the speed limit, the only evidence being that of two constables, who had been stationed at either end of the measured distance, and who deponed, the one to the time at which the car entered, the other to the time at which it passed out of, the measured distance. *Held* that the evidence was sufficient. Scott v. Jameson, (J.) p. 187.

Sufficiency of evidence—National Insurance—Failure to pay contributions.

3. *Observations* on the evidence required to prove a charge of failure to pay contributions under the National Insurance Act, 1911, and, in particular, upon the question whether the evidence of one servant that the employer had not stamped a card for him was evidence supporting a similar charge made against the accused with regard to another servant. Kinnear v. Brander, (J.) p. 141.

See *Justiciary Cases*, 2.

PROPERTY. *Real burden—Servitude—Declaration in disposition that land should not be sold except under conditions as to building—Construction—Ground described as "occupied as" a "lawn"—Identification of ground.*

1. The proprietor of lands, after feuing a portion thereof to A, disponed the remainder, with the mansion-house thereon, to B. The disposition to B contained a declaration that "it shall not be lawful to" B "or his foresaids to sell or feu any part of the ground occupied as the lawn between the ground feued" to A and the mansion-house "excepting under the express conditions and declarations that there shall be no more than one dwelling-house with suitable offices on any two acres of the ground so sold or feued," and that each of the houses should be of, and should be maintained at, a certain value, "which restriction shall be a real burden affecting the said lands, and shall operate as a servitude in favour of A and his foresaids in all time coming." In an action to enforce this restriction, brought by a singular successor of A against a singular successor of B who proposed to build on his lands, *held* that the terms of the declaration above quoted were not habile to constitute a real burden or servitude on the lands, but merely imposed a prohibition on B and his heirs—not against building on the lands—but against the sale or feuing of them except under the specified conditions; and defender *assoilzied*. *Held* further (*per* Lord Guthrie) that the restriction could not in any event be enforced, in respect that the description of the ground alleged to be affected by the restriction was not sufficiently definite. Anderson v. Dickie, p. 706.

Building restriction—Buildings to be "continued permanently as dwelling-houses"—Restriction on construction or on use.

2. The proprietor of one of the houses in a row of dwelling-houses—founding on restrictions in the titles to the steadings of ground on which the row was built, which declared that the proprietors should only be entitled to erect self-contained lodgings or dwelling-houses, and that no part of such dwelling-houses should be converted into shops or trading places—sought to interdict the Postmaster-General, who had acquired a lease of the adjoining house, from using it as an office for the discharge of certain clerical work by the staff of the post office. *Held*, on a construction of the titles, that the restrictions applied to structure only and not to use; and, as the Postmaster-General proposed to make no

PROPERTY—*Continued.*
structural alterations, action *dismissed.* Mathieson v. Allan's Trustees, p. 464.
March fence—Cost of erecting march fence between Highland sheep farms—Rights of proprietors—Act 1661, *cap.* 41.
3. The owner of an estate in the highlands of Inverness-shire, founding on the Act 1661, cap. 41, brought an action against the owner of the neighbouring estate to compel him to concur in erecting, and to pay half the cost of, a sheep fence between the estates, which marched with each other for five miles. *Held* that the pursuer was entitled under the Act to the decree craved, in respect that his demand did not involve such a want of community of benefit or such a grave disproportion of benefit to expense as amounted to oppression of or injustice to the defender. Secker v. Cameron, p. 354.
See *Reparation,* 10-12.

PUBLIC AUTHORITIES PROTECTION. See *Expenses,* 6.

PUBLIC HEALTH. *Food and Drugs—Sale of milk deficient in fat—Sale by servant of accused—Complaint—Specification of modus—Sale of Food and Drugs Act,* 1875, *sec.* 6—*Master and Servant.*
Where, in a prosecution under a complaint charging a dairyman with selling milk which was not genuine, in contravention of sec. 6 of the Sale of Food and Drugs Act, 1875, it appeared at the proof that the sale was effected, not by the accused, but by his servant, *held* that the complaint was lacking in specification, in respect that it did not set forth that the sale was effected by the hand of a servant; and complaint *dismissed.* Wilson v. Fleming, (J.) p. 20.

PUBLIC RECORDS. *Writ—Registration—Keeper of General Register of Sasines—Discretion to refuse to register writ—Procedure where exercise of discretion challenged.*
1. The Keeper of the General Register of Sasines has a discretion to refuse to register any deed presented to him. Any question which may arise with regard to an exercise of this discretion should be referred, in the first instance, either by the Keeper or by the party presenting the deed, to the Deputy Clerk Register, and by him, in cases of doubt or difficulty, to the Court. *Observed* that the practice recently followed by the Keeper of referring such questions to the Secretary for Scotland, with a request that Crown counsel should be consulted, was incorrect, but that the Deputy Clerk Register might, if he so pleased, consult Crown counsel on such a question. Macdonald v. Keeper of the General Register of Sasines, p. 854.
Writ—Registration—General Register of Sasines—Deed in form of general testamentary settlement—Insufficient description of subjects—Refusal to register.
2. *Circumstances* in which the Court *refused* to ordain the Keeper of the General Register of Sasines to record in that Register a deed in the form of a general testamentary settlement, the granter of which was still alive. *Observations* (*per* the Lord President) on the circumstances in which the Keeper might refuse to record a deed in which the subjects to which it applied were insufficiently described. Macdonald v. Keeper of the General Register of Sasines, p. 854.

RAILWAY. *Lands purchased by railway under compulsory powers—Statutory title.*
Observed that when a railway company acquires lands compulsorily the only title it can make up to them is a statutory title. Heriot's Trust v. Caledonian Railway Company, p. 601.
See *Compulsory Powers,* 3—*Reparation,* 14-16.

RATES AND ASSESSMENTS. See *Local Government.*

RECOMPENSE. *Quantum meruit—Construction of railway—Claim, in excess of contract price, for value of work done.*

Circumstances in which a firm of contractors, who had constructed a line of railway on the faith of representations by the railway company as to the nature of the ground which were inaccurate although made in good faith, were *held* entitled to payment, on the footing of *quantum meruit*, for the extra cost in which they had been involved through the error into which they had been led. Boyd & Forrest v. Glasgow and South-Western Railway Co., p. 472.

REPARATION. *Illegal apprehension—Arrest by constables without warrant of person "reasonably suspected of" crime—Privilege—Glasgow Police Act*, 1866, *sec.* 88.

1. *In an action of damages for wrongous arrest brought against two Glasgow constables who had apprehended the pursuer without a warrant, the defenders maintained that, as they had* bona fide *suspected the pursuer of a crime and as, in their judgment, their grounds of suspicion were reasonable, they were protected by section* 88 *of the Glasgow Police Act*, 1866, *which empowers constables to arrest without warrant persons "reasonably suspected of having committed" a penal offence and that the action should be dismissed; or, otherwise, that if a trial were allowed, malice must be put in issue, in respect that the pursuer was bound to prove that the defenders had been actuated by ill will towards him.* Held (1) *that it was a question for a jury whether the grounds of the defenders' suspicion were or were not reasonable;* (2) *that the pursuer was not bound to prove ill will on the part of the defenders, and accordingly that malice need not be put in issue, and an issue whether the defenders "wrongfully and illegally, and without reasonable grounds of suspicion apprehended the pursuer"* approved. Shields v. Shearer, (H. L.) p. 33.

Wrongous use of interdict—Interdict not resulting in invasion of any legal right.

2. A tenant obtained interim interdict against a firm of timber merchants from erecting a sawmill on a site which he alleged to be included in subjects let to him. The interdict was subsequently recalled on the ground, *inter alia*, that the tenant was not in possession of the site, which, by decree of the Land Court, had been declared to form part of a statutory small tenant's holding. The timber merchants thereupon brought an action of damages for wrongful use of interdict against the tenant in which, while averring that the tenant had no right to exclude them from the site, they did not aver any legal right in themselves to enter on the lands or to erect a sawmill thereon. The Court *dismissed* the action as irrelevant, in respect that the pursuers, as they were unable to make such an averment, had failed to disclose the invasion of any legal right resulting in a civil wrong for which they could recover damages. John Macdonald, Limited, v. Lord Blythswood, p. 930.

Illegal use of ship—Smuggling—Steward supplied with articles to be smuggled—Fine imposed on ship—Liability of supplier of articles to repay fine.

3. A British ship, trading between Grangemouth and South America, was fined, on arriving at Buenos Ayres, by the Customs authorities in respect that certain dutiable articles on board had not, as required by Argentine law, been declared in the ship's manifest and had been found concealed in the steward's cabin. These articles had, unknown to the shipowners but with the connivance of the captain, been supplied to the steward by a firm of merchants at Grangemouth in the knowledge that they were to be carried on board the ship and traded

REPARATION—*Continued.*

with by him, and that, for the purpose of successful trading, they would have to be smuggled into the port of destination. They were supplied on credit, and were to be paid for by the steward out of the proceeds of the trading. *Held* that the merchants, having been accessory to the wrongful and illegal use of the vessel for carrying goods on a smuggling adventure, were liable for the loss and damage thereby occasioned to the owners, and were bound accordingly to repay the fine. Cairns v. Harry Walker, Limited, p. 51.

Slander—Falsity of slanderous statements admitted in letter of apology—Action of slander for subsequent repetition of same statements—Plea of veritas—Competency.

4. *Held* that the defender in an action of damages for slander was not barred from pleading *veritas* by having, on a former occasion, written a letter of apology, admitting that similar statements then made by her were false, and undertaking not to repeat them. R. v. S., p. 193.

Slander—Innuendo.

5. A ratepayer having made certain charges against the matron of a hospital, an inquiry was held in which evidence was given by the matron and by other members of the hospital staff. The commissioner who conducted the inquiry reported adversely on the credibility of certain members of the staff, but stated his belief in the truthfulness of the matron, and exonerated her from the charges made against her. On this report being sent to the ratepayer, he acknowledged receipt of it in a letter in which he said: "I have but a languid interest in the question of which member of the staff lied the most." In an action of damages for defamation brought by the matron against the ratepayer, the pursuer sought to innuendo these words as representing that she had lied in giving evidence at the inquiry. *Held* that the words would not bear this innuendo; and an issue *disallowed*. Couper v. Lord Balfour of Burleigh, p. 139.

Slander—Innuendo—Allegation of professional incapacity—"Quack."

6. In an action of damages for slander at the instance of C., the superintendent of a district lunatic asylum (who was admittedly not a qualified medical practitioner), complaining that the defender had said of him, "What does that mannie C. know about treating lunatics? He is just a quack. We will sack him yet," *held* that the pursuer was entitled to an issue with the innuendo that these words represented "that he was unfit for his duties as superintendent, that he did not know his work, was not properly qualified for the work in which he was engaged, and ought to be dismissed from his post." Chisholm v. Grant, p. 239.

Slander—Privilege—Sufficiency of averments of malice—Report by ratepayer to local authority as to management of a public hospital.

7. The matron of a hospital belonging to certain local authorities brought an action of damages against a ratepayer for defamatory statements regarding her conduct, contained in letters addressed by him to the County Council and to the Local Government Board, reporting information which he alleged he had received with regard to the management of the hospital, and demanding an inquiry. The pursuer averred that the defamatory statements were deliberately invented by the defender, although he had information in his possession which disproved them; that they were made maliciously and with the intention of injuring her; that the defender had never received the alleged information; and that the letter to the Local Government Board was accompanied by a private letter from the defender to a member of the Board, designed to influence him against the pursuer and that the defender declined to produce this letter. *Held* that, while the defender's letters were privileged, facts and circumstances sufficient to infer malice were

REPARATION—*Continued.*

averred; and issues *allowed.* Couper v. Lord Balfour of Burleigh, p. 139.

Slander—Accusation of dishonesty—Privilege—Malice—Sufficiency of averments of malice—Master and Servant.

8. A cashier, who had been dismissed from his employment, brought an action of damages for slander against his employer, for having, on two occasions (which were admittedly privileged), accused him of misappropriating money, the proposed issue being whether the defender had made these accusations "falsely, calumniously, and maliciously." The pursuer averred that the defender, with whom he had previously been on friendly terms, had conceived an *animus* against him, and had, by a series of petty incidents which he detailed, endeavoured to annoy him and to induce him voluntarily to leave the defender's service; and that having failed in this purpose the defender had taken steps to dismiss him by making the false accusations complained of. He further averred that these accusations had been made and repeated by the defender in the knowledge that they were false, without inquiry and without listening to the explanation of his innocence which the pursuer had offered, and would have been able, to give. *Held* that the pursuer had averred facts and circumstances relevant to instruct malice on the part of the defender. The general rule laid down by Lord President Kinross in *Macdonald* v. *M'Coll*, (1901) 3 F. 1082, and followed in subsequent decisions, as to the necessity in cases of privilege of averring facts and circumstances from which malice can be inferred, *doubted per* Lord Skerrington; and *opinion* that in certain cases of privilege a general averment of malice is sufficient. Suzor v. M'Lachlan, p. 306.

Slander—Accusation of dishonesty—Privilege—Malice—Sufficiency of averments of malice.

9. A cashier, who had been dismissed from his employment, brought an action of damages for slander against the manager of the business. The pursuer averred that, having discovered shortages in the cash, he reported these to his employer; that the same afternoon, in the presence of his employer, the defender charged him with having taken the money, and the same evening dismissed him from the employment. Two days later the defender called on him at his house and, in the presence of his wife, said to him, "I have come to ask for explanations; you must have taken the money." He further averred that the defender, who had formerly been very friendly, had for some months entirely changed in his demeanour; that he had become jealous of the pursuer and desired to undermine his influence with his employer and to find an excuse for getting him dismissed; that he made these accusations, which inquiry would have shown to be baseless, without making any investigation and with the object of gratifying the *animus* he had conceived against the pursuer. *Held* that, on the pursuer's averments, the occasion when the slander was uttered in the pursuer's house was not privileged; and issue without malice *allowed.* *Held* further that, if it should appear at the trial that the occasion was privileged and consequently that malice must be established, the pursuer's record contained relevant averments of malice. Suzor v. Buckingham, p. 299.

Negligence—Property—Defective condition of premises—Lighting of common stair—Glasgow Police Act, 1866, *sec.* 361.

10. In an action of damages for personal injuries, brought against the proprietor of a tenement in Glasgow, the pursuer averred that she received the injuries through falling on the common stair while on her way after dark to visit the tenant of one of the houses in the tenement. The fault on the part of the defender which she alleged was that the stair was not sufficiently lighted. *Held* that, as the duty of the

REPARATION—*Continued.*

defender under the Glasgow Police Act, 1866, sec. 361, consisted in lighting the stair to the satisfaction of the inspector of lighting, and as it was not averred that he had failed in that duty, the action was irrelevant. *Observed* (*per* Lord Salvesen) that there is no duty at common law on the part of the proprietor of a tenement to light a common stair. Gaunt v. M'Intyre, p. 43.

Negligence—Property—Outside stair giving access to premises let—Visitor injured through defect in stair—Liability of landlord—Possession and control.

11. The only access to premises let to a tenant was by an outside stair and gangway which formed the access to these premises alone. All the repairs to the stair and gangway were executed by the landlord and not by the tenant. A visitor to the premises having been injured through the defective condition of the stair and gangway brought an action of damages against the landlord. *Held* that the landlord was not liable in respect that, in the circumstances, he could not be held to have retained possession and control of the stair and gangway. M'Ilwaine v. Stewart, p. 934.

Negligence—Property—Common stair—Duty of proprietor to provide safe access—Child.

12. A father brought an action in the Sheriff Court against the proprietor of a tenement for damages for injuries sustained by his pupil daughter, who, he averred, while on her way to visit a companion who lived in the tenement, had fallen from the common stair, either through a gap in or over the balustrade, which was not only defective but also of insufficient height for the protection of children. *Held* that the pursuer was entitled to have an inquiry as to whether the defenders had discharged their duty to use all reasonable care to provide a safe access. *Observations* on the question whether the duty of one having the control of premises is the same towards children as towards adults. Grant v. John Fleming & Co., Limited, p. 228.

Negligence—Relevancy of alternative and inconsistent averments of fact.

13. In an action of damages for personal injuries against a tramway company the pursuer averred that she was injured by being thrown off a tramway car, owing to the car starting violently forward as she was about to alight at one of the car's ordinary stopping-places. She averred fault on the part of the conductor of the car, in respect that he had failed to observe that she was about to alight and had failed to give a signal to the driver to stop the car; or, alternatively, fault on the part of the driver, in respect that he had disregarded a signal to stop given him by the conductor. *Held* that, although these alternative averments of facts were contradictory and mutually exclusive of each other, yet, as either one or the other would, if proved, infer liability on the part of the defenders, the pursuer had stated a relevant case. Clarke v. Edinburgh and District Tramways Co., Limited, p. 775.

Negligence—Liability to licensee—Railway—Persons other than passengers permitted to be in railway station—Negligence of railway servant.

14. A person who goes upon premises as a mere licensee is not there at his own risk if he suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licensee has entered the premises. So where a person, who had been permitted to go upon a railway platform to see friends off by a train, was injured through the fault of the station employees in starting a train without closing the doors, the railway company were *held* liable in damages. Tough v. North British Railway Co., p. 291.

Negligence—Railway—Nervous shock resulting from fright—Door of railway carriage flying open.

15. In an action of damages for personal injuries against a railway com-

REPARATION—*Continued.*

pany the pursuer averred that, while travelling in a carriage on the defenders' railway, he leaned across to deposit tobacco ashes in an ash-holder placed at the opposite side of the carriage door, when the door suddenly flew open and he with great difficulty saved himself from being thrown out; that the speed at which the train was travelling caused the door to swing backwards and forwards violently; that the glass in the window was broken into fragments, and the door itself damaged; and that he endeavoured to shut the door, but was unable to do so. He further averred that the shock arising from the danger in which he was placed caused severe injury to his nervous system. He also averred fault on the part of the defenders' servants for the insecure fastening of the door. *Held* that the pursuer had started a relevant case for inquiry. Fowler v. North British Railway Co., p. 866.

Negligence—Railway—Passenger on railway platform struck by open door of train in motion—Contributory negligence.

16. In an action of damages for personal injuries, brought against a railway company, it was proved that the pursuer, while walking along a platform, was struck by an open door of a train which entered the station from behind her. The door, which had no handle on the inside, was on the side of the train which was next the platform only at the station of departure and at the station in question; at the ten intermediate stations the opposite side of the train had been next the platform. There was evidence to show that the door was swinging open and that the compartment was empty when the train entered the station in question, but it was not proved how the door came to be open, or whether the compartment was occupied in the course of the train's journey. *Held* (1) that there was evidence on which a jury might infer negligence on the part of the defenders; and (2) that in the circumstances the pursuer had not been guilty of contributory negligence. Burns v. North British Railway Co., p. 754.

Negligence—Contributory negligence—Motor car—Collision at night—Pursuer on wrong side of road—Pursuer misled by defender's failure to show proper light.

17. A motor car was travelling at night on its proper, *i.e.*, the near or left, side of a country road, but, in contravention of the Motor Cars Order, 1904, without having a light burning upon the off or right side of the car. An approaching motor bicyclist, seeing only one light, mistook the car for a bicycle; and, imagining that the dark mass of the car was a cart travelling in the same direction as himself, swerved into the midde of the road to enable him to pass the cart when he overtook it. In consequence of this manœuvre he collided with the motor car and was injured. When the collision occurred he was about three feet on his wrong side of the centre of the road. In an action of damages at the instance of the motor bicyclist against the driver of the car, *held* that the pursuer had not been guilty of contributory negligence, in respect that the error which he had committed in going over to the wrong side of the road had been induced by the fault of the defender in not having his offside light burning; and accordingly that the defender was liable in damages. Pressley v. Burnett, p. 874.

Negligence—Unskilful treatment by doctor—Ground of action—Delict or breach of contract—Title to sue—Patient or employer of doctor.

18. *Held* that the ground of action in a claim of damages against a medical man for unskilful treatment is breach of his duty to his patient and not breach of his contract with his employer; and, accordingly, that a married woman had a title to sue such an action, although the medical man had been employed to attend to her by her husband and not by herself. Edgar v. Lamont, p. 277.

REVENUE. *Estate-duty—Succession-duty—Property reverting to disponer—"Disposition"—Husband's liferent in marriage-contract fund, forfeited to wife in consequence of decree of divorce, reverting to him on her death—Finance Act*, 1894, *secs.* 1 *and* 2 (1) (*b*)—*Finance Act*, 1896, *sec.* 15 (1)—*Succession-Duty Act*, 1853, *secs.* 2 *and* 12.

1. In consequence of the dissolution of a marriage by decree of divorce on the ground of the husband's adultery, the income of a fund—which, under the marriage-contract, was settled by the husband's father on him, and after his death on his wife, for their liferent alimentary uses respectively—was paid to the wife until her death, after which event it again became payable to the husband. *Held* that estate and succession-duties were payable on the property passing to the husband on the wife's death, the exemptions created by sec. 15 (1) of the Finance Act, 1896, in the case of estate-duty where property reverts to the "disponer," and by sec. 12 of the Succession-Duty Act, 1853, in the case of succession-duty where a person takes a succession under a "disposition" granted by himself, being inapplicable, in respect that the wife had acquired the income as a legal consequence of the decree of divorce and not by a "disposition" from her husband. Lord Advocate v. Montgomery's Trustees, p. 414.

Excise—Passenger vessel liquor licence—Restrictive endorsement—Contravention—Penalty—Statutory Offences—Passage Vessel Licences Act, 1828, *sec.* 3—*Passenger Vessels Licences Amendment* (*Scotland*) *Act*, 1882, *secs.* 1 *and* 2—*Finance* (1909-10) *Act*, 1910, *secs.* 49 (1), 50 (3), 52, 92, 96 (1) *First Schedule, D.*

2. *Held* (1) that the Commissioners of Customs and Excise in issuing a licence for the sale of intoxicating liquors on a "passenger vessel" under the Finance (1909-10) Act, 1910, sec. 49 (1), and First Schedule, D, are entitled to endorse upon the licence the condition against the sale of liquor on Sunday authorised by the Passenger Vessels Licences Amendment (Scotland) Act, 1882, sec. 1, with regard to vessels plying in Scotland; (2) that the penalty for an infringement of such a condition is that enacted by sec. 50 (3) of the Finance Act, viz., £50, and not that incorporated into the Act of 1882 from sec. 3 of the Passage Vessel Licences Act, 1828, viz., £10. Rhind v. Wimpress, (J.) p. 31.

Income-Tax—Method of assessment—Trade commenced in year preceding year of assessment—First balance-sheet struck during year of assessment—Competency of considering profits earned during year of assessment—Income-Tax Act, 1842, *sec.* 100, *Schedule D, First Case, Rule First.*

3. A company commenced business on 13th September 1911, and its first balance-sheet was struck at 20th November 1912, thus covering a period of 434 days' trading. The Inland Revenue assessed the company for income-tax for the year 5th April 1912 to 5th April 1913 on the basis of the profits disclosed for this period of 434 days, by taking $\frac{365}{434}$ of that sum as representing one year's profits. The company contended that it was incompetent to take into consideration any profits earned after the commencement of the year of assessment, and accordingly that the year's profits, on which they fell to be assessed, must be estimated on the basis of the profits actually earned by them during the period 13th September 1911 to 5th April 1912. *Held* that the method adopted by the Inland Revenue was right. Steamship "Glensloy" Co., Limited, v. Inland Revenue, p. 549.

Income-tax—Trading Profits—Ascertainment—Purchase of going concern—Entries in purchaser's books—Entries made for purely bookkeeping purposes—Income-Tax Act, 1835, *section* 2, *Schedule D.*

4. A limited company was formed to take over as a going concern the manufacturing business then being carried on by a company in liquida-

REVENUE—*Continued.*

tion. *Circumstances* in which *held* that the Inland Revenue, in ascertaining for the purposes of income-tax the profits of the new company for its first year, was not entitled to take as conclusive evidence of the value of the stock taken over by the company the figure at which, for book-keeping purposes, it had been entered in the company's books in allocating the purchase price between buildings, plant, and stock, but that the Inland Revenue was bound to ascertain the true value and assess for income-tax on that basis. J. & M. Craig (Kilmarnock), Limited, v. Inland Revenue, p. 338.

Income-Tax—Exemption—Literary or scientific institution—Income-Tax Act, 1842, *Schedule (A), Rule No. VI.*

5. The Juridical Society of Edinburgh, which was composed of persons who were, or intended to become, Advocates or Writers to the Signet, maintained a library chiefly of law books, and published from time to time a style book of legal forms. It also held debates on legal questions, attendance at which was optional. *Held* that the Society's premises were not exempt from income-tax under the Income-Tax Act, 1842, Schedule (A), Rule No. VI., which makes an exemption in favour of literary or scientific institutions, in respect that the Society was not such an institution but an association whose main objects were professional. Inland Revenue v. Juridical Society of Edinburgh, p. 731.

RIGHT IN SECURITY. *Contract by party purporting to create ground-annual in favour of self.*

1. *Held* that a contract, entered into by a proprietor of lands as first party and himself as second party, purporting to create a ground-annual in favour of himself, was ineffectual, in respect that a man cannot by any deed constitute a debt by himself to himself. Church of Scotland Endowment Committee v. Provident Association of London, Limited, p. 165.

Real burden — Constitution — Assignation of invalid ground-annual—Disposition in security—Absence of express personal obligation.

2. By a deed in the form of a contract of ground-annual (containing a personal obligation) the owner of land purported to dispone it to himself in consideration of the payment by himself to himself of a ground-annual, which was declared to be a real burden on the land and in security of which he reconveyed the land to himself. By subsequent recorded deed he disponed for value to third parties the ground-annual and security-subjects specified in the prior deed. The later deed contained no personal obligation. In an action by the disponees under the later deed against the proprietors of the land, who were the singular successors of the original owner, the pursuers, while admitting that no ground-annual was created by the prior deed, maintained (1) that the later deed, though intended to transfer a ground-annual which in fact did not exist, was sufficient by its terms to constitute a ground-annual as a real burden in their favour over the land in question; or otherwise (2) that, by the later deed, they were validly infeft in the land in real security of an annual payment by the granter and his heirs, which, the deed being onerous he must be held to have warranted, and which was also binding on him in respect that he had impliedly adopted in the later deed the personal obligation in the prior deed. *Held* that the pursuers were entitled to succeed on both of the grounds stated. Church of Scotland Endowment Committee v. Provident Association of London, Limited, p. 165.

Promissory-note—Promissory-note by several co-obligants—Subsequent disposition in security by one co-obligant—Sale of security subjects by creditor—Title of another co-obligant to challenge sale—Cautioner.

3. A, B, and C granted a promissory-note for £500 in favour of a firm

RIGHT IN SECURITY—*Continued.*

of money-lenders for the accommodation of A. Five months afterwards A disponed a heritable property to the firm in security of this sum of £500, and also in security of a sum of £1000 contained in a promissory-note previously granted by himself and B. Neither of the notes having been paid, the firm obtained decrees for these two sums, and subsequently assigned the decrees and also the disposition in security to X. Thereafter X sold the security subjects to a company. C having been charged for payment of the £500 sought to suspend the charge, and maintained that, as a cautioner, she had a right to challenge the method in which the security subjects had been dealt with, and that, in any event, the debt had in effect been satisfied. She averred that the subjects which X had sold for £700 were worth £10,000; that X was himself the principal shareholder in the company to which they had been sold; and that he had thus obtained the equivalent of a sum of money far in excess of the amount due under the notes. *Held* that, as C had failed to prove that she was in reality only a cautioner and entitled as such to the equities of a cautioner, and as the security had not been created for her behoof, she had no title to inquire into the question of how X had disposed of the security subjects, and suspension *refused*. Scott v. Davidson, p. 791.

See *Contract*, 2—*Ground-annual*, 1, 3—*Sale*, 2.

RIGHT OF WAY. See *Road.*

ROAD. *Right of way—Extent of right—Right of frontager on public right of way to traverse part thereof as access to his lands.*

The right of the public to use a public right of way is not confined to end-to-end user, but may be exercised over any portion of it. *Held*, consequently, that the proprietor of lands abutting on a public right of way was entitled, as a member of the public, to use a portion of the right of way as an access to his lands. M'Robert v. Reid, p. 633.

SALE. *Time of delivery not specified—Unreasonable delay in delivery—Competency of counter claim of damages for delay in defence to action for price.*

1. In an action for the price of goods sold and delivered under a contract which specified no time for delivery, *held* that it was competent for the defender to plead *ope exceptionis* a claim of damages for failure to deliver within a reasonable time. British Motor Body Co., Limited, v. Thomas Shaw (Dundee), Limited, p. 922.

Sale or security—Sale of Goods Act, 1893, *secs.* 17 *and* 61 (4).

2. A creditor, who was pressing for payment of a debt of £130, obtained from his debtor a receipt for that sum, which bore to be in payment of certain articles of furniture belonging to the debtor and sold to the creditor. A list of these articles signed by the debtor was appended to the receipt. No discharge of his indebtedness was granted to the debtor, no money passed, and the furniture remained in the debtor's house. The creditor subsequently sought to have the articles of furniture excluded from the execution of a poinding of the debtor's effects in which they had been included, on the ground that they were his, the creditor's, property. *Held* that the transaction, though in the form of a contract of sale, was intended by the parties to operate by way of security within the meaning of sec. 61 (4) of the Sale of Goods Act, and, accordingly, that the property had not passed to the creditor, and his claim *dismissed*. Hepburn v. Law, p. 918.

SERVITUDE. See *Property*, 1.

SHERIFF. *Jurisdiction—Declarator of Heirship—Sheriff of Chancery.*

An action was brought in the Court of Session for declarator that the

SHERIFF—*Continued.*
pursuer was heir of a certain deceased person, the only purpose of the action being admittedly to obtain a decree which might be used as evidence before the Privy Council in support of a claim by the pursuer to be placed on the Roll of Baronets. The Court *dismissed* the action as incompetent, in respect that the question was one for the Sheriff of Chancery. Menzies v. M'Kenna, p. 272.
See *Justiciary Cases*, 22—*Process*, 9, 13.

SHIP. *Maritime lien—Form of process for making maritime lien effective.*
It is competent to initiate proceedings for the purpose of making a maritime lien effective by presenting a petition to the Lord Ordinary on the Bills for a warrant to arrest the vessel. *Form* of order pronounced by the Lord Ordinary. M'Connachie, p. 853.
See *Reparation*, 3.

SLANDER. See *Reparation*, 4-9.

SMALL HOLDINGS. See *Lease*, 4-12.

SOLICITOR-GENERAL. See *Justiciary Cases*, 19.

STATUTE. *Construction — Ejusdem generis — Resumption for "building, planting, feuing, or other purposes"—Agricultural Holdings (Scotland) Act*, 1908, *sec.* 18 (1) *and* (5).
Under the Agricultural Holdings (Scotland) Act, 1908, sec. 18, in leases from year to year six months' notice of termination must be given except where there is a stipulation entitling the landlord to resume land for "building, planting, feuing, or other purposes." *Observed* that, as "building, planting, feuing" did not form a genus, no question of *ejusdem generis* construction could arise under the section. Crichton Stuart v. Ogilvie, p. 888.

STATUTES.
Act 1563, *cap.* 68, p. 998.
Act 1567, 1 *Jas. VI. cap.* 14, pp. (J.) 38, 108.
Act 1593, *cap.* 165, p. 1018.
Act 1661, *cap.* 38, p. 1018.
Act 1661, *cap.* 41, p. 354.
Act 1669, *cap.* 17, p. 365.
Act 1681, *cap.* 5, p. 560.
48 *Geo. III. cap.* 151 (*Court of Session Act*, 1808), p. 548.
55 *Geo. III. cap.* 42 (*Jury Trials (Scotland) Act*, 1815), pp. 934, 959.
57 *Geo. III. cap. lvi.* (*Union Canal Act*, 1817), p. (H. L.) 38.
5 *Geo. IV. cap.* 83 (*Vagrancy Act*, 1824), p. (J.) 11.
9 *Geo. IV. cap.* 47 (*Passage Vessel Licences Act*, 1828), p. (J.) 31.
5 *and* 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842), pp. 549, 731.
8 *and* 9 *Vict. cap.* 19 (*Lands Clauses Consolidation (Scotland) Act*, 1845), pp. 601, 727.
11 *and* 12 *Vict. cap.* 36 (*Entail Amendment Act*, 1848), p. 860.
16 *and* 17 *Vict. cap.* 34 (*Income-Tax Act*, 1853), p. 338.
16 *and* 17 *Vict. cap.* 51 (*Succession-Duty Act*, 1853), p. 414.
16 *and* 17 *Vict. cap.* 119 (*Betting Act*, 1853), pp. (J.) 77, 174.
18 *Vict. cap.* 23 (*Intestate Moveable Succession Act*, 1855), p. 62.
19 *and* 20 *Vict. cap.* 60 (*Mercantile Law Amendment Act*, 1856), p. 259.
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy (Scotland) Act*, 1856), p. 131.
20 *and* 21 *Vict. cap.* 85 (*Divorce and Matrimonial Causes Act*, 1857), p. (J.) 47.
21 *and* 22 *Vict. cap.* 76 (*Titles to Land (Scotland) Act*, 1858), p. 608.
24 *and* 25 *Vict. cap.* 84 (*Trustees (Scotland) Act*, 1861), p. 110.
24 *and* 25 *Vict. cap.* 109 (*Salmon-Fisheries Act*, 1861), p. 998 *et seq.*

STATUTES—*Continued.*
24 *and* 25 *Vict. cap.* 114 (*Wills Act*, 1861), pp. 210, 214.
25 *and* 26 *Vict. cap.* 97 (*Salmon-Fisheries* (*Scotland*) *Act*, 1862), pp. 997 *et seq.*, (J.) 92.
25 *and* 26 *Vict. cap.* 113 (*Poor Removal Act*, 1862), p. 241.
26 *and* 27 *Vict. cap.* 118 (*Companies Clauses Act*, 1863), p. 180.
29 *and* 30 *Vict. cap. cclxxiii.* (*Glasgow Police Act*, 1866), pp. 43, (H. L) 33.
29 *and* 30 *Vict. cap. cccxxv.* (*Caledonian Railway Act*, 1866), p. 603.
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act*, 1868), pp. 835, 957.
31 *and* 32 *Vict. cap.* 123 (*Salmon-Fisheries* (*Scotland*) *Act*, 1868), pp. 997 *et seq.*, (J.) 92.
33 *and* 34 *Vict. cap.* 61 (*Life Assurance Companies Act*, 1870), p. 330.
34 *and* 35 *Vict. cap.* 112 (*Prevention of Crimes Act*, 1871), p. (J.) 11.
35 *and* 36 *Vict. cap.* 41 (*Life Assurance Companies Act*, 1872), p. 331.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing* (*Scotland*) *Act*, 1874), pp. 459, 560.
38 *and* 39 *Vict. cap.* 63 (*Sale of Food and Drugs Act*, 1875), p. (J.) 20.
40 *and* 41 *Vict. cap. ccxl.* (*Solway Fisheries Act*, 1877), p. 1002.
45 *and* 46 *Vict. cap.* 66 (*Passenger Vessels Licences Amendment* (*Scotland*) *Act*, 1882), p. (J.) 31.
46 *and* 47 *Vict. cap.* 22 (*Sea Fisheries Act*, 1883), p. (J.) 131.
48 *and* 49 *Vict. cap.* 69 (*Criminal Law Amendment Act*, 1885), p. (J.) 85.
50 *and* 51 *Vict. cap.* 35 (*Criminal Procedure* (*Scotland*) *Act*, 1887), pp. (J.) 12, 15, 69, 107.
53 *and* 54 *Vict. cap.* 39 (*Partnership Act*, 1890), p. 839.
54 *and* 55 *Vict. cap.* 69 (*Penal Servitude Act*, 1891), p. (J.) 11.
55 *and* 56 *Vict. cap.* 55 (*Burgh Police* (*Scotland*) *Act*, 1892), pp. (J.) 126, 165.
55 *and* 56 *Vict. cap. clxv.* (*Glasgow Police* (*Further Powers*) *Act*, 1892), p. (J.) 60.
56 *and* 57 *Vict. cap.* 61 (*Public Authorities Protection Act*, 1893), p. 633.
56 *and* 57 *Vict. cap.* 71 (*Sale of Goods Act*, 1893), p. 918.
57 *and* 58 *Vict. cap.* 30 (*Finance Act*, 1894), p. 414.
59 *and* 60 *Vict. cap.* 28 (*Finance Act*, 1896), p. 414.
61 *and* 62 *Vict. cap.* 21 (*Poor Law* (*Scotland*) *Act*, 1898), p. 241.
61 *and* 62 *Vict. cap.* 60 (*The Inebriates Act*, 1898), p. 249.
1 *Edw. VII. cap.* 22 (*Factory and Workshop Act*, 1901), p. (J.) 150.
3 *Edw. VII. cap.* 33 (*Burgh Police* (*Scotland*) *Act*, 1903), pp. (J.) 126, 169.
3 *Edw. VII. cap.* 36 (*Motor Car Act*, 1903), p. (J.) 187.
6 *Edw. VII. cap.* 58 (*Workmen's Compensation Act*, 1906), pp. 28, 36, 125, 423, 432, 453, 525, 533, 539, 718, 740, 765, 770, 871, 965, (H. L.) 40, 44, 53, 91, 104.
7 *Edw. VII. cap.* 47 (*Deceased Wife's Sister's Marriage Act*, 1907), p. (J.) 44.
7 *Edw. VII. cap.* 51 (*Sheriff Courts* (*Scotland*) *Act*, 1907), pp. 228, 835, 929.
8 *Edw. VII. cap.* 59 (*Prevention of Crime Act*, 1908), pp. (J.) 8, 69.
8 *Edw. VII. cap.* 64 (*Agricultural Holdings* (*Scotland*) *Act*, 1908), pp. 689, 844, 888.
8 *Edw. VII. cap.* 65 (*Summary Jurisdiction* (*Scotland*) *Act*, 1908), pp. (J.) 12, 123.
8 *Edw. VII. cap.* 67 (*Children Act*, 1908), p. (J.) 159.
8 *Edw. VII. cap.* 69 (*Companies* (*Consolidation*) *Act*, 1908), pp. 280, 547, 913, 915.
9 *Edw. VII. cap.* 49 (*Assurance Companies Act*, 1909), p. 320.

STATUTES—*Continued.*
10 *Edw. VII. cap.* 8 (*Finance* (1909-10) *Act*, 1910), p. (J.) 31.
1 *and* 2 *Geo. V. cap.* 49 (*Small Landholders* (*Scotland*) *Act*, 1911), pp. 1, 159, 174, 215, 675, 689, 783.
1 *and* 2 *Geo. V. cap.* 55 (*National Insurance Act*, 1911), pp. 16, 826, 965, (J.) 141.
1 *and* 2 *Geo. V. cap.* 57 (*Burgh Police* (*Scotland*) *Amendment Act*, 1911), pp. 126, 169.
1 *and* 2 *Geo. V. cap. lxxx.* (*Dundee Harbour and Tay Ferries Consolidation Act*, 1911), p. 374.
2 *and* 3 *Geo. V. cap.* 14 (*Protection of Animals* (*Scotland*) *Act*, 1912), p. (J.) 114.
2 *and* 3 *Geo. V. cap.* 28 (*Sheriff Courts* (*Scotland*) *Act*, 1913), pp. 743, 835.
2 *and* 3 *Geo. V. cap. clxix.* (*Kirkcaldy District Water Order Confirmation Act*, 1913), p. 882.

STATUTORY TRUST. See *Harbour—Title and Interest to Sue*, 5.

SUCCESSION. *Legitim—Effect on legitim fund of testamentary provision for widow—Election—Equitable compensation.*
1. A testator, who had married without entering into a marriage-contract, executed a testamentary deed of appointment directing his trustees to pay the income of three-fifths of his estate to his widow for her liferent alimentary use, and to pay the income of the remaining two-fifths to his children equally during her life, and after her death to divide the whole trust fund equally among his children then surviving and the issue of those who might predecease her. These provisions were declared to be in satisfaction of *jus relictæ* and legitim. Owing to the character of the investments the legitim fund extended to one-half of the trust-estate. The children having claimed legitim, *held* (1) that the provision in favour of the widow, being testamentary, had not the effect of postponing payment of any part of the legitim fund; (2) that the trustees were not entitled to encroach annually upon the capital of the half of the estate remaining in their hands to the extent required to pay to the widow a sum equal to the income of three-fifths of the whole estate; (3) that the question whether her representatives could claim to be compensated from capital for her loss of income, due to the claim for legitim, would not arise until her death. M'Leod's Trustees v. Love, p. 983.

Legitim—Collatio inter liberos—Only one child claiming legitim.
2. Where only one of several children claims legitim, the rest having accepted testamentary provisions in lieu thereof, there is no room for *collatio inter liberos*, and the legitim fund consists of one-half or one-third, as the case may be, of the free estate, without imputation of advances made by the parent in his lifetime either to the child claiming or to any of the other children. Coats's Trustees v. Coats, p. 744.

Heritable and moveable—Jus relictæ—Debenture stock—Provision in deed creating stock that the stock should be personal estate.
3. *Held* that a provision in a trust-deed, under which the debenture stock of a company was issued, that the stock "shall be, and shall have the incidents of, personal estate," did not have the effect of making the stock moveable in a question as to *jus relictæ*. Stewart's Trustees v. Battcock, p. 179.

Intestacy—Representation in moveables—Collation—Intestate Moveable Succession Act, 1855, *secs.* 1 *and* 2.
4. *Held* that sec. 1 and sec. 2 of the Intestate Moveable Succession Act, 1855, must be read together, and accordingly that the proviso contained in sec. 1, that no representation should be admitted among collaterals after brothers and sisters descendants, also applied to sec. 2, and

SUCCESSION—*Continued.*

excluded a deceased cousin's son, who was the heir in heritage of an intestate, from collating the heritage and claiming from a surviving cousin, who was the sole next of kin, a share of the moveable succession. *Observed* (*per* the Lord President) "(1) that the first and second sections of this statute are not to be regarded as separate and independent enactments, but are to be read together as comprehending the whole scheme of representation in moveables introduced by the Act of Parliament; (2) that the proviso in the first section is applicable to the whole scheme of representation in moveables introduced by the statute; and (3) that the object of the second section of the statute is to apply, in the case of mixed successions, the rule of representation which is applied by the first section to estates consisting of moveables alone." Colville's Judicial Factor v. Nicoll, p. 62.

Testament—Construction—Proof—Admissibility of extrinsic evidence—Ambiguity in designation of beneficiary.

5. *Where there is an ambiguity as to the identity of the party to whom a testator has bequeathed a legacy, the fact that the description of one only of the claimants corresponds exactly with the description of the legatee given by the testator does not* per se *conclude the question in favour of that claimant, and does not preclude inquiry into the question whether another claimant, whose description does not exactly correspond, may not be the legatee intended by the testator; but there is a strong presumption in favour of the party exactly described which cannot be overcome except by cogent positive evidence. A Scotsman, living in Scotland, left, among other legacies to charities, all of which were Scottish, a legacy to "The National Society for the Prevention of Cruelty to Children." In a competition between "The National Society for the Prevention of Cruelty to Children," a society working in England, and "The Scottish National Society for the Prevention of Cruelty to Children," a society working in Scotland,* held *that the legacy fell to be paid to the English society in the absence of clear proof that the testator intended that it should go to the Scottish society.* Naamyth's Trustees v. National Society for the Prevention of Cruelty to Children. (H. L.) p. 76.

Marriage-contract—Construction—Destination to "next of kin"—Marriage-contract executed in Scotland—Spouses dying domiciled in England—Lex loci contractus or lex domicilii.

6. An antenuptial contract of marriage was entered into between an Englishman residing in Scotland and a Scotswoman. The contract was prepared by a Scottish solicitor, was in Scottish form, and contained a provision that a fund provided by the wife should, after her death failing issue, belong to her "next of kin, excluding her husband." Some years after the marriage the parties moved from Scotland to England, and the wife died domiciled there. *Circumstances* in which *held* that it was the intention of the parties to the contract that the wife's next of kin entitled to succeed to the fund should be ascertained according to the law of Scotland, and accordingly that brothers and sisters of the half blood were excluded. Lister's Judicial Factor v. Syme, p. 204.

Legacy—Appropriation of investments to particular legacies—Competency.

7. Circumstances where *held* that trustees were not entitled to appropriate investments to a legacy, and accordingly that the investments having depreciated, the legatee was entitled to payment in full. Colville's Trustees v. Colville, p. 255.

Accretion—Joint or several bequest—Direction to pay and divide in certain proportions to parties named.

8. A testatrix directed her trustees to pay to each of three daughters, whom she named, the annual produce of one-third of the residue of her

SUCCESSION—*Continued.*

estate, and upon the death of each to pay, divide, and convey the principal of the one-third part of the residue so liferented "in the proportions following," viz., to four sons and another daughter (each of whom she named) "each two shares," and to a granddaughter (also named) "one share," with a provision that, in the event of any of them dying before the period of payment leaving issue, such issue should take their parent's share. There then followed declarations that the interests of the residuary legatees should not vest until the terms of payment, and that the interests "conferred on or accruing" to females should belong to them exclusive of the *jus mariti*. There was no clause of survivorship. One of the liferentrices having died predeceased by certain of the residuary legatees who left no issue, *held* that the testatrix had made a series of separate bequests to individuals, and not a joint bequest, and that consequently the shares of the predeceasers did not accresce to the survivors, but fell into intestacy. Cochrane's Trustees v. Cochrane, p. 403.

Faculties and Powers—Power of appointment—Validity of exercise—Appointment to persons not objects of power—Consent of objects.

9. A father made provision in his marriage-contract for payment after his death of certain sums to the capital value of £3000 to the children of his marriage, reserving to himself power to apportion these sums among his children. He died survived by sons and daughters. In his will he professed to exercise the reserved power by bequeathing a legacy of £25 to each of his sons, and by directing his trustees to hold a sum of £7000 of the residue of his estate for his daughters in liferent and for their issue in fee. In a special case in which the daughters, as parties, consented to and upheld the validity of this appointment, *held* that the appointment, although made to persons who were not objects of the power, had been wholly validated by this consent. Macleod's Trustees v. Macleod's Trustees, p. 10.

Vesting—Fee or liferent—Gift of fee followed by limiting provision—Repugnancy.

10. A testator by his will appointed an executor, and disposed of the residue of his estate by leaving it to two persons "for behoof of" Mrs R. and Mrs B., and enjoined on these two persons "not to put a shilling at risk during the life of the two ladies." There was no further disposal of the residue. *Held* that the residue was vested in fee in the two ladies equally, and that they were entitled to immediate payment thereof. Veitch's Trustees v. Rutherford, p. 182.

Vesting—Conditional institution—Destination to A "and her heirs and successors"—Destination to A "and her heirs and representatives."

11. A testator by his trust-disposition and settlement conveyed his whole estate to trustees, and directed them to pay to his wife, during her lifetime, the whole income thereof, and on her death, *inter alia*, (1) to convey a certain heritable subject to his daughter "and her heirs and successors whomsoever," and (2) to pay to the daughter "and her heirs and representatives" a sum of £300. The daughter survived the testator but predeceased the liferentrix. *Held* that both bequests vested in the daughter *a morte testatoris*. Marshall's Trustee v. Campbell, p. 443.

Vesting subject to defeasance—Gift on several contingencies.

12. Testamentary trustees were directed to hold a legacy in trust for H. in liferent, and for her children or their issue in fee. Failing issue of the liferentrix the fee was destined to her brother R., whom failing to his issue, whom all failing to three members of the family of C. *nominatim* and the survivors and survivor of them, the issue of predeceasers being entitled to the share which their parent would have taken on survivance. A residuary clause in the testator's settlement

SUCCESSION—*Continued.*

was declared to include any legacy that lapsed. All the legatees named to whom the fee was destined survived the testator, but all predeceased the liferentrix without issue. On the death of the liferentrix without issue, the legacy was claimed by the representatives of R. as having vested in him *a morte testatoris* subject to defeasance on contingencies which had not occurred; and it was also claimed by the representatives of the last survivor of the family of C. as having vested in that party on the predecease of R. and the other two members of that family. *Held* that the legacy had lapsed and had fallen into residue. *Observations* (*per* the Lord President) on the doctrine of vesting subject to defeasance. *Opinion* (*per* Lord Mackenzie) that "there is no reason in principle why a fee should not vest subject to divestiture upon one or more than one contingency." Bannatyne's Trustees v. Watson's Trustees, p. 693.

SUCCESSION-DUTY. See *Revenue*, 1.

SUPERIOR AND VASSAL. *Casualty—Compulsory powers—Railway—Lands purchased by railway under compulsory powers—Statutory title—Right of superior to demand casualty—Lands Clauses Consolidation (Scotland) Act*, 1845, *secs.* 80, 107, 111, *and* 126.

1. A railway company acquired certain lands, being the whole lands held by the same owner under the same title, by compulsory powers under the Lands Clauses Consolidation (Scotland) Act, 1845, and obtained a conveyance thereto, substantially in the form prescribed by section 80 and Schedule A of that Act. This conveyance was not registered until after the expiry of sixty days from its date, and the feudal charges upon the lands remained unredeemed. In a petitory action by the superiors for payment of the amount of a casualty of composition, the company pleaded in defence that they had completed a valid statutory title to the lands to the effect of extinguishing the pursuers' rights of superiority therein. The pursuers maintained that they were entitled to the casualty in respect that the defenders, having failed to comply with section 80 of the Act by not registering the conveyance within sixty days, held only on a common law title; or, whether that were so or not, that casualties were due until redeemed. *Held* that the pursuers were entitled to the casualty sued for. *Per* the Lord President and Lord Skerrington on the ground that, although the defenders held the land on a statutory title, the feudal relationship of superior and vassal still remained, including the right of the superiors to recover feudal payments until they were redeemed, although the feudal remedy of resuming possession of the lands was abolished. *Per* Lord Johnston on the ground that the feudal relationship was extinguished, but that a right was reserved to the superiors to recover feudal payments until they were redeemed. Heriot's Trust v. Caledonian Railway Co., p. 601.

Casualty—Action for declarator and payment of casualty—Onus of proving death of last entered vassal—Conveyancing (Scotland) Act, 1874, *sec.* 4 (4).

2. In an action for declarator and payment of a casualty in the form introduced by sec. 4 (4) of the Conveyancing (Scotland) Act, 1874, the onus lies on the pursuer of proving the death of the last entered vassal. Marquess of Bute's Trustees v. Crawford, p. 459.

TESTAMENT. See *Succession—Writ*, 1.

TITLE AND INTEREST TO SUE AND DEFEND. *Assignation by executors before confirmation—Title of assignee to sue.*

1. The trustees and executors of a deceased, acting under his trust-disposition and settlement which contained a general disposition in their

TITLE AND INTEREST TO SUE AND DEFEND—*Continued.*

favour, granted an assignation of certain copyrights forming part of his estate, before they had obtained confirmation. The assignee having brought an action in respect of infringement of the copyrights, *held* that he had a good title to sue, although confirmation would have to be expede by the trustees before he could extract a decree for payment. Mackay v. Mackay, p. 200.

Death of pursuer pendente lite—Right of executor to be sisted—Executor having no interest in the merits—Title and interest of executor to sue merely for expenses.

2. A member of a trades union brought an action to interdict the union from applying funds contributed by its members to political purposes. The pursuer died before the case was heard in the Procedure Roll. His widow, as his executrix, craved to be sisted in his place as pursuer in order that she might insist in the action for the purpose of recovering as expenses the sums which he had expended in the litigation. *Held* that the executrix was entitled to be sisted, reserving all questions as to her right to insist in the cause. After hearing the executrix, *held* further that, as she had no interest in the merits, and as there had been no unreasonable conduct on the part of the defenders, she should not be allowed to proceed with the action merely for the purpose of recovering expenses; and action *dismissed.* Martin's Executrix v. M'Ghee, p. 628.

Donation—Title of donee to sue for recovery of gift sent in error to third party.

3. The pursuer in an action for payment of a sum of money averred that the money was a charitable donation intended for her which had been sent in error to the defender, and that the defender fraudulently refused to part with it though informed by the donor that the gift was not for his benefit but for that of the pursuer. *Held* that the pursuer had relevantly averred a title to sue the defender for recovery of the gift. Costin v. Hume, p. 134.

Unskilful treatment by doctor—Patient or employer of doctor.

4. *Held* that a married woman had a title to sue an action of damages against a medical man for unskilful treatment, although the medical man had been employed to attend to her by her husband and not by herself. Edgar v. Lamont, p. 277.

Statutory trust—Harbour—Ultra vires—Title of private trader and ratepayer to interdict ultra vires action of statutory harbour trustees—Lord Advocate's title to sue.

5. A body of harbour trustees, incorporated by Act of Parliament, were vested in a monopoly of ferry within certain local limits, and had power, in the event of a deficiency in the ferry revenues, to increase the rates payable by shipowners using the harbour. One of the steamers maintained by the trustees for the purposes of the ferry was hired out by them from time to time for excursions beyond the ferry limits. A firm of shipowners, part of whose business consisted in hiring out excursion steamers, and who paid rates to the trustees for the use of their harbour, brought an action of interdict to restrain the trustees from so using the ferry steamers, and proved that their profits from excursion traffic had been reduced by the action of the trustees. *Held* that the firm of shipowners had a title and an interest to sue (*a*) as traders, and (*b*) as ratepayers. *Opinions, per* Lord Salvesen and Lord Guthrie, that the Lord Advocate would have had no title to sue the action. D. & J. Nicol v. Dundee Harbour Trustees, p. 374.

TITLE TO HERITAGE. See *Superior and Vassal*, 1.

TRAMWAY. See *Reparation*, 13.

TRUST. *Constitution.*

1. Dictum *of Lord Westbury in* Fleeming *v.* Howden, (1868) 6 *Macph. (H. L.)* 113, *at p.* 121, *L. R.*, 1 *H. L. Sc.* 372, *at p.* 383, *that "an obligation to do an act with respect to property creates a trust"* discussed. Bank of Scotland v. Liquidators of Hutchison, Main, & Co., Limited, (H. L.) p. 1.

Administration—Appropriation of investments to particular legacies—Competency—Depreciation in value of investments.

2. A body of testamentary trustees, who were directed to pay a legacy of £5000 at a postponed date, invested that sum in trust investments and appropriated them to the legacy. The trust-deed contained no express or implied direction to appropriate investments to particular legacies, nor was such appropriation necessary to facilitate the administration of the trust. When the term of payment of the legacy arrived the investments appropriated thereto had materially depreciated in value, and the legatee refused to accept the depreciated investments and claimed payment of the legacy in full. *Held* that the trustees were not entitled to appropriate investments to the legacy, and accordingly that the legatee was entitled to payment in full. Colville's Trustees v. Colville, p. 255.

Administration—Special powers—Nobile Officium—Authority to trustee to purchase trust subjects at public roup.

3. *Circumstances* in which testamentary trustees were authorised to sell pictures, forming part of the trust-estate, by public roup at prices not less than those put upon them in a valuation, under the express condition that one of the trustees as an individual should be entitled to bid for such pictures as he might desire. Coats's Trustees, p. 723.

Exercise of discretionary powers—Delectus personæ—Assumed trustee.

4. A testatrix by her settlement appointed two persons to be her trustees and executors (the appointment of one of them being afterwards recalled by codicil), and conveyed to them her whole estate. The trust purposes included a direction to divide the residue among such charitable institutions in Glasgow, and in such proportions "as my trustees in their absolute and uncontrolled discretion shall decide." The deed was silent as to the assumption of new trustees. *Held* on a construction of the terms of the settlement that, as there was no indication that the testatrix intended to limit the exercise of the discretionary power with regard to residue to the trustee nominated by her, that power could be validly exercised after his death by a trustee assumed under the statutory power. Shedden's Trustee v. Dykes, p. 106.

See *Company*, 1.

ULTRA VIRES. See *Harbour—Title and Interest to Sue*, 5.

VALUATION ACTS. *Value—Offices in city owned and occupied by statutory body—Method of valuation—Comparison of rentals—Contractor's principle.*

1. *Held* that the proper method of valuing a large building centrally situated in Glasgow, the property of the Parish Council of Glasgow and occupied by them as their offices, was by a comparison with the rentals of premises of a similar character in the neighbourhood; and that the mere fact that the owners and occupiers were a statutory body, in whose place it might not be possible to find a similar tenant, was not a reason for adopting the "contractor's principle" of valuation. *Observed* that the "contractor's principle" could only be legitimately adopted if the method of comparison were wholly inapplicable, or for the purpose of checking a valuation otherwise arrived at. Glasgow Parish Council v. Assessor for Glasgow, p. 651.

Value—Public Sewers—Method of Valuation.

2. *Held* that sewers, owned and occupied by a statutory body of Com-

VALUATION ACTS—*Continued.*

missioners, fell to be entered in the Valuation-roll at the yearly rent which a hypothetical statutory tenant would give for the sewers; and that that rent was represented by a sum made up by taking 3¼ per cent on their total capital cost, and adding thereto, in addition to landlord's rates and the average annual charge which would fall on a landlord for maintenance, such a percentage on the cost of the sewers (as distinct from land and wayleaves) as, paid annually into a sinking fund, would provide for their complete renewal in 100 years. *Held* further (1) that, in calculating the capital cost of sewers constructed by the Commissioners under their statutory powers, lands purchased by the Commissioners were to be taken at the full prices paid, and that there also fell to be included the legal and engineering expenses incurred in acquiring the lands, but not the Parliamentary expenses of obtaining the Act, nor sums paid as compensation for disturbance; (2) that the capital cost of existing sewers acquired and utilised by the Commissioners was to be taken as the additional sum which would have had to be expended on new sewers by the Commissioners had the existing sewers not been available. Water of Leith Sewerage Commissioners v. Assessor for Midlothian, p. 664.

Value — Unlet country mansion-house — Country mansion-house with shootings attached.

3. A large mansion-house, with expensive gardens and policies attached, was situated on an estate which was small in comparison with the size of the house and on which the shootings were not of much value. The house was occupied by the proprietor, and had never been let. It had cost £17,000 to build, and was valued by the Valuation Committee at a yearly rent or value of £190. The proprietor sought to have this valuation reduced to £115, and led evidence to show that, owing to the expense of upkeep and the unattractiveness of the shootings, the house, if lettable at all, could not be let at such a rent as would give a net return of anything approaching £190. The Court *sustained* the valuation of the Committee. *Observations* on the methods of arriving at the valuation of mansion-houses which are unlet; and on the regard to be had to enhanced rents obtainable for country houses which have valuable shootings attached. *Opinion* (*per* Lord Johnston) that, as one of the factors in valuing a mansion-house which has not been let, an assessor is entitled to take the proprietor as a potential tenant, and to consider what rent he would have to pay for a residence appropriate to the size and rental of his estate. Scott v. Assessor for Kincardineshire, p. 655.

WAIVER. See *Company*, 4—*Succession*, 9.

WORKMEN'S COMPENSATION ACT, 1906. *C. A. S.* 1913, *L. xiii.* 17 (*g*)—*Appeal by Stated Case—Remit to arbitrator for further information.*

1. Observations *on the principles which should guide the Court in remitting stated cases back to the arbitrator for further information.* Lendrum v. Ayr Steam Shipping Co., Limited, (H. L.) p. 91.

Sec. 1 (1)—"*Accident*"—*Pneumonia following upon chill—Wreck in mine involving withdrawal of workmen—Chill due to standing in a draught while waiting to be raised to the surface.*

2. *During the working time in a coal mine the miners in No.* 2 *pit, owing to a wreck in the shaft, were ordered to ascend to the surface by the shaft of No.* 1 *pit, which was the downcast shaft for the air current which ventilated the mine. The miners, who had been sweating at their work, were compelled to wait at a mid-landing for an hour and a half, exposed to the down draught of cold air, until the men from the lower levels, who usually ascended by this shaft, had been raised. On reaching the surface one of the miners, who had been exposed to the draught,*

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

complained of chill. On this chill pneumonia supervened, and resulted in the death of the miner. Held *that there was evidence on which an arbitrator might competently find that the deceased's death was due to an "injury by accident."* Brown v. John Watson, Limited, (H. L.) p. 44.

Sec. 1 (1)—"*Accident*"—"*Out of and in the course of the employment*"—*Death due to apoplexy brought on by over exertion.*

3. A gatekeeper employed at a flax mill—whose duty it was, besides attending to the gate, to take charge of the ambulance appliances for use in cases of accidents occurring in the works, to telephone for the doctor in case of necessity, and to attend personally to minor accidents—was informed, while on duty, of a scaffold accident in the works to some slaters, who were not in the employment of the flax spinners but who were engaged in doing work at the mill. The gatekeeper ran to the scene of the accident, and then back to the gate to telephone for a doctor. The exertion of running, and the excitement, brought on an apoplectic shock, from which he died in a few hours. *Held* that the death of the workman was due to an accident, within the meaning of the Act, arising out of and in the course of his employment. Aitken v. Finlayson, Bousfield, & Co., Limited, p. 770.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Breach of rule—Miner doing shot-firer's work contrary to rule.*

4. *The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot-firer, and that, where the firing was done by electricity, it was the duty of the shot-firer himself to connect the charge with the cable, and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter. A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was seriously and permanently disabled by the explosion.* Held *that the accident arose out of and in the course of the miner's employment, in respect that the accident was really due to the premature firing of the charge by the shot-firer, and could not be attributed to the miner having arrogated to himself a duty which he was neither engaged nor entitled to perform.* Smith v. Fife Coal Co., Limited, (H. L.) p. 40.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Carter assisting fellow-carters to work for a third party.*

5. A carter in the service of carting contractors was employed to deliver goods to consignees. It was his duty to sling the goods from his lorry into tackle provided by the consignees, but he had no duty to receive or stow the goods inside the consignees' warehouse. A custom prevailed among the carters, which was not proved to have been known to their employers, that, when several were delivering goods at the same time, one remained outside and slung the goods from all the lorries, while the others entered the warehouse and helped the consignees' servants to receive and stow the goods. For these services each carter, including the one who remained with the lorries, received remuneration from the consignees. When the carter, in accordance with this custom, was slinging goods from several lorries belonging to his employers, he was injured by accident while working on a lorry other than that of which he was in charge. *Held* that the accident did not arise out of and in the course of his employment with the contractors. Carlton v. William Sinclair, Limited, p. 871.

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Dangerous act committed in breach of rules—Railway porter jumping on to footboard of incoming train.*

6. A railway porter, whose duty it was to unload passengers' luggage, was seriously and permanently injured by falling on to the rails while attempting to jump on to the footboard of an incoming train in order to be ready to remove the luggage as quickly as possible when the train stopped. This act was in breach of the company's rules, a copy of which the porter had received but had not read, and he had been reprimanded by the station-master for doing the same thing on previous occasions. *Held* that the accident arose out of and in the course of his employment. M'William v. Great North of Scotland Railway Co., p. 453.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Driver of traction-engine falling from engine while drunk.*

7. The driver of a traction-engine, while driving the engine, fell from the footplate and was run over and killed. The arbitrator found that the accident did not arise out of his employment, in respect that the man was under the influence of drink and unfit for his work at the time of the accident. *Held* that the accident arose out of and in the course of the employment. Fraser v. Riddell & Co., p. 125.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Seaman returning to vessel—Fall from quay.*

8. A seaman employed on a ship in port went ashore after work was over, as he was entitled to do, partly to buy food (which under his contract of employment he was bound to provide for himself) and partly to see the town. On returning to the vessel, before he had reached the gangway which was the only access from the quay to the vessel, he accidentally fell from the quay into the water and was drowned. The passage-way along the quay from the gangway to beyond the point where the man fell was narrowed to a width of two feet by a row of barrels which were standing on the quay. *Held* that there was evidence to warrant an arbitrator's finding that the accident did not arise out of the employment. Craig v. Owners of s.s. "Calabria," p. 765.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Unexplained death—Intoxication—Commercial traveller run over by train while drunk.*

9. A commercial traveller, in the course of his rounds, arrived late in the day at a town where he had customers. He, however, did not attempt to transact business, but proceeded to get intoxicated, and while in this condition found his way to the railway station (where he could get a train for his home), and when last seen uninjured he was sitting on a seat on the platform. After a goods train had passed, he was found on the line, having been run over by the train and having sustained injuries from which he died. No one saw how he got, or fell, on to the line. *Held* that the accident did not arise out of the employment of the deceased. Renfrew v. R. & J. M'Crae, Limited, p. 539.

Sec. 1 (1)—"*Out of and in the course of the employment*"—*Unexplained death—Seaman found drowned—Inference from proved facts.*

10. *In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation.* Circumstances *in which the House of Lords* affirmed *the award of the arbitrator, holding that there was evidence from which a reasonable man might draw the inference that the accident which caused death arose out of the employment.* Lendrum v. Ayr Steam Shipping Co., Limited, (H. L.) p 91.

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Sec. 8 (1) (2), *and Third Schedule—Industrial disease—Process of "mining"—Surface labour.*

11. *Held* that a man employed at the pithead of a colliery as a surface labourer was not employed in the process of "mining" in the sense in which that expression is used in relation to industrial diseases in the Workmen's Compensation Act, 1906. Scullion v. Cadzow Coal Co., Limited, p. 36.

Secs. 13 *and* 14—*Action of damages by father of deceased workman against son's employers—Competency.*

12. *Held* that the limitation of appeal to the Court of Session, imposed by sec. 14 of the Workmen's Compensation Act, with regard to actions of damages at the instance of injured workmen was made applicable by sec. 13 to actions at the instance of the persons specified in the latter section; and accordingly that an appeal (not on a question of law) in an action of damages for the death of a workman, brought by his father against the employers at common law or under the Employers Liability Act, 1880, was incompetent. Cook v. Bonnybridge Silica and Fireclay Co., Limited, p. 740.

First Schedule (1) (*b*)—*Where incapacity "results from the injury"—Natural tendency to obesity increased by enforced inactivity following injury.*

13. *A miner, aged sixty, received injuries by an accident arising out of and in the course of his employment, which for a time totally incapacitated him for active work. Three years after the accident he had recovered from the direct effects of it, but had become unfit for any except sedentary work. This partial incapacity for work was due to age and obesity; and the obesity was the result of a natural tendency increased by the enforced inactivity following on the accident. In an arbitration under the Workmen's Compensation Act,* 1906, *the arbitrator found that the partial incapacity did not result from the accident, and terminated the compensation.* Held (rev. *judgment of the First Division, reported Court of Session, p.* 432) *that there was evidence to justify the arbitrator's finding, and his decision* affirmed. Opinions *that in order to entitle a workman to compensation it is not necessary that the incapacity in respect of which he makes his claim should be the direct result of the accidental injury, or that there should be no contributory source of weakness in the workman.* Clark v. Taylor & Co., (H. L.) p. 104.

First Schedule (1) (*b*) *and* (16)—*Incapacity—Permanent injury—Chance of employment—Compensation—Review—Termination or suspension.*

14. A workman met with an accident which necessitated the amputation of the thumb of his left hand. In an arbitration under the Workmen's Compensation Act, 1906, after the workman had recovered from the effects of the operation, the arbitrator, after a proof, found that he was fit to resume his former work as a brakesman, and also that the loss of his thumb did "not impair his chance of employment in his former line of employment or in any other line of employment which he might reasonably hope to follow," and terminated the compensation. *Held* that, notwithstanding the permanent and patent nature of the injury, the arbitrator, in view of his finding as to the workman's chance of employment, was entitled to end and not merely suspend the compensation. Watson v. William Beardmore & Co., Limited, p. 718.

First Schedule (1) (*b*) *and* (16)—*Incapacity—Cessation of incapacity—Possibility of supervening incapacity—Suspensory order—Competency.*

15. A workman, who had suffered injuries which necessitated the amputation of portions of three fingers of the right hand, after recovering from

WORKMEN'S COMPENSATION ACT, 1906—*Continued.*

the operation obtained work at higher wages in the district where he had been employed, and where, owing to the construction of public works, there was a large demand for labour. In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator, while finding that the workman's injuries were permanent, found also that he was no longer incapacitated owing to the accident from earning his former wages, and ended the compensation that was being paid to him. In an appeal at the instance of the workman the Court *hoc statu remitted* the case to the arbitrator to consider and decide whether the ending of the payment of compensation should be permanent or temporary. *Opinion* (*per* the Lord President, *dub.* Lord Johnston) that a suspensory order was the proper judgment for the arbitrator to pronounce, looking to the possible adverse effect of a change in the condition of the labour market on the future wage-earning capacity of a permanently damaged workman. Dempsey v. Caldwell & Co., Limited, p. 28.

First Schedule (3)—*Cessation of incapacity*—"*Suitable employment*"—*Risk of future incapacity—One-eyed miner.*

16. A miner was struck by a chip of coal while working at the coal face, and thereby lost the sight of one eye. His employers, after paying compensation for a time, ceased payment on the ground that he was able to resume his former occupation and to earn his former wage. The miner having applied to the Sheriff to have the compensation continued, the Sheriff dismissed the application, finding that the miner was able to resume his former occupation at the face and to earn his former wage, and that the risk, which was incidental to working at the face, of a similar accident again happening was not increased by the fact that he had lost the sight of an eye. On appeal it was contended for the miner that the Sheriff had disregarded the relevant consideration that the loss of one eye, although not increasing the risk of a similar accident occurring, would render the results of such an accident more serious, as total blindness would follow; and accordingly that, the employment of a miner working at the face not being a "suitable employment" for him, he was still entitled to compensation. *Held* that the determination of the Sheriff, in dismissing the application, was right. *Observed* that the question whether an employment was "suitable" arose only under the First Schedule (3) to the Workmen's Compensation Act, when partial incapacity existed, and therefore did not arise in this case, as the workman's incapacity had ceased. *Opinions*, *per* the Lord President and Lord Guthrie, that the consideration that the results of a future accident might be more serious to a workman who had lost one eye than to a workman who had not could not relevantly be taken into consideration in determining what was "suitable" employment: *opinion contra*, *per* Lord Johnston. Law v. William Baird & Co., Limited, p. 423.

First Schedule (3) *and Second Schedule* (9)—*Compensation—Wage-earning capacity—Partially incapacitated workman—Employer's offer of full wages for light work—Refusal of offer by workman—Recording of memorandum—Suspension of compensation.*

17. An injured workman, who had been receiving compensation in pursuance of an agreement with his employer, recovered from his injuries sufficiently to be fit for light work.. His employer thereupon offered him such work, and offered to pay him therefor the same wage as he had been earning before the accident. The workman refused this offer, and presented for registration a memorandum of the agreement with his employer. The Sheriff refused to record the memorandum, and ended the compensation. *Held* (1) that the workman was barred from receiving compensation by his refusal of work, at full wages, suited to

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his capacity; (2) that the proper course for the Sheriff was to have recorded the memorandum, but, in respect of the employer's offer to pay the workman full wages, to have suspended compensation by sisting procedure *hoc statu*. Keevans v. Mundy, p. 525.

First Schedule (16)—*Review of weekly payments—Date from which weekly payments may be ended or altered—Remedy of employer where workman charges for payment.*

18. *The employers of an injured workman, in terms of an award of an arbitrator, paid him compensation for total incapacity up to 24th September, at which date they ceased the payments, contending that his incapacity had ceased. On 4th November they presented an application for review of the compensation, asking that the payments should be terminated as at 24th September. The arbitrator found in fact that the workman had completely recovered his capacity at 24th September.* Held *that the compensation fell to be terminated as at the date when the incapacity ceased, and not merely at the date of the application for review.* Opinion (per *Lord Atkinson*) *that the same principles would apply to an application to diminish or increase the weekly payments.* Observations, per *Lord Shaw of Dunfermline, on the procedure to be adopted by an employer who maintains that the workman has recovered and ceases the weekly payments, if the workman proceeds to charge for payment.* Wishart v. Gibson & Co., (H. L.) p. 53.

Second Schedule (9)—"*Party interested*"—*National Insurance Act*, 1911—*Approved Society.*

19. *Question* whether an approved society under the National Insurance Act, 1911, is a "party interested" who, in terms of the Workmen's Compensation Act, 1906, Second Schedule (9), may apply for registration of a memorandum of an agreement regarding the payment of compensation to one of its members. William Baird & Co., Limited, v. Ancient Order of Foresters, p. 965.

Second Schedule (9)—*C. A. S.*, 1913, *L. xiii.* 12—*Recording of memorandum—Procedure—Insurance—National Insurance—National Insurance Act*, 1911, *sec.* 11 (1) (*c*)—*Workman member of approved society—Approved society objecting to recording of memorandum.*

20. An injured workman, who was an insured person with an approved society under the National Insurance Act, 1911, agreed to accept from his employers a lump sum in full of all his claims for compensation under the Workmen's Compensation Act, 1906, and lodged a memorandum of this agreement with the Sheriff-clerk for registration. The approved society thereupon lodged with the Sheriff-clerk a minute in which they stated that they objected to the recording of the memorandum on the ground that the lump sum was inadequate. The minute contained no averments in support of this objection. The Sheriff-clerk put the memorandum and minute before the Sheriff, who found that the Sheriff-clerk had in effect, though not by formal minute as required by C. A. S., 1913, L. xiii., sec. 12, referred the question in dispute to him, and accordingly that the matter fell to be dealt with by him as arbitrator. *Held* that the procedure followed had been irregular, and case *remitted* to the Sheriff Court in order that the Sheriff-clerk might discharge the duty imposed on him by par. (9) (*d*) of the Second Schedule to the Act, and by sec. 12 of the Act of Sederunt, of considering any information, including that of the approved society, relating to the objection to recording the memorandum, and of laying before the Sheriff, if so advised, a minute setting forth his grounds for refusing to record the memorandum. *Held* further that the Sheriff, before disposing of the question raised, would be entitled to hear the approved society. William Baird & Co., Limited, v. Ancient Order of Foresters, p. 965.

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Second Schedule (9) (*d*)—*Recording of memorandum—Agreement for payment of lump sum—Objection to recording of agreement—Lump sum already paid to workman—Validity of Sheriff's order for consignation of sum by workman before disposing of objection.*

21. An injured workman entered into an agreement with his employers that the weekly compensation due to him should be redeemed for a lump sum of £100, which sum was paid over to him. On the employers presenting a memorandum of this agreement for registration, the Sheriff-clerk refused to record it on the ground of the inadequacy of the sum, and referred the matter to the Sheriff-substitute, all in terms of the Act. The Sheriff-substitute, holding that further inquiry into the question was necessary, ordained the workman to consign in Court the £100 (less the weekly compensation due to date), as a condition precedent to the inquiry being held. *Held* that the Sheriff-substitute was not entitled to make such an order. M'Vie v. Taylor & Co., p. 533.

WRIT. *Holograph writing—Testament—Subscription.*

1. A document was found in the repositories of the deceased Miss Jessie Taylor enclosed in an unsealed envelope on which was written "My will." The document, which was holograph of the deceased, was written on one side of a sheet of paper and contained a list of bequests which disposed of the whole of her estate. It was headed, "Sunnybank Alford My last Will Jessie Taylor," but was not signed by her at the end. *Held* that, in the absence of subscription, the document could not receive effect as a valid testamentary writing. Taylor's Executrices v. Thom, p. 79.

Authentication—Subscription by witnesses ex intervallo—Witness adhibiting signature to testamentary writing after death of testator—Informality of execution—Act 1681, *cap.* 5—*Conveyancing Act*, 1874, *sec.* 39.

2. A domiciled Scotswoman was taken ill in London and sent for her son, who was a doctor there, and dictated to him certain testamentary directions which effected a fundamental alteration on her existing trust-disposition and settlement. The document thus written out by her son was signed by her in his presence, and also in the presence of her nurse, who, at the same time, adhibited her signature as a witness. The document was then sealed up and sent to the testatrix's law-agents. Six days afterwards she died. Three weeks after her death the son, at the request of the law-agents, adhibited his signature to the document as a witness. In a petition under sec. 29 of the Conveyancing (Scotland) Act, 1874, *held* that the testamentary writing was duly subscribed by the son as an attesting witness. Walker v. Whitwell, p. 560.

See *Public Records*, 1, 2.

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